Mosoti v Republic (Criminal Petition 1 of 2019)
[2024] KEHC 6690 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 1 OF 2019

JRA WANANDA, J

JUNE 7, 2024

BETWEEN

DENNIS GACHIRI MOSOTI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Before Court is the undated Petition filed on 3/01/2019. It is brought on the basis of the now famous Supreme Court case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (commonly referred to as Muruatetu 1). The Petitioner seeks that the sentence of death imposed upon him in this matter on 16/08/2022 upon conviction for the offence of murder be reviewed.

2. Considering the age of the original High Court file, the same could not be immediately traced Ordinarily, it would have been prudent for this Court to have sight of the trial Court file before determining this Petition. However, considering the age of this matter and other relevant factors, my view is that it will be a dereliction of the duty of this Court to insist on waiting indefinitely for the said file. In the interest of justice, and to save the Petitioner from the agony of uncertainty over his fate, I have decided to therefore proceed to determine the Petition nevertheless.

3. Even without the trial Court file, I have ascertained from the record the background of the case to be that the Petitioner and his brother were charged in Eldoret High Court Criminal Case No. 16 of 1997 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 14/05/1994 at Maili Inne Location, in Uasin Gishu District of Rift Valley Province, they jointly murdered one Salima Nyokabi. The deceased was the Petitioner's sister-in-law as she was the wife of the Petitioner's co-accused. The Petitioner and his brother both pleaded not guilty and the matter then proceeded to full trial. Upon considering the testimonies of the witnesses and the evidence tendered in Court, Hon. Nambuye J, on 16/08/2002, convicted both the Petitioner and his brother and sentenced each to death.

4. It is also evident from the record that aggrieved with the decision of the trial Court, the Petitioner and his brother instituted an Appeal, namely, Eldoret Court of Appeal Criminal Appeal No. 260 of 2003 against both the conviction and sentence. The Appeal was however dismissed in its entirety on 19/10/2007.

5. In the Petition, the Petitioner urged that the imposition of a mandatory death sentence was arbitrary and unconstitutional, that the same was a denial of his right to fair trial and right to correction and rehabilitation, that he has been in custody for 23 years (as at the date of filing this Application on 3/01/2019), that he is remorseful and regrets the commission of the offence, that during his stay in prison, he has acquired training in various vocational fields, and he promised to be a model in the society if is given a chance to return thereto. He stated further that his death sentence was commuted by the President in 2009, that he has been in custody for 17 years since he was sentenced and before that, he had been in remand for 7 years. He thus prayed that pursuant to Section 333(2) of the Criminal Procedure Act, the said period be factored.

6. The State (Respondent) did not file a formal Response but Ms. Okok, Prosecution Counsel opted to address the Court orally. In her address, she submitted that the deceased was last seen alive in May 1994, that the Petitioner and his said brother locked the deceased in a room and beat her up, that when people made inquiries, the Petitioner and his brother did not disclose the whereabouts of the deceased, they were arrested in February 1995 upon which they took the police to where they had buried the deceased whereupon the body was exhumed, and that the post-mortem showed that the deceased had fractured ribs and eyes. She submitted that the deceased was killed by the Petitioner and his brother (husband to deceased) who were the people to protect her but instead killed her, that in Muruatetu, the Supreme Court stated that one of the factors in re-sentencing is whether the death was caused on gender-based violence (GBV) which the instant one is and thus the death sentence was merited and should be upheld.

Determination

7. The issue for determination is "whether this Court should review the death sentence imposed by the High Court in the year 2002."

8. Section 203 and 204 of the *Penal Code* under which the Petitioner was convicted is premised as follows:

> " 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> 204. Any person who is convicted of murder shall be sentenced to death."

9. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "murder" as per the provisions of Section 204 of the Penal Code is the death sentence. I presume that the trial Judge imposed the death sentence on the basis that the same was the only sentence available upon conviction for the offence of murder thus a mandatory sentence.

10. It is now however generally agreed that in spite of the mandatory language employed by the statute, the Courts nevertheless still possess discretion in sentencing of offenders convicted for the offence of murder. It is on this basis that the Supreme Court, in Muruatetu, while dealing with a case of murder, declared the mandatory death sentence unconstitutional. This is how the Supreme Court put it:

> " (66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording

of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

11. Regarding sentence, Majanja J, quoting Muruatetu, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaptation of the offender;
>
> (h) any other factor that the Court considers relevant."

12. It should however be recalled that the decision of the Supreme Court in Muruatetu only faulted the mandatory nature of the death sentence in Section 204 of the Penal Code and which it termed inconsistent with *the Constitution*. The Court did not therefore outlaw the death sentence but held that the Court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. The death penalty is therefore still prescribed in Kenyan law and can still, in appropriate cases, be imposed.

13. Applying these Muruatetu guidelines, the Court of Appeal has on several occasions, upon considering the factors set out above, substituted death sentences imposed on convicts for the offence of murder to determinate terms. For instance, in *Jonathan Lemiso Ole Kini v Republic* [2018] eKLR, the Court of Appeal substituted a sentence of death with one of 30 years, in *Simon Shisukane v Republic* [2019] eKLR, with 15 years and in *Olum v Republic* (Criminal Appeal 225 of 2018) [2024] KECA 386 (KLR) (12 April 2024) (Judgment), also with 30 years. The High Court has also followed suit in numerous cases.

14. Coming back to this case, the Petitioner having been sentenced on 16/08/2002, is now serving his 22nd year in prison since then. He states further, and this has not been controverted, that he was arrested

on 25/01/1995 and remained in remand custody throughout during the trial and which amounted to another 7 years. If his account is true, then he has to date been in custody for an aggregate period of about 29 years. That indeed is a long time. His sentence indeed deserves review.

15. On mitigating factors, I note the Petitioner's expression of remorse and regret for his actions. He also states that he has learnt a number of skills which he can put into use outside prison. He has pleaded for leniency.

16. I however also note some aggravating factors. I observe that in executing the offence, the Petitioner and his brother connived and locked the deceased in a room then viciously beat her up. They were so brutal on the deceased that the injuries led to her death. After realizing that the deceased was dead, instead of reporting the matter to the authorities, they secretly and hastily buried the deceased in the hope that the body will never be recovered. Whenever inquiries were made on the whereabouts of the deceased, the Appellant and his brother continuously gave false answers including that the deceased had travelled. It was not until almost a year later when under intense interrogation by the police, they finally owned up to their crime and took the police to the location where they had buried the deceased. I have also taken into account that this was an extreme case of gender-based violence.

17. In the circumstances, and having taken into account of all the factors mentioned hereinabove, I am of the view that the sentence of death ought to be reduced as I believe, the Petitioner has undergone sufficient retribution for his actions and has now been rehabilitated.

Final Orders

18. In the circumstances, considering the degree of gravity of the offence that the Applicant committed, I hold that the aggregate period of about 29 years that the Petitioner has already served both in remand and in prison custody is sufficient punishment. I therefore order as follows:

    i. The death sentence is reviewed and commuted to the period already served in custody.

    ii. In the premises, the Petitioner is ordered to be set at liberty forthwith and released from prison unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JUNE 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of: