



**Ndung'u v Republic (Petition E008 of 2021) [2024] KEHC 8243 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8243 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PETITION E008 OF 2021  
DKN MAGARE, J  
JUNE 20, 2024**

**BETWEEN**

**LUCAS MBUGUA NDUNG'U ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This matter has been on the corridors of justice for a long time. The Petitioner was charged with murder contrary to Section 203 as read with 204 of the Penal Code.
2. He exhausted his appeal process. He was sentenced to life imprisonment. He now seeks to have a lenient sentence.
3. His case has been considered in line with the decision in Francis *Karioko Muruatetu & Another v Republic* (2017) eKLR by the Supreme Court.
4. There is now a reconsideration of the life sentence. It is understood that the Supreme Court decision is binding on this court. It does not mean however that we cannot observe that it is a jurisprudential position that has changed litigation and criminal jurisprudence. The concept of finality of litigation is now loosely understood.
5. Be it as it may, the Petitioner has a duty to place before court evidence warranting resentencing. The first sin occurred while the death penalty was lawful but was replaced with a sentence for life that now appears to be indeterminate.
6. There needs to be a decision regarding the death penalty. It should be carried out or abolished. It is a legislative laziness to pretend that the death penalty is lawful and at the same time not appoint a hang man to carry out the sentence.



7. The other alternative would be amendment of the *Prisons Act* to remove death by hanging to death by firing squad or by lethal injection. If this cannot happen, then abolish the same and replace with determinate sentences.
8. The problem with post facto resentencing is that old wounds are opened in a new profound way. Some freed horrible men who were younger come for review while they are tired and enjoy what they never should have enjoyed. This kind of litigation is cyclic and leads to a circus of litigation which does not serve the purpose of punishment especially retribution.
9. In *Francis Karoki Muruatetu & Another V Republic* [2017] eKLR the court outlawed the mandatory nature of death sentence where the Court stated as doth:-
  - (52) We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the *Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the *Penal Code*. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.
  - (53) If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.
  - (54) A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law. Counsel for the petitioners and amici curiae both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under Article 50 (2) (q) of the *Constitution*. On this issue, we are persuaded by the decision in *Edwards v The Bahamas* (Report No. 48/01, 4<sup>th</sup> April 2001) which was decided by the Inter-American Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him
10. This also created a dilemma where a court is resentencing a person whose appeal on sentence had been considered by the court of appeal and dismissed. The retroactive application of sentence is anathema to good order. It is thus a call for jurisprudential guidance in the context of a judicial decision on the status of reviewing judgment already dealt with by a higher court. The trouble with the decision in *Muruatetu* (*supra*) is that it is in the status of an advisory.
11. That aside, there are several factors to consider in resentencing. The Judgment in HCCR No 35 of 2007 sets out the fact. The court rightly sentenced the Petitioner to death.
12. The minor aged 4 years had bruises and hypoxia secondary to strangulation. This was seen to be a gender based violence. The Petitioner did not admit guilt. He went through the hearing and thereafter appeal. The court found bruises on the neck, right thigh and vaginal wall and a broken hymen. I disagree with the prosecutor that the case was not gender based violence. The Petitioner alleged that



he was 26 years when he was arrested, he still has over 60 years to live to be 90 years therefore, his life is not equivalent to 60 years old.

13. In the circumstances, I find that the life sentence is the proper sentence. I shall equate the same to 50 years. In determining the term, I understand the juvenile was a girl aged 4 years and the crime was committed with extreme violence including sexual violence. The Petitioner is a pedophile who should not be mixed with other people in the society in his life time.
14. In the circumstances, I shall calculate life sentence to 50 years.

#### **Determination**

15. In the upshot, I make the following findings: -
  - i. The life sentence imposed on the Petitioner is substituted with a determinate term of 50 years.
  - ii. Pursuant to Section 333(2) of the *Criminal Procedure Code*, the sentence shall run from 6/8/2007 being the date of arrest.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20<sup>TH</sup> DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Ms. Kaniu for the State

Appellant present in person

Cpl. Muriithi

Court Assistant – Jedidah

