



**Ireri v Republic (Constitutional Petition E006 of 2023)
[2024] KEHC 9388 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E006 OF 2023**

LM NJUGUNA, J

JULY 24, 2024

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLES 22(1), 23(1), 25(C), 27, 28, 50(2) (P & Q) &
159(2), 160(1) & 165 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE
RULES AND IN THE MATTER OF THE SUPREME COURT CASE OF FRANCIS
KARIOKO MURUATETU & ANOTHER V. REPUBLIC (2017) EKLR AND IN THE
MATTER OF THE HIGH COURT CASE OF DOUGLAS MUTHAURA N'TORIBI VS
REPUBLIC MISC. CRIMINAL APPEAL CASE NO. 4 OF 2015, [2018] EKLR AND IN THE
MATTER OF SECTIONS 216, 329 AND 333(2) OF THE CRIMINAL PROCEDURE CODE**

BETWEEN

DENNIS MURIUKI IRERI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner has filed a petition dated 13th June 2023 seeking the following orders:
 - a. That the honourable court be pleased to review his sentence and grant him a lenient definite sentence in accordance with his mitigation and the unique facts and circumstances of the case pursuant to Article 50(2)(p&q) of the Constitution of Kenya;
 - b. That if the court should consider prayer 1 above, he prays that the court should consider time spent in remand as part of the sentence in accordance with section 333(2) of the Criminal Procedure Code and the case of Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) (2021) KEHC 457 (KLR);



- c. That the honourable court be pleased to grant probation orders if the circumstances of his case so fit; and
 - d. Any other order that the honourable court deems fit to grant in the interest of justice.
2. The petitioner was sentenced to death after he was convicted of the offence of murder contrary to section 203 as read together with 204 of the *Penal Code* in Embu High Court Criminal Case No 5 of 2006. He stated that he appealed against the said decision but he has never been summoned to attend the Court of Appeal to date. He is seeking resentencing based on the findings of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* (2017) eKLR. In his affidavit, he deposed that the sentence he is serving contravenes the above cited provisions of the *Constitution*. He urged the court to exercise its discretion under Article 159 of the *Constitution* and grant him a defined sentence.
 3. The petition was canvassed by way of written submissions.
 4. The petitioner submitted that his death sentence was commuted to life imprisonment through a presidential petition. That the life imprisonment sentence was held as unconstitutional given its indeterminate nature. He relied on the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) KLR 1 and stated that his court has jurisdiction to determine the petition and resentence him in accordance with the directions of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).
 5. He stated that the prison system has completely reformed him and he relied on the case of *Douglas Muthaura Ntoribi v Republic* Misc. Criminal Appeal Case No 4 of 2015, [2018] eKLR where the court reduced a life imprisonment sentence to 15 years since the petitioner had reformed through the prison systems. Further reliance was placed on the cases of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) and *Boniface Keya v Republic* Misc. Criminal Application No E007 of 2023. He submitted that he has been in prison for the past 18 years, during which time he has rehabilitated and learned useful crafts which he intend to use for gain upon his release.
 6. He relied on the case of *Samson Njuguna Njoroge v Republic* (2018) eKLR where the court considered time spent in remand as part of the sentence. He also relied on the cases of *Republic v William Onura Omandi* (2021) eKLR, *Daniel Nzioki Mbuti & another v Republic* (2021) eKLR and *Abmad Abolfathi v Republic* [2016] eKLR and urged the court to sentence him to a defined number of years less the 3 years he spent in custody in accordance with section 333(2) of the *Criminal Procedure Code*.
 7. The respondent submitted that there is a pending appeal before the court of appeal and the petitioner has not withdrawn it to enable the trial court to resentence. That if the court should consider the resentence application herein, then it should note the respondent's opposition of the same.
 8. The issue for determination herein is whether the petition has merit.
 9. The petition is rightly before this court as the High Court bears original jurisdiction to entertain constitutional petitions. Further, this court has jurisdiction to entertain matters of resentencing as donated to it through recent jurisprudence, particularly in the Court of Appeal decision in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023). In this case, it was held thus:

“...we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be



heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution".

10. The petitioner seeks review of the life imprisonment sentence. In the same breadth, the petitioner seeks that the court should consider the 3 years spent in remand as part of the defined sentence he seeks. Article 48 of the Constitution guarantees everyone a right to justice while Article 50 provides for the right to fair trial, which includes the right to downward review of a sentence. In the case of Francis Karioko Muruatetu & another v Republic (2017) eKLR (*supra*), it was held thus:

"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of the Constitution; an absolute right.... We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute..." (emphasis added)

11. As a consequence of the abovesited decision, the Supreme court found it necessary to give further direction in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2) where it gave the following directions:

- "18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:
- i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;
 - ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;
 - iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
 - iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
 - v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.



vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.....”

12. The Supreme Court stated that where the applicant for resentencing has a pending appeal, the resentence hearing shall only be entertained once the Court is satisfied that the appeal has been withdrawn. In other words, the applicant herein cannot benefit from the appeal at the Court of Appeal and the resentence hearing at the High Court at the same time. From a perusal of the trial file, it is evident that the applicant herein lodged an appeal challenging this court’s findings on conviction and sentence. He prayed that the appellate court sets aside both findings. There is no proof that the appeal has been withdrawn, neither has the applicant pleaded as much.

13. In the pendency of an appeal, the resentence hearing will amount to futility if the appeal succeeds. Therefore, being guided by the Supreme court’s directions in Muruatetu 2, this court will not go any further in considering the resentencing application herein, even though it raises valid points for consideration. Until such time as the applicant shall withdraw the appeal before the Court of Appeal, this court cannot exercise its discretion to review the sentence.

14. At this point in time, the petition lacks merit and it is hereby struck out.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondent

