



**Kamau v Director of Public Prosecution (Petition E005 of 2021)  
[2023] KEHC 18416 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18416 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E005 OF 2021  
HK CHEMITEI, J  
JUNE 14, 2023  
IN THE MATTER OF NAROK CMCR CASE NO. 1578 OF 2005**

**BETWEEN**

**MICHAEL KAMAU ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The petitioner herein on July 10, 2021 filed a petition seeking the following orders;
  - a. That, I urge this honorable court to kindly set aside the death sentence and in its place I be set free or be awarded a definite jail term.
  - b. That, I urge the honorable court to find the mandatory death sentence imposed on prisoner convicted under section 296 (2) of the penal code unconstitutional.
  - c. That, any other order (s) that it may deem appropriate be issued by this honorable court for the interest of justice.
  - d. That, in view of the above, I therefore kindly and humbly pray that the same be fully considered in to totality for the interest of justice while putting into account
  - e. That this petition is duly supported by the annexed affidavit and notice of motion of I the petitioner NAK/631/020/LS Michael Kamau amongst other grounds to be addressed at the hearing thereof.



2. In his supporting affidavit he deponed that he was charged, convicted and sentenced to a mandatory death sentence before Principle Magistrate's court Narok on November 30, 2006 which at the time of his conviction was the mandatory sentence for the offence of robbery with violence under sec 296 (2) of the penal code in criminal case No 1578 of 2005. That being dissatisfied with the decision of the lower court, he filed an appeal before high court Nakuru registered under criminal appeal No 287 of 2006 which was found lacking merit and dismissed entirely.
3. He deposed further that according to Supreme Court decisions on judgments dated December 14, 2017 and July 6, 2021 the mandatory death sentence was declared unconstitutional. That therefore, this court had jurisdiction to hear and determine the instant petition pursuant to the clear provisions of the law under article 23 and 165 (3) (9) of the constitution of Kenya together with all other enabling provisions of the law.
4. The prosecution counsel filed a replying affidavit dated January 23, 2022 in response to the petition. He deponed that the petitioner was convicted and sentenced in criminal case 1578 of 2005 for the offence of robbery with violence and a death sentence was preferred against him by Hon S M Githinji Principal Magistrate on the November 30, 2006. That the petitioner together with another appealed in the high court of Nakuru in consolidated high court criminal appeal number 287 of 2006 where his appeal was dismissed for lack of merit and the death sentence upheld.
5. The prosecution counsel referred to paragraph 4 of the petitioner's affidavit and deponed that out of the Supreme Court decision in petition 15 and 16 of 2016 Francis Karioko Muruatetu and Wilson Thirumbu Mwangi and the ruling of the said petition set the rules for persons who were facing the death penalty for Murder cases and set seven guidelines for purposes of resentencing.
6. He deponed further that he did not object to this court having a resentence hearing save for it to give an appropriate sentence commensurate to the offence committed as a deterrent sentence noting the seriousness of the offence and the prevalence. That a lenient sentence should not be meted out but he did not object the court considering the time the petitioner has been in custody under section 333 of the Criminal Procedure Code and the time he has served during the pendency of his incarceration as a death row convict.
7. When the application came up for hearing the court ordered the parties file submission but none complied.

#### **Analysis and Determination.**

8. I have perused the pleading by both parties and the issue for determination by this court is whether the petitioner is entitled to the orders sought.
9. The petitioner herein in his petition seeks among other prayers, the setting aside of the death sentence imposed on him by the trial court and in its place he be set free or be awarded a definite jail term. He also urges this court to find that the mandatory death sentence imposed on him under section 296 (2) of the Penal Code be declared unconstitutional. He referred to the Supreme Court decisions on judgments dated December 14, 2017 and July 6, 2021 where the said sentence was declared unconstitutional.
10. Upon a further perusal of the court records, I note that on October 6, 2021 the petitioner told the court that in the year 2009 he was committed to life imprisonment for the offence of robbery with violence.
11. In view of the foregoing, it clear that the petitioner seeks a review of the sentence imposed to him and in this case, life imprisonment. The request for review of sentence, the Supreme Court revisited the Muruatetu Petition No 15 and 16 of 2015 (consolidated) and issued directions on July 6, 2021. It



clarified that their decision in the said case only related to the mandatory death sentence for murder cases under section 203 and 204 of the *Penal Code*, and did not apply to any other statutory mandatory death sentences or minimum sentences. The Supreme Court went ahead to issue the following guidelines in that respect;

- “18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
- i. The decision of *Muruatetu* and these guidelines apply only in respect to sentences of murder under section 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 victim 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.
  - vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
    - 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 respect of gender based violence.
    - f. The manner in which the offence was committed on the victim.
    - g. The physical and psychological effect of the offence on the victim’s family.
    - h. Remorsefulness of the offender.
      - i. Possibility of reform and social adaptation of the offender.



- j. Any other factor the court considers relevant.
- k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
- l. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.”

- 12. In upshot of the foregoing therefore, this being a matter where the petitioner was convicted and sentenced for robbery with violence under section 296 of the *Penal Code*, the only recourse is the recent jurisprudence developed by this court and the Court of Appeal dealing with such a matter.
- 13. For the foregoing reasons the court agrees with the learned state counsel. The applicant has been in custody for almost 18 years. The circumstances of the offence show that there were no fatalities and or injury upon the complainant.
- 14. The applicant was a first offender and from the prisons record he appears to have improved himself by learning several trades and skills. Hopefully this will enable him utilize the same while out of custody.
- 15. In the premises, this court set asides the life sentence imposed against the applicant and substitutes it with imprisonment for the term he has been in custody.
- 16. He is hereby set free unless lawfully held.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 14<sup>TH</sup> DAY OF JUNE 2023.**

**H. K. CHEMITEI**

**JUDGE**

