



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karuri v Republic (Criminal Petition E003 of 2022)  
[2023] KEHC 20669 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL PETITION E003 OF 2022  
LM NJUGUNA, J  
JULY 21, 2023**

**BETWEEN**

**JOSEPH NJIRE KARURI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was tried and convicted of two counts of robbery with violence contrary to section 296 (2) of the *Penal Code* and was sentenced to suffer death via a judgment delivered on April 3, 2012.
2. Having been dissatisfied with the conviction and sentence by the trial court, the petitioner herein appealed the same before this court vide Criminal Appeal No 72 of 2012 and wherein this court after considering afresh the facts and the law, reached a determination via a judgment delivered on February 2, 2018 affirming the conviction and sentence in reference to the 1<sup>st</sup> count while the sentences in the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts were held in abeyance.
3. The petitioner therefore filed the current petition on April 11, 2022 together with the notice of motion seeking for orders as follows:
  - i. Spent.
  - ii. That the Honourable Court be pleased to allow a retrial for resentencing.
4. The petition in a nutshell is hinged on the fact that after having been tried, convicted and sentenced to suffer death, he was not offered an opportunity to mitigate. It is his contention that his right was taken away from him due to the nature of the offence he was charged with. That in reference to the Supreme Court directives in Petition No 15 of 2015, *Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR*, the Supreme Court held that mandatory sentences deprive courts their legitimate jurisdiction



to exercise discretion to mete out an appropriate sentence to the offenders facing mandatory sentences. It was averred that the death sentence was inhuman and further infringed on his rights and majorly his dignity. This court was therefore urged to consider the issues raised herein in line with the Supreme Court's directions as enunciated in the case of Francis Karioko Muruatetu & Another Vs Republic (supra) and in doing so, to grant the prayers sought herein.

5. Directions were taken that the petition be canvassed by way of written submissions and both parties complied with the directions.
6. The petitioner submitted that he was convicted of the various counts of the offence herein and thereafter appealed before the High court and wherein the finding of the trial court was upheld. That he preferred a second appeal but thereafter withdrew the same as he preferred to file the petition herein instead. It was his contention that he does not challenge his conviction but only the sentence for the reason that the mandatory sentence imposed by the court created an impression that the trial court did not have discretion to mete out a proper sentence. That the discretion had been taken away from the trial court due to the provisions of the law on mandatory sentences. The petitioner submitted that he is therefore entitled to benefit from the least severe punishment as enshrined in Article 50 (2) (p) of the Constitution and therefore, this court was urged to consider the petition herein. The petitioner placed reliance inter alia on the cases of Vincent Sila Jona and 87 Others Vs Kenya Prison Services and 2 Others Petition No 15/2020 and Joseph Kaberia Kabinga and 11 Others Vs Republic Petition No 618 of 2010. That his discipline, transformation and rehabilitation has enabled him to undergo vocational network course which has enabled him to acquire a Diploma in Bible Courses and a certificate in Theological Studies. He stated that the same has helped him in transforming his character. In the end, the petitioner urged this court to exercise its discretion and resentence him.
7. On its part, the respondent submitted that the petitioner challenges the constitutionality of the mandatory death sentence under section 296(2) of the Penal Code given that his appeal filed at the Court of Appeal was already withdrawn. The respondent argued that in as much as the petitioner placed reliance on Petition No 15 and 16 of 2015 SC Francis Karioko Muruatetu & Another, it is crucial to note that the Supreme Court did not outlaw the death penalty. It was submitted that the Supreme Court gave directions on which it was categorical that the said judgment only outlawed the mandatory nature of death sentence in murder cases and that the same did not affect other mandatory sentences.
8. In the end, it was submitted that the application herein be dismissed for want of merit for the offence with which the petitioner was charged does not fall within the directions by the Supreme Court.
9. I have considered the petition herein together with the submissions by both parties and I form the view that the matter for determination is whether the order for resentencing can be granted.
10. The petitioner has invoked the resentencing jurisdiction of this court as was laid down by the Supreme Court in Francis Kariuki Muruatetu & Another Vs Republic Petition No 15 and 16 of 2015 and wherein the Learned Judges held that Section 204 of the Penal Code was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing. The court while remitting the matter to the High Court for re- hearing on sentence held that: -

' The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We



therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.'

11. The court proceeded to give the guidelines to be considered by the court while considering an application for re-sentencing and held interalia that: -

' [71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge: -

- 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.

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.'

12. From the guidelines by the Supreme Court in the case of Francis Karioko Muruatetu & Another Vs Republic (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code; the same also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.
13. The Supreme Court was categorical that in an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and the same informs the reason why the petition herein is currently before this court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.
14. In the case herein, the petitioner submitted that he previously appealed against his conviction and sentence before the Court of Appeal but has since withdrawn the same.
15. The Supreme Court further directed that in a 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. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.
16. In the instant case, the petitioner moved this court for orders for resentencing to conform to the Supreme Court's directives. The Court reiterated that in re-hearing the sentence for the charge of



murder or any mandatory sentence, the court had to take into account the mitigating factors that had earlier been set out in the same case of Francis Karioko Muruatetu & Another Vs Republic (Supra). And bearing in mind the case of Francis Karioko Muruatetu & Another Vs Republic (Supra) and The Sentencing Policy Guidelines, 2016 of the Judiciary, and the circumstances obtaining in the case herein, I hold the view that this is a case for the court to exercise its discretion to review the mandatory death sentence meted out on the petitioner.

17. Notably, the petitioner was found guilty of the offence of robbery with violence and he is not challenging the conviction but urges the court to consider resentencing him. According to the petitioner, his discipline, transformation and rehabilitation has enabled him to undergo vocational network course and wherein the same has enabled him to acquire a Diploma in Bible Courses and a certificate in Theological Studies and the same has helped him in transforming his character.
18. It was submitted that this court has jurisdiction in resentencing and in doing so this court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory death sentence. [See *Michael Katbekwa Laibena & another Vs Republic (2018) eKLR* and further article 165 of the *Constitution*]. Further that, the trial court did not consider mitigation by the petitioner during sentencing as the law provided for mandatory sentence.
19. From the record herein, it remains unclear whether the petitioner was given a chance to mitigate but nonetheless, the trial court sentenced the petitioner to suffer death as per the provisions of the law then. In his application, the petitioner reiterates that the power of the trial court to sentence him was taken away and further, he suffered a mandatory sentence which deprived him the right to appropriate sentence. [See Article 50 (2) (p); *Kamulak Shuma Vs Republic [2021] eKLR*].
20. For the foregoing reasons, the upshot of this court's decision is that the Petitioners' Petition for review of the sentence filed on April 11, 2022 is merited and the same is hereby allowed.
21. Accordingly, the court upholds the conviction of the Petitioner for the offence of six counts of robbery with violence contrary to section 296 (2) of the Penal Code but reviews the mandatory death sentence that was imposed upon him in the following terms:
  - i. That the petitioner is hereby sentenced to 35 years imprisonment from the date of the judgment which was on August 10, 2011.
  - ii. That the sentences on 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> counts shall be held in abeyance.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

