Peter & another v Republic (Petition 19 of 2018 & Criminal Petition 20 of 2018 (Consolidated)) [2024] KEHC 13572 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION 19 OF 2018 & CRIMINAL PETITION 20 OF 2018 (CONSOLIDATED)

JRA WANANDA, J

NOVEMBER 6, 2024

IN THE MATTER OF ARTICLE 22(1)

N THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 1(1) (3), 2(4), 1, 3, 19(3), 25, 26, 27(1), 28, 29, 50 (2), 160 (1), 159 (1), 165(3)(B) OF THE CONSTITUTION OF KENYA

BETWEEN

FRED NYONGESA PETER ..... 1ST PETITIONER

GEOFFREY JUMA NYONGESA ..... 2ND PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This case is a classical example of the adage "shooting oneself in the foot". It is a case of accused persons being "let off lightly" by the Magistrate's Court but being dissatisfied, appeal to the High Court, which instead enhances the sentence. Again, being dissatisfied, the convicts move to the Court of Appeal where, to their shock, the punishment is enhanced even higher to the death penalty.

2. The background of the matter is that the Petitioners were jointly charged with one other co-accused with 2 counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code in Eldoret Chief Magistrate's Court Criminal Case No. 699 of 2007.

3. The particulars of the 2 counts were that on 21/01/2007 at Mulima village, Lugari District, jointly with others not before Court, while armed with dangerous weapons, namely, a pistol and pangas, robbed a couple of a motor vehicle, cash and other assorted personal belongings, and that immediately after the time of such robbery, they wounded their said victims. The 1st Petitioner and the co-accused were also jointly charged with 2 counts of the alternative offence of handling stolen property contrary to Section 322(2) of the Penal Code.

4. The Petitioners and their co-accused all pleaded not guilty and the case then proceeded to full trial. Upon close of the trial, the Court by its Judgment delivered on 24/12/2007, found that the prosecution had only established the ingridients of the lesser offence of "simple robbery" under Section 296 (1) of the Penal Code against the Petitioners and also the alternative charge of handling stolen property contrary to Section 275 of the Penal Code against the 1st Petitioner and the co-accused. Accordingly, while their co-accused escaped with a lighter 18 months imprisonment sentence, the Petitioners were sentenced to 4 years imprisonment.

5. Dissatisfied with the decision, the Petitioners filed respective appeals, namely, Eldoret High Court Criminal Appeal No. 146 and 147 of 2010 which were then consolidated. The Appeal was heard by a 2-judge bench (F. Azangalala and A. Mshila, JJ) which by its Judgment delivered on 31/01/2013, found that the prosecution had, in fact, proven the main charge of "robbery with violence" and that the trial Court erred in finding that only the charge of "simple robbery" had been proved. The High Court therefore substituted the conviction and also substituted the 4 years prison sentence with one of 25 years imprisonment.

6. Again, aggrieved by the above further decision, the Petitioners preferred a second appeal to the Court of Appeal vide Eldoret Court of Appeal Criminal Appeal No. 76 of 2014. In its Judgment delivered on 28/10/2016, the Court of Appeal dismissed the appeal on conviction but on sentence, held that the High Court had erred in sentencing the Appellant to the lesser prison term of 25 years. The Court therefore set aside the sentence and substituted it with an enhanced one of the death penalty.

7. The Petitioners have now, after exhausting their appeal avenues, returned to this Court with the respective (now consolidated) identical but undated Petitions seeking review of their sentences on the ground that the mandatory death sentence imposed on them is in violation of their fundamental rights. According to them, the mandatory death sentence is unconstitutional. They have relied on the case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR which declared statutory mandatory sentences to be unconstitutional.

Hearing of the Petition

8. It was then directed that the Petition be canvassed by way of written Submissions. Pursuant thereto, the Petitioners filed their respective but identical Submissions on 20/7/2023. On her part, Senior Prosecution Counsel, Ms Emma Okok appearing for the Respondent, had filed hers earlier on 8/03/2022.

Petitioner's Submissions

9. The Petitioners, in quite lengthy Submissions, contended that they have brought the Petition under constitutional elements since the Muruateu case (supra), is no longer applicable in robbery cases. They urged that they filed the Petition pursuant to the directions given in Muruatetu to the effect that for a determination on whether the Muruatetu principle should be extended to cases of other nature, apart from cases of murder, "a challenge on the constitutional validity of the death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal".

10. They then submitted that the death sentence is cruel, inhuman and degrading punishment which has violated their rights, and that it should be abolished and be declared unconstitutional as had been done in other jurisdictions. They cited Articles 20(4)(a), 22(1)(b) and 23 of *the Constitution* of Kenya, 2010. They then prayed for re-sentence hearing and imposing of a definite sentence. They urged that the enhancement of their 4 years prison sentence imposed by the Magistrate's Court, by the High Court,

to 25 years and eventually by the Court of Appeal, to death was inconsistent with Article 50(2)(h)(p) of *the Constitution* and Section 329 of the Criminal Procedure Code. They asked the Court to declare that Section 296(2) of the Penal Code is inconsistent with Article 26(1), 27(1)(2), 28, 48, 50(1)(2) of *the Constitution*. They also cited Articles 2(5)(6), 25(c) and 50 of *the Constitution*, and also Article 10 of the Universal Declaration of Human Rights, Article 19(3), Article 20(3) and (4), and Article 28 and 131(e) of *the Constitution*. They contended that a re-sentence hearing will grant the Court the opportunity to consider their mitigation.

11. The Petitioners also submitted that Section 332(3) of the Criminal Procedure Code mandates the President to issue a death warrant or order for the sentence of death to be commuted or pardoned and that the said provision is in contravention of Article 131(1)(e) and the Sentencing Guidelines, 2016, which stipulate that sentencing is a judicial function. According to them therefore, their death sentence is as of now at the mercy of the President, and not the Courts and that this is bad in law and thus necessary for the Court to order for re-sentencing. They contended further that the death sentence is against international law which under Article 2(5) of *the Constitution*, form part of the laws of Kenya and that Kenya is a signatory to the International Covenant on Civil and Political Rights (ICCPR).

12. On the claim that their mitigation was not considered by the trial Magistrate because his hands were tied by the mandatory statutory death sentence, they cited the case of Edwin Otieno Odhimabo vs Republic (2009) eKLR.They contended that gone are the days when Amurabi laws were embraced, that the law of "an eye for an eye" which the death penalty seems to have embraced, is not good law, that both the Bible and the Quran do not support killing of a person because of his misdeeds but support forgiveness and giving of another chance. They also cited Article 27(1) of *the Constitution* and termed the imposing of the death sentence in cases of robbery with violence as being discriminatory when compared with the sentences available for in statutes dealing with other offences. They cited, for instance, the penalties stipulated under the Terrorism Act and under Section 202 and 205 of the Criminal Procedure Code relating to cases of murder, both which, they submitted, allow for the imposing of imprisonment, and not necessarily, death as a sentence.

13. According to the Petitioner the death sentence does not meet international law principles thus the need for its abolition. They also cited the case of Godfrey Ngotho Mutiso Vs. Republic, Criminal Appeal No. 17 of 2008. They then gave exmaples of other jurisdictions where, they submitted, the death penalty has since been abolished.

14. The Petitioners also argued that Sections 295, 296(1) and (2) of the Penal Code contravene the principles of fair trial, that there is an apparent ambiguity in the definition regarding the circumstances that are aggravated under Section 296(2) of the Penal Code, as read with the provisions of Sections 216 and 329 of the Criminal Procedure Code. They cited the Court of Appeal case of Joseph Mwaura Njuguna & 2 Others vs Republic [2013] eKLR. They contended further that Article 50(1)(2)(p)(q) entitles an accused person to the least severe of prescribed punishments for an offence, and that in this instant case, the charge was under Section 295 as read with Section 296(2) which prescribes a sentence of 14 years, which is the lesser severe of the punishments prescribed for the offence. They therefore urged that the Court should settle the cited ambiguity by ruling in the Petitioners' favour.

15. Regarding this Court's jurisdiction to determine the issues raised, they cited the cases of The Owners of Motor Vessel Lilian "S" vs Caltex Oil (Kenya) Ltd (1989) KLR, the case of Samuel Macharia & Another vs Kenya Commercial Bank Ltd & 32 Others, Application No. 2 of 2011 and also Articles 23(1) and 165 of *the Constitution* which empowers the High Court "to hear and determine Applications for redress for a denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights".

16. Regarding their reform and rehabilitation, they cited the case of Francis Opondo v Republic [2017] eKLR and submitted that the sentence to be imposed should take into account the need to accord an Applicant an opportunity to be rehabilitated. They also cited the case of Douglas Muthaura Ntoribi v Republic [2014] eKLR and submitted that while in custody, they have undergone rehabilitation programmes and that they are now ripe to be re-integrated back to the society. They then attached copies of several certificates obtained while in prison.

17. In conclusion, the Petitioners cited Section 333(2) of the Criminal Procedure Code which obligates the Court, when sentencing, to take into account the period spent in remand custody by a convict before sentencing and asked the Court to apply the same. They asked that computation of the sentence that may be imposed do commence from the date of arrest.

Respondent's Submissions

18. In her Submissions on behalf of the State, Senior Prosecution Counsel Ms. Okok submitted that the Supreme Court on 6/07/2021 gave directions on the Muratetu case and held that the decision applies only in respect to sentences for the offence of murder under Section 203 and 204 of the Penal Code. She submitted that the Court advised parties who were aggrieved by the death penalty under other provisions of the law to challenge the constitutional validity of the mandatory death penalty by filing proper applications before the High Court and escalate them to the Court of Appeal, if necessary, at which a similar outcome as that in the Muratetu case may be reached. Counsel submitted that the Petitioners have not done this and that therefore, the Petition lacks merit and should be dismissed in it entirety.

Determination

19. The issue for determination herein is "whether this Court should review the death sentence meted on the Petitioners by the Court of Appeal on the basis that the death sentence is unconstitutional,"

20. As already stated, the Petitioners were convicted and sentenced to serve 4 years imprisonment by the Magistrate's Court for the lesser offence of "simple robbery" as opposed to the offence of "robbery with violence" which was the main offence that they had been charged with. They appealed to this High Court, which enhanced the conviction to one for "robbery with violence" and sentenced the Petitioners to 25 years imprisonment each. Undetterred, the Petitioners moved to the Court of Appeal where the conviction for the offence of "robbery with violence" was upheld and the sentence enhanced even further to the death penalty.

21. The offence or "robbery" is defined under Section 295 of the Penal Code as follows:

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

22. Section 296(2) of the Code then defines "robbery with violence" and also sets out the sentence to be meted out to the offender as follows:

> (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

23. It is therefore clear that the statutory prescribed mandatory sentence for the offence of "robbery with violence" as per the provisions of Section 296(2) of the Penal Code is only one, the death sentence. It is evident that the High Court, in substituting the conviction for the offence of "simple robbery" with one for "robbery with violence", did not impose the death sentence prescribed as aforesaid, but meted out a sentence of 25 years imprisonment. In chosing not to impose the mandatory death sentence as stipulated by statute, the 2-judge bench of the High Court stated as follows:

> " The sentence provided for such an offence is death. Death is no longer the mandatory sentence but the maximum sentence. ....."

24. The Court of Appeal did not however appreciate the above line of reasoning and in rejecting it, pronounced itself as follows:

> " 19. On 27th October 2014 when this appeal first came up for hearing, the court cautioned the appellants that they risked being sentenced to suffer death, in the event that their appeal was unsuccessful.
>
> 20. The Court drew the appellant's attention to its eralier decision in Joseph Njuguna Mwaura & Others v Republic [2013] eKLR where a 5 judge bench affirmed the position that it was imperative to impose the death sentence upon a conviction for robbery with violence. The Court adjourned the hearing of the appeal to afford the appellants sometime to consult and make up their minds. That notwithstanding the appellants chose to proceede with their appeal.
>
> 21. We are satisfied that from the evidence on record that, the High Court in holding that the appellants were guilty of robbery with violence, reached the correct finding. That being the case, the only prescribed sentence for commission of such an offence is death.
>
> 22. The High Court erred in law in sentencing the appellants to 25 years imprisonment. In the circumstances, that sentence is hereby set aside and instead substituted with death sentence in its entirety"

25. 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 convicts. It is on this basis that in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, although dealing with a case of murder, and not robbery with violence as herein, the Supreme Court of Kenya 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."

26. It is therefore evident that the Supreme Court, in Muruatetu (supra), only faulted the mandatory nature of the death sentence under Section 204 of the Penal Code and which it termed inconsistent with *the Constitution*. The Court did not therefore outlaw the death sentence but only held that the Courts have 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.

27. It is also evident that although the issue of mandatory minimum or maximum sentence is still a subject of contention in our Courts today, in *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions) commonly referred to as "Muruatetu II", the Supreme Court clarified that not all cadre of minimum or maximum sentences were pronounced unconstitutional in Muruatetu 1 but only death sentence in respect to the offence of murder.

28. Be that as it may, in this case, the sentence of death having been enhanced by the Court of Appeal, what the Applicant is, in effect, inviting this Court to do is to interfere with the sentence imposed by the Court of Appeal, a higher Court, an action which is untenable in law. A High Court Judge cannot sit on appeal over a decision of another Judge, much less a decision of the Court of Appeal. As the Applicant exercised his right of appeal to the Court of Appeal on the issue of sentence and upon which the Court of Appeal pronounced itself, this Court is now functus officio.

29. I echo the words of Kiarie Waeru Kiarie J made in the case of Joseph Maburu alias Ayub vs Republic [2019] eKLR, in which he stated the following:

> " Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary Tenth (10th) Edition describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

30. I may also mention that the Petitioners contend that they have brought the Petitions herein under constitutional elements since the Muruateu case is no longer applicable in robbery cases. According to them, they filed the Petitions pursuant to the directions given in Muruatetu to the effect that for a determination on whether the Muruatetu principle should be extended to other cases, apart from cases of murder, "a challenge on the constitutional validity of the death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal".

31. In countering this argument, Ms. Okok agreed that, indeed, the Supreme Court advised parties who were aggrieved by the death penalty under the other provisions of the law, to challenge the constitutional validity of the mandatory death penalty by filing proper applications before the High Court and escalate them to the Court of Appeal, if necessary, at which a similar outcome as that in the Muratetu case may be reached. According to her, however, the Petitioners have not done that.

32. In connection to above contention, recently, just about 3 months ago, the Supreme Court, in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)*

(Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), reiterated and restated the following:

> " 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.
>
> .....
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> 61. Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. .....
>
> 62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.
>
> ....."

33. In light of the foregoing, I agree with Ms. Okok's submissions above. My understanding of the Supreme Court's directions is that the nature of the constitutional Application contemplated to be escalated through the judicial hearchy is a live ongoing case before the High Court, whether in its original or appellate jurisdiction, not one, as in this case, that has been through the entire Court system hiercarcy, beyond the High Court and has already gone to the Court of Appeal where it has been finally and conclusively determined. The Supreme Court directions given in Muruatetu could not have been intended to be applied to resuscitate, as herein, a concluded matter where an Applicant has already exhausted all his avenues of Appeal. It should also be recalled that the offence was committed way back in January 2007, the Magistrate's Court which was the trial Court delivered its Judgment in December 2007, the High Court determined the Appeal in January 2013 and eventually, the Court of Appeal delivered its Judgment on the second Appeal in October 2016, finally "driving a final nail" into the Petitioners' series of appeals. Considering this very long time lapse, it would be a mockery of the judicial system to permit the Petitioners to make an attempt to "sneak" back the issue of sentence for re-hearing in disguise.

34. The upshot of the foregoing is that this Court lacks the jurisdiction to entertain the instant Petitions as the High Court has no mandate or powers to review or re-open a decision already made by the Court of

Appeal, a higher Court. Not even the issue of the proviso to Section 333(2) of the Criminal Procedure Code (in respect to the taking into account of time spent in remand custody before sentence) can be entertained by this Court at this stage. The Court of Appeal having already dealt with the issue of sentence in general, this Court cannot purport to re-examine it.

35. In the premises, the two consolidated Petitions herein are struck out in their entirety.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. Okaka, Prosection Counsel – for the State

Court Assistant: Brian Kimathi