REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CRIMINAL PETITION NO. 82 OF 2018

SAMUEL WAFULA WANYONYI.....1ST PETITIONER

RICHARD WANYONYI NABENDE.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS .....2ND RESPONDENT

RULING

The Petitioners, Samuel Wafula Wanyonyi and Richard Wanyonyi Nabenda, were convicted of the **offence of murder** contrary to **Section 203 as read with Section 204** of the **Penal Code.** They were both **sentenced to death** on **19th November 2002**. On Appeal, both Petitioners' convictions were upheld on **26th November 2004**. Their sentences were later **commuted to life imprisonment**. They have been serving a custodial sentence since.

The substratum of the Petition brings to this Court's attention the import of the decision in **Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR (hereinafter the Kaberia case)** and **Francis Karioko Muruatetu & another v Republic [2017] eKLR (hereinafter the Muruatetu case)**. According to the present Petition, the effect of the orders in both decisions are now binding precedents. Consequently, the judgement in the High Court in **Kitale HCCR no. 8 of 1999; Republic –versus- Peter Nyongesa Wanyonyi & 2 others** that convicted them ought to be in consonance with the decisions.

The gist of the Petition is that the findings in the **Kaberia case** invalidated the bold provisions of **Section 296 (2) of the Penal Code** rendering a case for review of the **Penal Code** having been found unconstitutional. Its subsistence continues to occasion prejudice to the Petitioners. It is further stated that in the **Muruatetu case**, mandatory death sentence was declared unconstitutional. In the circumstances of the two decisions cited above, the Petitioners seeks a review of their custodial sentence taking into account the period spent in custody.

This Courts note that the Petitioners were convicted under **Section 203** as read with **Section 204** of the **Penal Code** and not the provisions of **Section 296 (2)** of the **Penal Code** as cited.

When the Petition came up for hearing on 22nd April 2021, it was indicated to the Court that the 2nd Petitioner died on 04th October 2020. Consequently, the Application by the 2nd Petitioner is abated. The 1st Petitioner submitted orally that he is remorseful for having committed the offence when he was a 22 years old. He has been in prison for 22 years and has learnt his lesson. While in prison, he took the chance to continue with his education and attained certificates in K.C.S.E, sign language, conflict resolution, First Aid from St. John Ambulance, ICT and Fire Safety Training, sign writing, painting and decoration and Biblical studies. His leadership qualities were recognized. He is waiting for the publication of a book he authored. He has been a Biblical studies teacher in prison. He was a member of Prisoner's Rehabilitation Lobby Group and is in charge of discipline. He has also trained in shoe making. He pleaded with the Court to be given a chance to have his skills utilized in the society. He pleads for leniency on his sentence.

Mr. Omooria for the Respondent urged this Court to exercise its discretion and consider the Application in view of the period that the Applicant has served.

The court has carefully considered the rival arguments made by the parties herein. The Petitioner is essentially seeking from this court a jettison of the life sentence he has been serving to be commuted to a lesser custodial sentence. He wants the court to take into consideration the facts that he has been in lawful custody for a period of (22) years. He has reformed since his incarceration. As part of his changed personality, he further relies on his educational achievements stating that he desires to utilize the acquired skills for the benefit of the society.

While the **Muruatetu case** found that mandatory death sentence was unconstitutional, the Court further went on to pronounce that the death sentence was still available and would be imposed at the discretion of the Court taking into account the prevailing circumstances. It is thus not a given that a death sentence will be automatically reconsidered. Where, for instance, mitigating circumstances were placed before the Court, the Court would take the resentencing hearing with great circumspection. In the 1st Petitioner's case, at the time of his conviction and sentence, the Courts understood the sentence to be imposed as mandatory. The 1st Petitioner has therefore made an appropriate case for resentencing.

The 1st Petitioner, heavily relied on the **Kaberia and Muruatetu cases**, challenged his indeterminate sentence of life sentence. Both courts, in the above cases, expressed the need to proffer mitigation mechanisms to an accused person once convicted of a capital offence. The Petitioner urges this Court to reconsider the sentence meted on him when he was convicted of murder. The Court in the **Muruatetu case** issued the following guidelines with regard to what the Court should consider in re-sentencing hearing as follows:

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

Similarly, the mechanisms in **Section 333(2)** of the **Criminal Procedure Code** necessitate the Court to take into account the period spent in remand custody.

This Court is also guided by other authorities. In **Francis Karioko Muruatetu & 6 others –vs- Director of Public Prosecution [2019] eKLR,** Ngenye J resentenced the Applicants' taking into account the roles they each played in the commission of the crime. The Court noted that the 5th and 7th Applicants actually participated in the crime and since their incarcerated had enrolled themselves in rehabilitative programs and were remorseful. The Court set aside their respective death sentences while substituting them with jail terms 40 and 30 years. Similarly, Majanja J in **Nelson Miriti Gikunda & 2 others -vs- Republic [2018] eKLR** resentenced the Petitioners to sentence of 25 years imprisonment. The Court of Appeal in **John Ndede Ochola** *alias* **Obago –vs- Republic [2018] eKLR and Jonathan Lemiso Ole Keni –vs- Republic [2018] eKLR** upheld sentences of 25 and 30 years imprisonment terms that were imposed respectively.

The deceased person was a neighbour of the 1st Petitioner. The 1st Petitioner made a Charge and Caution Statement and Statement Under Inquiry at the trial. In both statements, the 1st Petitioner confessed to having participated in the crime in the company of his brother and father. He further confirmed that the motive behind the murder was a land dispute wherein the deceased mother had evicted them. Upon his arrest, he directed officers to where the body of the deceased was recovered. Indeed, this was an egregious crime that cannot be condoned. The deceased person did not deserve to die. Antithetically, the Petitioner has expressed remorse for his actions indicating that he was young and impressionable. Indeed, he has also enrolled in several courses to improve the quality of his life.

The Court takes into account the period that the 1st Petitioner has been in custody, the remorsefulness of the Petitioner, the 1st Petitioner's age at the time he committed the offence and his active participation to reform while in prison. Taking into account the period of 22 years that the 1st Petitioner has been in lawful custody, this Court is of the view that the 1st Petitioner has been sufficiently punished. He has repaid his just debts to the society. His sentence is commuted to the period served. He is ordered set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT KITALE THIS 10TH DAY OF MAY 2021

L. KIMARU

JUDGE