



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL PETITION NUMBER 14 OF 2020

JOHN KARANJA NJUGUNA.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. John Karanja Njuguna was the 8<sup>th</sup> Accused in **High Court Criminal Case Number 42/2010** in which he was jointly charged with others with **Murder Contrary to Section 203 as read with 204 of the Penal Code**. It was alleged that on 11<sup>th</sup> April 2020 at Kenya Nut Company Farm Morendat in Naivasha District within Rift Valley Province they jointly murdered one Clement Muguimi.

2. After a full trial the applicant together with the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> accused persons were found guilty of the offence and convicted accordingly on 20<sup>th</sup> December 2013.

3. After hearing mitigation from each of the accused person the learned trial judge *Hon. Anyara Emukule* vide a Ruling delivered on 28<sup>th</sup> February 2014 stated that having considered the mitigation of each of the accused persons, he treated their statement of mitigation with the seriousness it deserved and found that they may have been led by youth bravado, and the mob they were in. *That* they however committed acts that had led to death of Clement Muguimi, and for that they deserved to be punished.

4. However the Judge found that the death sentence to which they were bound to be sentenced to be antithetical and inconsistent with the right to life under **Article 26(3) of the Constitution**. He therefore sentenced each to twenty (20) years imprisonment to run from the date of arrest.

5. The petitioner filed **Appeal No 10 of 2014** in the Court of Appeal.

6. On 27<sup>th</sup> August 2020 he filed this petition vide Notice of Motion Supported by his affidavit seeking orders that this court be pleased to order that the less than three (3) years balance of his sentence be substituted with a probationary sentence in the interests of justice

7. On 25<sup>th</sup> September 2020 he filed a bundle of documents, which included a progress report from the office in charge Nakuru main Prison.

**a. National Trade test certificates for grades 1, 11, III in welding.**

**b. Medical report by Dr. Thaithi FB showing that he suffers from chronic allergic lung disease, Rheumatoid Arthritis and pre-hypertension.**

8. In the Notice of Motion the petitioner invokes the provisions of **Articles 22, 23, 50(1), SO(2)(p), 159, 165(3)(9) and 259 of the Constitution**. He also invokes the **“Probation of Offenders Act Cap 64 Laws of Kenya as read with the Community Service Orders Act.”**

8. The Petitioner goes on to lay the Constitutional Foundation from his petition:-

- That under Article 50(1) he has a right to have his application determined in accordance with the law.
- That under Article 27(1) he has the right to be treated equally before the law, to equal protection and benefit of the law.
- That under Article 27(2) he has the right to the full and equal enjoyment of all the rights and fundamental freedom in the Constitution – and to have similar treatment as other cases to be cited as authorities.

- That this right to fair trial under Article 50(1) and 50(2) of the Constitution cannot be limited under Article 25(c)
- That this court is clothed with unlimited original jurisdiction under Articles 22, 23, 165(3) and 258 to hear and determine this petition.

He also invokes Articles 19, 20, 21, 24, 25, 28, 29, 48, 159 and 259 of the Constitution, the Probation of Offenders act and the Criminal Procedure Code.

10. At the hearing of the petition he relied on his written submissions filed on 2<sup>nd</sup> March 2021. He submitted that after he was sentenced to twenty (20) years imprisonment, he filed an appeal No. 10 of 2014 before the Court of Appeal but this appeal had not been heard by the time of filing this petition.

11. That he was no longer desirous of pursuing the said appeal, and now this petition was his only hope of freedom.

12. In his submission the petitioner urged the court to find that;

1. It has jurisdiction to hear and determine this petitioner.
2. It would be in the interests of justice the balance of his sentence can be substituted with probation sentence.
3. This court could also order that the sentence be reduced to the period served and to have the petitioner released forthwith from custody.

13. He urged the court to find guidance in the **Sentencing Policy Guidelines, 2016**, the mitigating factors set out in the case of **Francis Karioko Muruatetu**, and the Probation of Offenders Act.

14. The Petitioner argued that our Constitution is geared towards restorative, and the ten (10) years spent in custody have not only given him time to ponder over his actions for which he is utterly remorseful, but have also provided him with time for rehabilitation and reformation. He argues that *“a probation sentence born of a custodial sentence is perfect and provident option towards achieving the sentencing goals. He submitted that had the trial court considered a probation officer’s report at the time of sentencing, the court would have “arrived at a more informed sentence.”*

15. The petition was opposed by Ms. Murunga prosecuting counsel on behalf of the state. Reiterating the facts of the case she submitted that the petitioner together with seven (7) others attacked the deceased who was just doing his job, beat him up leaving him for dead, and prevented his colleagues from rescuing him for treatment – she submitted that the petitioner and his co-accused deserved the sentence they got.

16. She submitted further that the petitioner had a right of appeal under **Section 378(1) of the Criminal Procedure Code**, and all the issues he had raised herein were issues that he ought to raise before the Court of Appeal. That this court lacked the jurisdiction to re-look at the petitioner’s sentence. That the case of **Muruatetu** was not applicable to this case, as he did not receive the mandatory sentence of death, to the contrary the trial judge heard his mitigation, considered his youth and exercised his discretion, declined to apply the sentence of death, and instead sentenced him to twenty (20) years imprisonment with effect from the date of arrest.

17. The issue is whether this can grant the orders sought and substitute the remainder of the petitioner’s sentence to a non-custodial sentence under **Probation of Offenders Act** or the **Community Service Order Act**? Or order that the remainder of his sentence be deemed as served hence granting the petitioner his freedom?

18. Under **Article 165(3) (a) of the Constitution** the High Court has unlimited original jurisdiction in criminal and civil matters. The question is whether that original jurisdiction empowers this court to review its own the sentence as sought by the petitioner.

19. The operative word here is **original**, that a matter of criminal or civil nature, which is not exempted by **Article 165(5)** – may start at the High Court.

20. This is not the case with this case the petitioner’s matter has already been determined by this court in the exercise of its original Jurisdiction and hence, the matter has already moved out of this court’s original jurisdiction this court does not have the power to exercise supervisory revisionary jurisdiction on itself .

21. The Petitioner’s right of appeal/review is clearly set out under **Article 50(2) of the Constitution** –

**“To appeal to, apply for review by a higher court as prescribed by law.”**

22. The jurisdiction to review is given to a higher court except in the exceptional circumstance set out in the **Muruatetu case**.

23. The petitioner’s right of appeal remains intact, and the points he makes here about a fair trial, about his sentence ought to be made at the Court of Appeal. Hence this court having exercised its original jurisdiction under **Section 203 of the Penal Code** cannot exercise it again as sought by the petitioner.

24. The application is declined. The petitioner to pursue his appeal in the Court of Appeal

**DATED, SIGNED AND DELIVERED VIA ZOOM THIS 18<sup>TH</sup> DAY OF JUNE, 2021**

**MUMBUA T. MATHEKA**

**JUDGE**

Court Assistant Edna

Ms. Murunga for state

Applicant Present virtually