



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**MISCELLANEOUS PETITION NO. 1 OF 2021**

*(Formerly Kericho High Court Petition No. 14 of 2017,*

*A Petition from the original Case File No. HCCRA 35 of 2007)*

**BENARD KIPYEGON KOECH.....PETITIONER/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This Petition was filed through a Notice of Motion stated to be brought under Articles 22 (1), 1(3), 3(2),4, 9(1), 25, 26, 27(1), 28, 29, 50, 160(1), 159 and 165 of the Constitution of Kenya together with Section 261 of the Criminal Procedure Code Cap 75. It is supported by an Affidavit sworn by the Applicant and filed on 13 May 2019. The Applicant seeks a re-hearing of the sentence imposed against him. He relies on the case of **Douglas Muthaura Ntoribi, Misc Application No. 4 of 2015, John Ng'ang'a & Ano HCCR Case No. 31 of 2016 and Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015.**

**Background**

2. The Applicant was first charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. He was arraigned before the Senior Resident Magistrate Court in Sotik in Criminal Case No. 3009/2005. During the testimony of the victim Alice Nyakiriaro (PW1), the prosecution realized that the accused person had also snatched the victim's belongings (a handbag with clothes inside), necessitating a more serious charge. They therefore requested the leave of the court to amend the charge sheet.

3. The Applicant was then charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the 30<sup>th</sup> day of December 2003, at Koruma Tea Estate in Bureti District, within Rift Valley Province, robbed Alice Nyakiriaro of one handbag, six dresses and at the time of such robbery used actual violence to the said Alice Nyakiriaro. He pleaded not guilty. At the close of the prosecution case, the accused was placed on his defense to which he opted to remain silent. The court convicted him of the offence and consequently sentenced him to the mandatory death sentence as stipulated by the law.

4. Dissatisfied with the decision of the trial court, the accused appealed in Kericho Criminal Appeal No. 35 of 2007 which appeal was heard by a two-judge bench of Angawa and Emukule JJ. He raised three main grounds in the appeal being that the Charge was defective, that the recognition evidence was defective; and; that the sentence was also defective. The court held that the facts established that the accused had committed the offence, that there was no substantive ground of appeal and that the injuries he occasioned on the victim were grave. The conviction and sentence were consequently upheld.

5. The Applicant then moved to the Court of Appeal but subsequently opted to withdraw his appeal in order to pursue the option of re-sentencing through the present application.

6. The above background forms the basis of this Petition in respect of sentencing. So far, the Applicant's death sentence has been commuted to life imprisonment under the Presidential Power of Mercy under Article 133 of the Constitution. This is the sentence that the Applicant is currently serving at the Kericho Main Prison.

**Submissions**

7. In his submissions for resentencing, the Applicant states that he relies on the decision in the landmark case of **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 & 16 of 2015** (hereafter the Muruatetu case). He stated that he did not seek to contest the merits of his case in the trial court and on appeal in the high court, as he felt that the courts had rendered themselves appropriately. He however contended that based on new jurisprudence and developments in the law, the court is now clothed with the necessary jurisdiction and is afforded a chance to exercise discretion in sentencing in a capital offence. That previously there was one mandatory sentence of death, with no consideration being given to the circumstances of the case or any mitigating factors. Indeed, during sentencing, the learned magistrate, Hon. T. Okelo in the trial court at Sotik stated as follows: -

***“I have considered the offence, the fact that the accused is a first offender and the mitigation that he offers of denying the commission of the offence. I am alive to the penalty which is imposed under section 296 (2) of the Penal Code which is a mandatory death sentence. The accused is committed to suffer a death sentence as it is provided for in law...”***

8. The Applicant further submitted that he was remorseful and had learned his lesson during his 14 years in prison. He told the court that he had trained and acquired the necessary skills for personal development being tailoring and dress making. Lastly, he pointed to the fact that he was a first offender and a young person who “was lost” due to bad influence. It was his prayer that the court would treat him as a first offender and give him a second chance at life to reintegrate in society and start a new life.

9. The Prosecution counsel left the matter to the court for its determination.

#### **Issues for consideration**

10. The main issue for consideration is whether the Application is merited and whether the court can exercise its discretion to re-sentence the Applicant.

11. In the Muruatetu case delivered on 14<sup>th</sup> December 2017, the Supreme Court set a novel precedent in respect of the mandatory death sentence, declaring the mandatory nature unconstitutional for taking away judicial discretion in sentencing. Indeed, this landmark precedent has been quoted by the Applicant authoritatively as the basis for which he instituted the present Application before court.

12. The Supreme Court in this case outlined several mitigating factors that must be considered where an accused person was charged with the offence of murder. These were, the age of the offender, being a first offender, whether the offender pleaded guilty, the character and record of the offender, commission of the offence in response to gender-based violence, the manner in which the offence was committed on the victim, the physical and the psychological effect of the offence on the victim’s family, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor the court considers relevant.

13. Courts have since this decision found themselves flooded with applications similar to the present one on the basis that mandatory sentences are outlawed because they robbed judicial officers their power to exercise discretion during sentencing to consider mitigating and aggravating factors. Courts have consequently applied the Muruatetu case to entertain re-sentencing hearing in cases of robbery with violence and under the Sexual Offences Act.

14. It is noteworthy that courts have given varying determinations during sentencing with some giving very lenient sentences and others upholding them.

15. In the case of **Nelson Mwitikunda & 2 Others vs. Republic (2018) eKLR**, Majanja J. resented the Petitioners to 25 years imprisonment from the date of sentencing. See also **Douglas Muthaura Ntoribi, Misc Criminal Appeal No. 4 of 2015, (2018) eKLR**, where the death sentence was revised to 15 years imprisonment to run from the date of conviction.

16. Several Court of Appeal decisions have also revised sentences as follows: In **Benjamin Kahindi Changawa vs. Republic Criminal Appeal No. 99 of 2019**, the court substituted the death sentence with 10 years imprisonment. In **Wycliffe Wangusi Mafura Vs Republic (2018) eKLR** the Appellant who had been in remand custody for 9 years was sentenced to death but the Court of Appeal substituted the death sentence with a sentence of twenty (20) years imprisonment. In **John Ndede Ocholla alias Obago vs. Republic, Kisumu Criminal Appeal No. 120 of 2014 (2018) eKLR** the court upheld the 25 years sentence. Finally, in **Jonathan Lemiso Ole Keni vs. Republic Nairobi C.A. Criminal Appeal No 51 of 2016, (2018) eKLR** the court upheld the sentence of 30 years imprisonment.

17. What is of utmost importance should be a re-consideration of the varying circumstances of each case. Some where the circumstances were aggravating would require that the sentence is not disturbed.

18. In the present matter, the accused was charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. It is his contention that at the time of his sentencing, the court lacked the authority to veer off from the stipulated sentence which was death. However, having seen the manner in which the court handled the mandatory aspect of the death sentence in the murder case of Muruatetu, he argues that the same principle ought to apply to him and his sentence ought to be reviewed through a consideration of the mitigating factors. His prayer is that he should not be subjected to the mandatory death sentence.

19. From the Probation Officer’s report dated 26 April 2021, a background of the Applicant is outlined and it is clear that coming from a poor family of ten, with parents who were alcoholic, he had no one to turn to for guidance and often had to fend for himself. This subsequently landed him in the company of negative influence and he ended up committing the crime which led to his life in prison. The same report also outlines that the family members and community are willing and ready to receive him home and assist in his re-integration to society. He also stated that he has acquired skills in tailoring and dress making till Grade 3 and has provided certificates to this effect demonstrating that he is ready to start life afresh and earn an honest living. The victim on the other hand is untraceable and so there was no victim-impact statement for our consideration.

20. Taking all the above factors into consideration, I am persuaded that the Applicant is deserving of some leniency in his sentence. He has served 14 years in prison and his family has expressed willingness to accept him back. Coupled with the fact that he has acquired the necessary skills, I am optimistic that given a chance he would be able to start afresh, fend for himself and be a useful member of society.

21. In the upshot, the application succeeds to the extent that the sentence is revised to 20 years imprisonment from the date of conviction and sentence in the trial court being the 4<sup>th</sup> July 2007.

22. Orders accordingly.

**Ruling delivered, dated and signed this 19<sup>th</sup> day of July, 2021.**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Applicant, Mr. Murithi. for the Respondents and Kiprotich (Court Assistant).**