



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. CRIMINAL APPLICATION NO. E080 OF 2021

CORAM: R.E. ABURILL, J

DANIEL OTIENO OCHIENG.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a petition for resentencing in Siaya High Court's Criminal Case No. 11 of 2015 delivered on 16.3.2017 by Hon. Justice J.A. Makau, J)

JUDGMENT

1. The Petitioner/applicant in this matter is Daniel Otiemo Ochieng. He was charged, tried and convicted of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code by Hon. J. Makau J in Siaya HCCR Case No. 11 of 2015 and sentenced to suffer death as per the judgment delivered on 16/3/2017 and sentence pronounced on 20th March 2017.
2. The Petitioner appealed to the Court of Appeal but from his statement in court, he withdrew the said appeal upon learning that the Supreme Court had vide Francis Muruatetu & Another v R [2017]eKLR held that mandatory death sentence was unconstitutional and that those condemned to death could petition for resentencing.
3. He claims that the mandatory death sentence imposed on him was unconstitutional and violated his rights. He has relied on several decisions including Charles Likoko Lisambu Vs Republic (Misc. 360/2008 at Kakamega High Court, Thomas Patrick Gilbert Cholmondeley Vs Republic - CRA 116 of 2017 and Albanus Mwanzia Mutua V R CRA 120 of 2004. He also relied on the Francis Karioko Muruatetu (the Muruatetu) supra case and supported by an affidavit sworn on 20th May 2021.
4. He deposes that he withdrew his appeal from the Court of Appeal (Appeal number not provided) vide ruling of 6/4/2021 and order dated 30/4/2021 in Order for him to seek for resentencing.
5. The Petitioner has also filed certificates of life skills obtained and gained while serving prison awaiting execution of death sentence and these are evidence of his changed life while in prison. He has acquired training in Bible league, Christian Discipleship and Gospel Faith Messenger Ministry and two Diplomas in Biblical studies. He also has a certificate in, "The way to Happiness from Giselle Foundation."
6. I have considered all the above documents and grounds for resentencing. I have also considered the fact that during sentencing of the Petitioner, which was prior to the decision in the Francis Muruatetu decision, the learned trial Judge made it clear that sentence punishment for murder is one, death and his hands were tied and sentenced the applicant herein to suffer death.
7. That was on 20/3/2017 before the Supreme Court decision in Francis Muruatetu decision hence the mitigation by the Petitioner's counsel did not matter.
8. In his mitigation, after the Prosecution submitted that they had no previous records and he could be treated as a first offender, the Petitioner's counsel Mr. Wakla submitted that the accused was remorseful and regrets the offence. He prayed for leniency.
9. I have also considered the circumstances under which the offence of murder was committed by the Petitioner who has not challenged his conviction. The Petitioner stabbed the deceased who died three days upon being admitted at Jaramogi Oginga Odinga Teaching and Referral Hospital. The stab measured 2 cm below the umbilical cord. Dr. Olwala who performed an autopsy on the deceased Kelvin Ndonga Orimba concluded that the cause of death was due to hypovolemic shock due to splenic laceration from stab wounds.
10. It is important to clarify that death sentence is not unconstitutional and neither did the Supreme Court in the Francis Muruatetu pronounce itself as such. What the court had issues with was the mandatory nature of the death sentence that deprived the trial court in murder cases of any

discretion in meting out sentence and the deprivation of an accused convict the right to mitigate so that the trial court can consider the said mitigation in imposing an appropriate sentence.

11. In the recent directions given by the Supreme Court in the same Muruatetu case, the apex court clarified the position and stated that:

“Where an appeal is pending at the Court of Appeal or High Court, they (trial Courts) will entertain an application for resentencing upon being satisfied that the appeal had been withdrawn.”

12. The applicant herein was sentenced by this Court presided over by my brother Justice J. Makau. He made it clear that his hands were tied and the only sentence he could impose upon convicting the accused for murder was death.

13. In this application, the prosecution left it to court to make a decision.

14. Exercising discretion to resentencing the accused person/petitioner herein and taking into account his mitigations and circumstances under which the accused fatally injured the deceased leading to his unchallenged conviction, after a fight, and considering the Judiciary Sentencing Guidelines and guidelines set out in the Francis Muruatetu decision, I hereby set aside the death sentence imposed and resentence the Petitioner herein **Daniel Otieno Ochieng** to serve **thirty five (35) years imprisonment** to be calculated from the date of his arrest as he did not post any bond pending trial.

15. Orders accordingly.

16. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JULY, 2021 VIRTUALLY IN THE PRESENCE OF THE APPLICANT AT KIBOS MAXIMUM PRISON.

R.E. ABURILI

JUDGE

In the presence of:

Ms Nambisia Prosecution Counsel

CA: Modestar and Mboya