REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. E022 OF 2021

DANIEL MWOMOLE ADEBE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] This petition was filed by **Daniel Mwomole Adebe** on **9 February 2021,** pursuant to the provisions of **Articles 22 (1), 27, 28, 48 and 50 (2)** of the **Constitution of Kenya,** among other provisions. He seeks for sentence re-hearing following the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR. In his Supporting Affidavit, he averred that he was charged and convicted of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**; and that he was convicted and sentenced to death, and has since exhausted his appeal options. He added that he is remorseful and has reformed, hence his prayer for the reconsideration of his sentence.

[2] The petitioner urged his petition by way of written submissions. He argued that the mandatory nature of the death sentence that was imposed on him is a violation of his rights to fair trial as provided for in **Article 50 (2) (q)** of the **Constitution**; as well as his right to dignity under **Article 28** of the **Constitution.** The petitioner further submitted that he has been in custody for over 10 years, including the pre-trial detention period; and that he has learned from his past mistakes and is ready for social re-integration. He added that he is remorseful and therefore is entitled to sentence reconsideration. In addition to the **Muruatetu Case**, the petitioner relied on the following authorities:

[a] Eldoret High Court Petition No. 24 of 2019: Ben Pkiech Loyatum vs. Republic;

[b] Eldoret High Court Petition No. 7 of 2018: Moses Kitui Barasa;

[c] William Okungu Kittiny vs. Republic [2018] eKLR

[d] Nairobi High Court Criminal Appeal No. 247 of 2014: Robert Mutashi vs. Republic

[3] The petition was opposed by **Mr. Mugun,** learned counsel for the State. He pointed out that the petitioner has exhausted the appeal process; and that the Court of Appeal has already pronounced itself on the case and taken into account the effect of the decision of the Supreme Court in the **Muruatetu** decision. It was therefore the submission of Counsel that this Court has no power to revise the decision of the Court of Appeal and therefore cannot intervene in the matter.

[4] In response to the submissions by **Mr. Mugun**, the petitioner insisted that he is entitled to equal protection of the law; and that he has seen his fellow inmates have their sentences reviewed after exhausting the appeal process. He therefore prayed that his petition be allowed and the sentence imposed on him reviewed.

[5] The brief background to the petition is that the petitioner was charged with the murder of a step-sister. The record of the criminal trial, being **Eldoret High Court Criminal Case No. 60 of 2010**, shows that the unlawful act of assault occurred on **12 April 2010;** and that the victim died later on **6 October 2010**, while undergoing treatment. The petitioner was found guilty after trial and was convicted of the offence of murder. He was consequently sentenced to death on **25 April 2017**. Aggrieved by his conviction and sentence, the petitioner appealed to the Court of Appeal vide **Eldoret Criminal Appeal No. 237 of 2018**. His appeal was dismissed on **17 October 2019**; whereupon the death sentence was confirmed.

[6] In the light of the foregoing background, the threshold issue that then arises is whether, in the circumstances of this case, this Court has the power to conduct a sentence re-hearing and to reconsider the penalty that was imposed on the petitioner. In principle, there is no gainsaying that sentence re-hearing is available to all offenders who had been subjected to the mandatory death sentence prior to the **Muruatetu** decision. It is also true that such reconsideration would be available to all eligible convicts, notwithstanding that they had

exhausted all their options on appeal. Hence, in **William Okungu Kittiny vs. Republic** [2018] eKLR the Court of Appeal held thus at paragraph 11:

> **"Although the appellants' appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending. The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."** (emphasis supplied)

[7] It is instructive however that the Court of Appeal also made it clear that, where an appeal was pending, the matter of sentence re-hearing be handled in that appeal. It is significant therefore that the petitioner's appeal to the Court of Appeal was filed on **4 May 2017** and was therefore pending by **14 December 2017** when the **Muruatetu Case** was determined. The appeal was ultimately concluded on **17 October 2019**, about two years after the **Muruatetu** decision and, indeed, the Court of Appeal addressed its mind to the ramifications of **Muruatetu** in determining the appeal. Here is what it had to say:

> **"We now consider the mandatory death sentence meted out on the appellant, we note that the same is provided for in Section 204 of the Penal Code and therefore the learned judge did not err in sentencing him as such. However, the appellant claimed that the same was harsh since he was a first offender. His counsel further urged the Court in his submissions to apply the Francis Karioko Muruatetu & Another vs. Republic, (supra) and reduce the sentence meted out on the appellant… In the instant matter, the circumstances under which the offence was committed was heinous and malicious. The appellant deliberately and with impunity pursued and viciously attacked the deceased with a clear intent to kill her even as she tried to flee to seek refuge. The injuries inflicted on the deceased were not only aimed to kill but were also meant to take away her dignity in the process."**

[8] Thus, in upholding the death sentence meted out against the petitioner, the Court of Appeal made it clear that:

> **"We are aware of the Supreme Court decision in Francis Karioko Muruatetu & Another –v- Republic (supra)… Nevertheless, due to the aggravating circumstances surrounding the death of the deceased, we decline to vary or interfere with the death sentence meted upon the appellant. This appeal has no merit. We uphold and affirm the conviction and the death sentence meted on the appellant. This appeal is hereby dismissed in its entirety."**

[9] In the premises, the only option available for the petitioner was to appeal to the Supreme Court, if need be. Taking into account the constitutionally established hierarchy of Courts, this Court has no power to revise the decision of the Court of Appeal. This then, is the end of the road for the petitioner. He must make peace with the decision of the Court of Appeal and serve his sentence.

[10] In the result, the petition is untenable and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF JULY 2021

OLGA SEWE

JUDGE