REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. E002 OF 2019

PATRICK KIHARA MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON SENTENCING

1. The Applicant in this case has filed a Chamber Summons and Supporting Affidavit seeking re-sentencing. He was convicted and sentenced for the offence of defilement contrary to **Section 8 (1)** and **8 (4)** of the **Sexual Offences Act** in Criminal Case No. 11 of 2007. He appealed vide HCCRA No. 64 of 2015 which was dismissed by the Naivasha High Court. He relies on the cases of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and **Dismas Kilwake v Republic [2018] eKLR**.

2. This court requested a probation report and a report from the Prisons Service. It also called for written submissions, which the applicant filed.

3. In allowing for submissions this, the court was following recent High Court and Court of Appeal precedents under which the now famous **Muruatetu Principles (2017)** were relied on to underpin resentencing for Sexual Offence and Robbery with Violence cases.

4. However, following the most recent Supreme Court Directives in **Francis Karioko Muruatetu & Another v Republic** and **Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR**, the Supreme Court has determined that the **Muruatetu Principles (2017)** apply only to murder sentences. In its directions the Supreme Court stated:

> ***"[7]In the meantime, it is public knowledge, and taking judicial notice, we d0 agree with the observations of both Mr. Hassan and Mr. Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to Section 296(2) of the Penal Code, and others under the Sexual Offences Act, presumably assuming that the decision by this Court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.***
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> **[8]** ***While it is regrettable that the report was not filed timeously and these directions not issued immediately, there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing. Appellants whose sentences were confirmed by the High Court and the Court of Appeal have returned to the magistrate's courts, where, without reference to the decisions of the two superior courts, have had those sentences revised. The magistrate's courts have also, in some instances entertained applications for re-sentencing in murder cases, clearly without jurisdiction. Likewise, some Appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that are pending hearing and determination, either in the High Court or the Court of Appeal, have also had their sentences revised by the magistrate's courts without disclosing the fact that pending appeals exist in Superior Courts.***
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> **[11]** ***The ratio decidendi in the decision was summarized as follows;***
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> > ***"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".***
> >
> > **[14]** ***It should be apparent from the foregoing that* Muruatetu *cannot be the authority for stating that* all provisions of the law *prescribing mandatory or minimum sentences are inconsistent with the Constitution. It***

bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court." (Emphasis added)

5. Further the Supreme Court has made the following clarification:

"[18] Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;

ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

(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) The manner in which the offence was committed on the victim;

(g) The physical and psychological effect of the offence on the victim's family;

(h) Remorsefulness of the offender;

(i) The possibility of reform and social re-adaptation of the offender;

(j) Any other factor that the Court considers relevant.

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu." (Emphasis added)

6. In light of the foregoing, this court clearly has no jurisdiction to apply the **Muruatetu Principles** for re-sentencing in respect of conviction for Sexual Offences as in this case.

7. Accordingly, the application is hereby dismissed.

Administrative directions

8. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference.

Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

9. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

10. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 19th Day of July, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Patrick Kihara Mwangi – Present in Person at Naivasha Maximum Prison

3. Court Assistant – Quinter Ogutu