



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 166 OF 2020 (CONSOLIDATED WITH PETITION NO. 81 OF 2020)**

**BARISA WAYU MATAGUDA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

**The Petition**

1. The Petitioner was tried and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal code as captured in the Judgment of the High Court in **CRIMINAL CASE NO. 6 of 2008**. He entered a plea of not guilty and his trial commenced. The learned judge found him guilty of the said offence, convicted him, and sentenced him to 40 years imprisonment. Being aggrieved by the said conviction and sentence, the Petitioner filed **Criminal Appeal No. 376 of 2012 (R)** in the Court of Appeal at Mombasa. The Court of Appeal upheld his conviction and sentence and dismissed the appeal for lack of merit.

2. The Petitioner lodged this Constitutional Petition seeking to be released to join the society.

3. The Respondent (DPP), filed submissions dated 19<sup>th</sup> April, 2021. The Respondent submitted that the Petitioner basically seeks to be released from prison and freed from serving the 40 years jail term.

4. When the matter came for resentencing **Miss.Wanjohi** learned counsel appeared for the Respondent (DPP). Counsel submitted that the Petitioner should be jailed for 40 years and that Muruatetu case does not apply in this case.

5. The Petitioner on his part submitted that he committed the offence without intension; that the person who died was his lover and she received a love message in his presence and they fought. Further that he has reconciled with the family of the deceased and that he regrets his actions but he never intended the same. The Petitioner in mitigation submitted that he has 4 children and old parents. He further submitted that it is because of anger that he is in prison but he has really reformed in prison and has managed his anger well now. The Petitioner has been in jail for about 14 years now.

6. I have considered the petition and the rival submissions and my understanding of the Petitioner case is that he is seeking re-sentencing under the **Muruatetu** case.

7. **The Judiciary Sentencing Policy Guidelines** on objectives of sentencing provide that: **“Sentences are imposed to meet the following objectives:**

**1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**

**2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**

**3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**

**4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a**

*sense of responsibility through the offender's contribution towards meeting the victims' needs.*

**5. Community protection: To protect the community by incapacitating the offender.**

**6. Denunciation: To communicate the community's condemnation of the criminal conduct.”**

8. The court in the case of **Josiah Mutua Mutunga & another v Republic [2019] eKLR** quoted the following case of laws:

In the case **R vs. Scott (2005) NSWCCA 152** Howie, Grove and Barr JJ stated:

***“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”***

In a New Zealand decision namely **R vs. AEM (200)** it was decided:

***“... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”***

9. The High Court in sentencing the accused considered the mitigation and seriousness of the offence and held that:

***“I have considered the mitigation raised on behalf of the accused however murder is an extremely serious offence. As a result of the accused's actions a human life has been lost and a family has been cast into mourning. The sentence must mirror the seriousness of the offence. I therefore sentence the accused to serve forty (40) years imprisonment. He has a right to appeal.”***

10. The Supreme Court in **PETITION NO. 15 & 16 (CONSOLIDATED) OF 2015** gave directions on the Muruatetu case guideline 4 states:

***“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.”***

11. In this case the appeal was heard and determined and the Petitioner's conviction and sentencing upheld. What is to be noted is that the High Court Judge listened to, and considered the Petitioner's mitigation and then sentenced him to 40 years. This sentence was confirmed by the Court of Appeal. Therefore, the petition before the Court does not fall within the ambit of Muruatetu case. The petition is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED IN MOMBASA THIS 20TH DAY OF SEPTEMBER, 2021.**

**E. K. O. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant