REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION AT MILIMANI

MISC. CRIMINAL APPLICATION NO. 189 OF 2019

JOHN GITAU GACHURI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a chamber summons application dated 10th April and filed on; 12th April, 2019 and supported by an affidavit sworn by the applicant, he seeks for re-sentencing based on the Petition No. 15, Francis Karioko Muruatetu & Another vs Republic, otherwise known as; Muruatetu's decision, of the Supreme Court of Kenya (SCOK).

2. The applicant avers that, he was charged with the offence of; murder contrary to section 203 as read with section 204 of the Penal Code, (cap 63) Laws of Kenya, vide High Court criminal case 43 of 2009 at Nairobi. He was found guilty, convicted and sentenced to death on; 11th July, 2013.

3. That, subsequently he lodged an appeal at the Court of Appeal at Nairobi, which is still pending. However, following the decision in Muruatetu, the mandatory death sentence was declared unconstitutional, hence the application for review of the sentence.

4. However, the application was opposed based on the grounds of opposition dated, 26th May 2021 that; -

a) The application is an abuse of court process.

b) The applicant has not shown any sign of reform

c) The applicant requires more time for rehabilitation.

d) The pre-sentence report is not favorable.

e) That the application lacks merit and is not supported by facts.

5. At the hearing of the application, the applicants stated that, he only seeks for re-sentencing. In that regard, the Respondent's counsel requested that, a pre-sentence report be ordered for. The request was granted and the same was availed.

6. In canvassing the application, the applicant filed 'mitigation submissions' dated 24th June 2021. In a nutshell he requested the court to consider that, he has already spent twelve (12) years in prison and give him a more lenient sentence or put him under probation. That he is sixty (60) years of age and vulnerable to disease. He wants to re-unite with his wife and five children who have gone through tough times since his incarceration.

7. That he was a first time offender and is deeply remorseful. Moreover, he has reached out to his sister and asked for forgiveness and they reconciled. Further after his imprisonment, he has become born again. That he joined carpentry classes to improve his life skills but due to injury on his hand he was unable to complete it.

8. He relied on the case of; *Mulamba Ali Mabanda Appeal No. 12 of 2013* where the court took into consideration, the fact that the appellant had been incarcerated for nine (9) years, was a first time offender and released him forthwith. Further, the court should pronounce the period of remission as held in; *Petition No. 15 of 2020 Vencent Sila Jona vs Republic* and section 46 of the Prison Act, 2016 and time already spent in custody when sentencing as directed in; *Petition No. 40 of 2018 John Kirema Kaibi vs Republic.*

9. However, in response, the Respondent filed submissions dated 10th June 2021, and submitted in a nutshell that, the pre-sentence report is not favorable to the applicant and has recommended a custodial sentence.

10. Further, his family members do not want him granted non-custodial sentence as they say, he is still violent and as per the step mother he still sends threatening messages to his brothers and sisters. That he has not also demonstrated any skills he has learnt while in prison.

11. At the conclusion of the matter I find that, the undisputed facts are that, the applicant was charged with the offence of; murder contrary to section 203 as read with section 204 of the Penal code on 23rd April 2009. He was subsequently convicted and sentenced to suffer death on 11th July 2013. Being dissatisfied with both conviction and sentenced, he lodged an Appeal No. 49 of 2015 at the Court of Appeal.

12. I note from the court record that, the appeal in the Court of Appeal was heard by; W. Karanja, H. Okwengu and S. Ole Kantai (Judges of Appeal) and a decision therein rendered on 8th March 2019. Whereby the appeal was dismissed in its entirety vide a Judgment dated 8th March 2019.

13. The question that arises is whether, this court has the jurisdiction to hear and entertain an application for review of sentence imposed by it, and upheld by the Court of Appeal. In my considered opinion, the answer is in the negative. The decision of the Court of Appeal binds this court, therefore this court cannot review a sentence confirmed and/or passed by the Court of Appeal

14. In that regard, this court became *functus officio* after its decision and upon filing of the appeal in the Court of Appeal. Therefore, if the applicant is aggrieved, he can only seek for review in the Court of Appeal against the decision thereof to the Supreme Court.

15. Even then re-sentencing based on the decision of what has come to be known as Muruatetu case can only be addressed in the Court of Appeal where the matter rests, unless the Court of Appeal directs the High Court otherwise.

16. Be that as it were, in the judgment delivered by the Court of Appeal, has already addressed that issue as follows;

> "As regards sentence, the trial judge sentenced the appellant to death. Counsel for the appellant has urged the Court to re-consider this sentence in light of the Supreme Court decision in *Francis Karioko Muruatetu & another vs Republic & 5 others* (supra). *In that decision the Supreme Court declared the mandatory aspect of the death sentence as provided under section 204 of the Penal Code, to be unconstitutional. What this means, is that a judge who finds an accused person guilty of murder, has the discretion to impose any sentence, death penalty being the severest sentence that can be imposed. As the appellant was sentenced on the 11th July, 2013, before the Supreme Court decision, the learned judge obviously did not have the benefit of that decision. Be that as it may, considering the circumstances in which this offence was committed, and the fact that the victim was the appellant's own mother, the sentence of death imposed by the trial judge was appropriate and*

there is no justification for this Court to interfere. The upshot of the above is that we find no merit in this appeal and do therefore, dismiss it in its entirety.''

17. Finally, it suffices to note that, the applicant concealed material facts in the affidavit in support of the application herein that, the appeal in the Court of Appeal had been heard and determined. He deposed that, the same was still pending. He who goes to equity must go with clean hands. The applicant therefore deserves to be cited for perjury or dishonesty.

18. Be that as it may, In the given circumstances, I strike out the application herein due to, want of jurisdiction.

Dated, delivered virtually and signed on this 13th day of September 2021.

19. It is so ordered.

DATED, DELIVERED VIRTUALLY, AND SIGNED ON THIS 13TH DAY OF SEPTEMBER, 2021

GRACE L. NZIOKA

PRESIDING JUDGE

In the presence of; Applicant in person

Ms Chege for the Respondent Edwin Ombuna – Court Assistant