



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION- MILIMANI**  
**MISC.CRIMINAL APPLICATION NO. 471 OF 2018**  
**STEPHEN KAHENYA IRUNGU.....APPLICANT**  
**VERSES**  
**REPUBLIC.....RESPONDENT**  
**RULING ON RE-SENTENCING**

Stephen Kahenya Irungu, the Applicant, seeks resentencing following conviction and sentence in HCCR 223 of 2004 where he was found guilty of murder contrary to **Section 203** as read with **Section 204** of the Penal Code and sentenced to suffer death as prescribed by law. The record also shows that the Applicant appealed in 2006 but the Court of Appeal confirmed both conviction and sentence of the High Court.

2. At the outset, the Applicant filed a petition alleging infringement of his rights to fair trial and adequate representation by counsel which petition was later abandoned and he elected to pursue re-sentencing instead of a retrial.

3. According to facts presented, the Applicant and four others murdered John Murigi Kingu (Deceased). The deceased, the Applicant's employer went out to answer a call of nature at night but did not return to his bedroom. Following investigations conducted, his body was found and exhumed from a shallow grave within his compound. He suffered a deep transverse penetrating cut wound at the nape of the neck, a cut that affected the head and the spinal cord column. The court concluded that he was attacked from behind. The Applicant was found guilty based on circumstantial evidence, having been the last person with the deceased, and also seen with the deceased's clothes; and found in possession of his ATM card and passport.

4. On appeal, the Court of Appeal affirmed the conviction and sentence.

5. The substratum of the application is that the mandatory death sentence has been declared unconstitutional by the case of **Francis Karioko Muruatetu & Another -Vs- Republic (2017) eKLR** such that the Applicant should be granted the

opportunity to be heard on his mitigation as per the cases of **William Okungu Kittiny -vs- Republic (2018) eKLR**, **Douglas Muthaura -Vs- Republic**.

6. In mitigation the Applicant submits that he is remorseful for the offence committed and that he is a law-abiding citizen. That he was involved in commission of the offence due to bad company; he is a first offender and has not been charged with other offences; he has been in custody for fifteen (15) years and has been engaged in activities through rehabilitation program, namely, carpentry and joinery, grade 1, polisher grade 1, 2 and 3; and wood carving grade 3. A medical report was also filed indicating that the Applicant was diabetic since September 2020,

7. In response thereto, the State urged that the Applicant had not factually annexed evidence of how he would benefit from prayers sought and also questioned jurisdiction on the part of the court. Initially the Applicant had brought before court constitutional issues where the court's jurisdiction was questionable as this court could not be moved as a constitutional court. However, the petition was abandoned and he mitigated on sentence.

8. The decision of the Supreme Court in the case Francis **Karioko Muruatetu -Vs- Republic 2017(eKLR)** declared the death sentence unconstitutional and a violation of an accused person's right to fair trial to the extent that he could not be heard on his mitigation.

9. In **Francis Karioko Muruatetu & another -Vs- Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR**, The Supreme Court stated as follows:

“[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:

**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. ....

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.**

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.**

v. ....

vi. ....

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) .....

(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.....”**

10. Following the recent decision of the Supreme Court in **Muruatetu (2021)** resentencing applies to persons who were convicted for murder under **Section 203** as read together with **Section 204**. This does not take away the Applicant’s right to resentencing. Therefore, the application for re-sentencing is properly before this court.

11. In this case, the Applicant was a first offender who is stated to have been of good conduct while in jail. However, considering circumstances in which the offence was committed, the Applicant was employed by the deceased as a farm hand who was provided with a room within the deceased’s house which had an independent door. After the deceased went out to answer a call of nature, the Appellant was heard calling him to go and meet one Ndungu. And after the deceased disappeared and the Appellant who deserted duties and sought employment elsewhere was seen wearing clothes that belonged to the deceased. His defence was a mere denial.

12. Although he alleges that he is now remorseful, he abused the trust bestowed upon him by his employer by turning against him and brutally murdering him. In the circumstances, I set aside the sentence meted out which I substitute with a prison term of 28 years imprisonment, to be effective from the date of arrest (7<sup>th</sup> September, 2004).

13. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**L. N. MUTENDE**

**JUDGE**