REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 92 OF 2020

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER CHAPTER 4 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RE-SENTENSING HEARING UNDER ARTICLE 19(3), 22,

25, 26, 27, 28, 29, 50(2), 159(1) AND 160 OF THE CONSTITUTION OF KENYA

BETWEEN

STEPHEN CHEBON KOMEN.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

[1] In this Petition, **Stephen Chebon Komen** (hereinafter, the petitioner), approached the Court pursuant to **Articles 16(3) 19(3), 22, 25, 26, 27(1), 28, 29, 50(2)(q), 160, 159(1)** of the **Constitution of Kenya**. The petitioner prayed for orders that:

> **[a]** the sentence imposed on him be reconsidered in accordance with the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic** [2017] eKLR.
>
> **[b]** his pre-sentence detention period be taken into account, along with the fact that he has had an opportunity for introspection and reform during his incarceration.

[2] The petition was premised on the grounds that the petitioner was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** in **Criminal Case No. 4 of 2008**; and that upon entering a plea of not guilty, a trial was conducted that resulted in his conviction. He was consequently sentenced to suffer death on **25 February 2008**. He further averred that while at Naivasha G.K. Prison, he has engaged himself in vocational training as well as christian activities that have tremendously reformed him. He therefore averred, in his supporting affidavit sworn on **23 November 2020**, that his application for re-sentencing hearing has been made in good faith.

[3] The petitioner urged his Petition vide his written submissions filed on **16 March 2021**. He explained the circumstances in which the offence occurred; namely, that he was confronted by the deceased and a group of other young men; and that he reacted in self-defence when he stabbed the deceased. He further explained that he quickly surrendered to the police at Marigat and explained what had transpired; and was thereafter charged and arraigned before Court. The petitioner further urged the Court to note that he spent 8 years in custody while undergoing trial, and that it was not until **25 February 2016** that Judgment was pronounced in his matter by **Hon. Kimondo, J.** He added that death sentence imposed on him was thereafter commuted to life imprisonment by the then President of Kenya, His Excellency Mwai Kibaki. He therefore made it clear that he has been incarcerated for 13 years so far; which in his view is sufficient retribution.

[4] The petitioner further submitted that he is remorseful for the crime he committed and that he has taken advantage of the rehabilitation programs in prison, including taking a theological course in addition to tailoring. He indicated too that when he was charged, he was a young man aged 20 years; and therefore that, although the sentence of death was commuted to life imprisonment, it is still necessary for the Court to define what constitutes life imprisonment so that he can be given a determinate term of imprisonment which takes into account his pre-trial detention period.

[5] The petitioner also mentioned that the emerging jurisprudence from the **Muruatetu** case paved way for persons serving mandatory sentences to have their sentences reconsidered and for fresh appropriate terms of imprisonment to be imposed as appropriate, in accordance with the guidelines set out in Paragraph 71 of the said Judgment. He accordingly submitted that he is, likewise, entitled to equal protection of the law.

[6] On behalf of the State, **Mr. Mugun** conceded to the Petition and took the posturing that it is merited. He was therefore of the view that it be allowed.

[7] Thus this is a sentence re-hearing that has been necessitated by the decision of the Supreme Court in **the Muruatetu Case** wherein the Supreme Court declared unconstitutional the mandatory nature of the death sentence. The Supreme Court expressed itself thus at paragraphs 58 and 59 of the said Judgment:

> **"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.**
>
> **[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution**."

[8] At paragraph 69 of its Judgment the Supreme Court made it clear thus:

> **"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."**

[9] Needless to underscore the fact that the death sentence is otherwise lawful and is still applicable, albeit as a discretionary maximum sentence. Accordingly, the duty of the Court is to consider the facts afresh for purposes of re-sentencing and, if need be, to come to an appropriate sentence in respect of the crime of which the petitioner was found guilty. In this regard, **Section 329** of the **Criminal Procedure Code** provides that:

> **"The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."**

[10] And, in the **Criminal Procedure Bench Book**, the standard practice recommended is set out thus:

> **"...Sections 216 and 329 of the CPC empower the convicting court to hear evidence before sentencing that it thinks necessary to determine the appropriate sentence or order. Such evidence may, for example, be contained in probation reports, community service reports, or general social enquiry reports from the probation officers. The offender may also present mitigating evidence to the court. The court ought to establish the history, character, and antecedents of the person convicted, as well as all matters relevant to punishment, before imposing a sentence. While requesting such additional information is discretionary ... it is desirable to do so. During the sentence hearing, the court receives submissions from the prosecution, the convicted person, the victim (voluntary), the probation officer and, where relevant, the children's officer."**

[11] In the same vein, at **Paragraph 23.9** of the **Judiciary Sentencing Guidelines,** it is suggested thus:

> **"The first step is for the court to establish the ... sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum ... sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."**

[12] Further to the foregoing, directions were given by the Supreme Court dated **6 July 2021** thus, (at Paragraph 18 thereof):

> **[a] The Judiciary Sentencing Policy Guidelines be revised in tandem with the new jurisprudence enunciated in Muruatetu;**
>
> **[b] All offenders who have been subject to the mandatory death penalty and desire be heard on sentence will be entitled to re-sentencing hearing.**
>
> **[c] 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.**
>
> **[d] 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.**

[e] In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court:

[i] Age of the offender;

[ii] Being a first offender;

[iii] Whether the offender pleaded guilty;

[iv] Character and record of the offender;

[v] Commission of the offence in response to gender-based violence;

[vi] The manner in which the offence was committed on the victim;

[vii] The physical and psychological effect of the offence on the victim's family;

[viii] Remorsefulness of the offender;

[ix] The possibility of reform and social re-adaptation of the offender;

[x] Any other factor that the Court considers relevant.

[13] Thus, the petitioner has presented information before the Court by way of his written submissions to show that, at the time of his arrest for the subject offence, he was a young man aged 20 years; and that he was sentenced to death on **25 February 2016**, after a trial that lasted 8 years. It is also plain that the petitioner has since served post-sentence detention for 5 years. He has therefore been incarcerated for a total of 13 years to date. In addition, the petitioner demonstrated that he has benefitted from the reform programs offered to inmates in prison. In the premises, and as conceded by counsel for the State, the death penalty that was imposed on him, though entirely lawful, was inappropriate.

[14] Nevertheless, it is noteworthy that the petitioner's sentence has since been commuted to life imprisonment; and therefore that the petition has, to that extent been overtaken by events. It is perhapts for this reason that the petitioner asked the Court to make a determination as to what constitutes a life sentence with a view of passing a determinate sentence that takes into account the period of his pre-sentence detention. While I agree that there may be need for certainty as to what amounts to life sentence, I subscribe to the view that that certainty can only be furnished by way of legislative intervention and not by this Court. Indeed, in **the Muruatetu Case**, the Supreme Court expressed itself on the matter and had the following observations to make:

[87] In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole life sentence and it is only handed down to those who have committed heinous crimes.

[88] Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

[89] In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the Constitution, which reads:.

"51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

(3) Parliament shall enact legislation that—

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) takes into account the relevant international human rights instruments."

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

"As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.

76. …. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the

courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

[15] It is plain therefore that the petitioner's prayer that his life sentence be converted into a determinate period of imprisonment is untenable. It is also noteworthy that, in his own written submissions, he conceded that the provocation that by the deceased and his party happened one week before the murder incident; and therefore that his actions were pre-meditated. In the circumstances, life imprisonment cannot, in my careful consideration, be said to be disproportionate to the crime. It is consequently my finding that no justification has been made for further review of the petitioner's sentence.

[16] It is in the light of the foregoing that I find the instant petition devoid of any merit. The same is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF DECEMBER 2021.

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OLGA SEWE

JUDGE