REPUBLIC OF KENYA

IN THE HIGH COUR OF KENYA AT KAJIADO

PETITION NO. 7 OF 2018

GEOFFREY WAMBUA MUSAU *alias* MUTUA.....PETITIONER

VERSUS

ATTORNEY GENERAL .....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUITON.....2ND RESPONDENT

JUDGMENT

1. Geoffrey Wambua *alias* Mutua, the Petitioner, was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. He was tried by this court, **(Nyakundi J),** convicted and sentenced to death on 5th May, 2017, the only sentence allowed by law for this offence.

2. The Petitioner has now moved this court under Articles 22(1), 23(1), 25, 50 (1) (a) 165, 258 and 259 of the Constitution for reconsideration of the sentence in terms of the Supreme Court decision in ***Francis Karioko Muruatetu & Others*** Supreme Court Petition No. 15 of 2015,[2017] eKLR; ***Joseph Kaberia Kahiga & Attorney General*** petition No. 618 of 2010 [2016] eKLR***; Samson Njguna Njoroge*** Cr. Appeal No. 150 of 2010

3. The Petitioner argues that the Supreme Court having found that the mandatory death sentence is unconstitutional, it follows that his sentence to death is a violation of his fundamental rights and freedoms. The Petition is supported by the Petitioners' affidavit filed together with the petition. He states that he has brought this petition urging this court to exercise its inherent jurisdiction to render substantial justice in this matter, and reconsiders death sentence meted out against him.

4. During the hearing of this petition, the Petitioner who was unrepresented, told the court that he had filed the petition seeking an alternative sentence. He stated that he was charged with murder, convicted and sentenced to death, but is now seeking an alternative sentence since death sentence has been declared unconstitutional and a violation of fundamental rights and freedoms. He stated that he had reformed while in prison; that he is a family man and that his family depended on him.

5. Mr. Njeru, learned Assistant Deputy Prosecution counsel, did not in principle oppose the petition. He urged the court that as it reconsiders the sentence, it should also take into account the circumstances under which the murder was committed. According to counsel, after committing the murder, the Petitioner locked up the body in the house an went away. He also urged the court to take into account rights of the victim's family. In Mr. Njeru's view, the fact that the petitioner has reformed is not sufficient to reducing the sentence but the court should consider the rights of the family of the victim and the young child left behind.

6. I have considered this petition, the arguments by the Petitioner and those on behalf of the Respondent. The Petitioner was charged with the offence of murder, convicted and sentenced to death by this court **(Nyakundi, J**.). He has come before this court for a reconsideration of that sentence following the decision in the **Muruatetu** case.

7. In that regard, this is not, therefore, an appeal but rather a request to this court to apply the decision in the Muruatetu case and consider imposing another sentence other than death sentence.

8. The Muruatetu case was a petition before the Supreme Court challenging the constitutionality of the death penalty, arguing that it was a violation of human rights. The Supreme Court agreed with the Petitioners that the death penalty violated their human rights and stated;

> ***"[45] To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless"***

9. The Supreme Court went on to state that section 204 violates the right to fair trial thus;

> ***"[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse."***

10. The Court then held that the mandatory death sentence deprives courts discretion to impose appropriate sentences, stating:

> ***[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right"***

11. In the above holding, the Supreme Court re affirmed the holding by the Court of Appeal in ***Godfrey Ngotho Mutiso v R,*** Criminal Appeal No. 17 of 2008, and stated:

> ***"We are in agreement and affirm the court of Appeal decision in Mutiso that whilst the constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty. If mitigation reveals an untold degree of brutality and callousness…"***

> ***'If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused criminal culpability. Further imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict…"***

12. The court directed the Attorney General to come up with modalities for dealing with these cases but this has not been done. It has, therefore, left individual convicts to approach courts on their own and courts have had to deal with these cases as and when they are filed. The court faced with such a matter has to determines it based on the circumstances of the case.

13. The jurisprudence arising from the ***Muruatetu case,*** is that death sentence is no longer mandatory. That means courts have discretion to impose a appropriate sentence depending on the circumstances of each case.

14. In this petition, the petitioner does not challenge his conviction. He has only asked the court to reconsider the death sentence meted out against him arguing that it is a violation of his fundamental rights and freedoms. This is not therefore an appeal against this court's own decision. Being a decision of its own the court has jurisdiction to reconsider the sentence it meted out against the petitioner in terms of the ***Muruatetu*** decision.

15. I have gone through the court's record of the criminal trial, the judgment and noted the circumstances under which the offence was committed. I have also perused the sentencing record of the court. The Petitioner's counsel offered mitigation which the court considered before it sentenced the Petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial, given that with or without mitigation, the court would still impose the death penalty.

16. Having considered the circumstances of the offence and mitigation recorded by the court, and considering the fact that death penalty is a violation of human rights and fundamental freedoms of an individual, I am satisfied that there is reason for this court to review the death sentence it imposed against the Petitioner. As to the sentence to impose, that is up to this court, considering that the sentence to impose should be an appropriate one depending on the circumstances of the case.

17. In ***Republic v Ruth Wanjiku Kamande*** [2018] eKLR. Lesiit J, was of the view any other sentence other than death should be imposed only in deserving cases. And in ***Misheck Ireri Njagi v Republic*** [2019] eKLR, Muchemi, J reduced a death sentence to 15 years' imprisonment. Applying the above in the present petition, I am of the view that given the circumstances under which this offence was committed, a sentence of 30 years will be appropriate.

18. The record shows that the Petitioner was first presented to court on 16th December 2011 while he was sentenced on 5th May 2017. Section 333 of the Criminal Procedure Code requires the court to consider the period an accused spent in remand or custody when passing sentence. The section 333 provides;

> ***"(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody." (Emphasis).

19. The position in the above section was clarified by the Court of Appeal in ***Ahmad Aboifathi Mohammed & another v Republic*** (Criminal Appeal No. 135 of 2016 [2018] eKLR, where the Appellants had spent time in custody but the trial court did not consider that period when passing sentence and the High court failed to appreciate this fact when dealing with the appeal. The Court of Appeal held that:

"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."

19. It is clear from the record that the Petitioner was in remand custody between 16th December 2011 and 5th May 2017 when he was sentenced. That period should as a matter of law, be taken into account in this sentence.

20. As I have already pointed out, taking into consideration, the circumstances of the case and the serious nature of the offence, including the violence visited upon the victim, the Petitioner deserves sentence other than death penalty, but which must act as a deterrent to other offenders.

21. Consequently, the petition is hereby allowed. The death sentence imposed against the Petitioner is hereby reviewed and set aside. The Petitioner is hereby sentenced to serve thirty (30) years imprisonment. The sentence will run form from 16th December 2011.

Dated, signed and delivered at Kajiado this 14th day of February, 2020.

E.C. MWITA

JUDGE