



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 7 OF 2018**

**MOSES KITUI BARASA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

[1] The Petitioner herein, **Moses Kitui Barasa**, was the accused in **Eldoret Chief Magistrate's Criminal Case No. 3317 of 1998: Republic vs. Moses Kitui Barasa**, wherein he was charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. He was also charged with a third count of being in possession of a firearm without a firearm certificate contrary to **Section 4(1)** of the **Firearms Act, Chapter 114** of the **Laws of Kenya**.

[2] The particulars of Count I were that on the **27<sup>th</sup> September 1998** at Kings Bakery in Eldoret Township in Uasin Gishu District within the Rift Valley province, jointly with others not before the court and while armed with a dangerous weapon, namely a homemade gun, the Petitioner robbed **Anil Amritlal Karia** of money in cash, amounting to **Kshs. 180,000/=**, one gold bracelet and one gold chain, all valued at **Kshs. 230,000/=**. It was further alleged that at, or immediately before, or immediately after the time of such robbery they used actual violence to the said **Anil Amritlal Karia**.

[3] The particulars of Count II were that on the **26<sup>th</sup> day of September 1998** at Kidiwa Grocers in Eldoret Township in Uasin Gishu District within the Rift Valley Province, jointly with another not before the court, and while armed with a dangerous weapon namely a homemade gun, the Petitioner robbed **Agnes Wanjiru Maina** of **Kshs. 2,000/=**; and that at, or immediately before or immediately after the time of such robbery, he used actual violence to the said **Agnes Wanjiru Maina**. And, in respect of Count III, it was alleged that on the **27<sup>th</sup> day of September 1998** at Kidiwa Estate in Uasin Gishu District of the Rift Valley Province, the Petitioner was found in possession of a firearm, namely a handmade gun, without a firearm certificate.

[4] Although the Petitioner denied all the foregoing allegations before the lower court, he was found guilty of the Counts I and III after trial and was sentenced to suffer death in respect of Count I; and 5 years' imprisonment in respect of the Count III. Being aggrieved by the decision of the lower court, which was rendered on **15 May 2002**, the Petitioner preferred an appeal to the High Court, being **Eldoret High Court Criminal Appeal No. 49 of 2002: Moses Kituyi Barasa vs. Republic**. However, the High Court found no reason for disturbing the decision of the trial court and dismissed the appeal on **9 December 2004**.

[5] Undeterred, the Petitioner moved to the Court of Appeal in **Criminal Appeal No. 9 of 2005: Moses Kituyi Barasa vs. Republic**. This second appeal was likewise dismissed; whereupon the Petitioner resorted to filing the instant petition on **22 June 2018**. By the time he filed this petition, his death sentence had been commuted to life imprisonment by a presidential decree. He therefore conceded in his petition that he had exhausted all his avenues for appeal; and that his single prayer was for the Court to reconsider the sentence imposed on him with a view of passing an appropriate sentence in the light of the pronouncement by the Supreme Court in **Petition No. 15 of 2015: Francis Karioko Muruatetu & Others vs. Republic** with regard to the mandatory nature of the death penalty.

[6] In his Supporting Affidavit, the Petitioner reiterated that his petition is based solely on **the Muruatetu decision** as well as **Article 163(3)(a)** of the **Constitution**. He pointed out that he has been in custody for 21 years during which he has reformed immensely and learnt new skills that have made him a better person. He urged his petition by way of written submissions filed herein on **24 October 2019** wherein he took the position that the death sentence is inhumane and harsh; and that it goes against the fundamental rights enshrined in the Constitution. The Petitioner also reiterated his averment that he has been in custody since **1998** and has greatly reformed, adding that he has also been serving as a teacher while in prison, thus contributing towards the reformation of other inmates.

[7] Other than **the Muruatetu Case**, the Petitioner relied on the following authorities:

[a] William Okungu Kittiny vs. Republic [2018] eKLR

[b] Robert Abass Maitijan vs. Republic, Kabarnet HCCRA No. 99 of 2017

[c] John Gitonga alias Kadosi vs. Republic, Meru High Court Pet. No. 53 of 2018

[d] Douglas Muthaura Ntoribi vs. Republic, Meru HCMCRA No. 4 of 2015

[e] Richard Kiptum Yego vs. Republic, Eldoret High Court Pet. No. 2 of 2018;

[f] Henry Katap Kipkeu vs. Republic, Eldoret HCMCR Application No. 37 of 2018.

[8] On behalf of the State, **Ms. Mokuu** urged the Court to find that the sentence of life imprisonment, which is what the Petitioner is currently serving, is appropriate. She accordingly urged the Court to confirm the same, given the circumstances under which the offences took place; and added that this would serve as a deterrence to others of like mind. However, the Petitioner responded to this assertion by citing **Article 27** of the **Constitution** and on the basis thereof he urged the Court to disregard the same on the ground that to uphold the reasoning adopted by the State would amount to perpetuating discrimination. He also pointed out that countrywide, the sentences of life imprisonment are being set aside and replaced with fixed terms.

[9] This being a matter for Sentence Rehearing, the focus of attention is, not so much the sentence of life imprisonment that the Petitioner is currently serving, but the death sentence imposed on him at the time he was sentenced by the lower court upon his conviction. In this respect, I agree entirely with the position taken by **Hon. Majanja, J.** in **John Gitonga alias Kadosi vs. Republic** (supra), that:

**"...this petition is one for resentencing not clemency. The petitioner has already had the benefit of his death sentence commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under Article 133 of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional."**

[10] I have carefully considered the Petition, the grounds in support thereof as well as the written and oral submissions made herein by the Petitioner. I have also given due consideration to the response made thereto on behalf of the State. It is manifest that the thrust of the submissions of the Petitioner was that the death penalty is unconstitutional and that it goes against the rights enshrined in the Constitution. He mentioned the right to human dignity and equality as provided for in **Articles 27 and 28** of the Constitution; and perhaps the Petitioner also had in mind the right to life, which is protected by **Article 26** of the **Constitution** and the freedom from cruel, inhuman or degrading treatment or punishment.

[11] However, **Article 26(3)** of the Constitution does recognize that a person may be deprived of his life for a lawful cause, as authorized by either the Constitution itself or by other written law. Hence, it is imperative to restate what the Supreme Court had to say in **the Muruatetu Case**. It held thus with regard to the death sentence:

**"[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."**

[12] The Supreme Court then added at paragraph 69 of its Judgment that

**"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."**

[13] It is manifest therefore that what was declared unconstitutional by the Supreme Court in **the Muruatetu Case** is not the death penalty as such, but the mandatory aspect of **Section 204** of the **Penal Code**. Needless to say that the decision has since been applied, *mutatis mutandis*, in respect of the provisions **Section 296(2)** of the **Penal Code**, which has a similar penalty. In **William Okungu Kittiny vs. Republic** (supra) the Court of Appeal had occasion to address the issue and it held as follows:

**"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the Constitution...as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296(2) and 297(2) of the**

**Penal Code on the death sentence fails.”**

[14] Clearly, therefore, the Petitioner’s argument that the death penalty is unconstitutional is untenable. Having so found, I now proceed to consider what would have been the appropriate sentence in the circumstances. In **the Muruatetu Case**, the Supreme Court proffered the following guidelines for consideration in respect of a sentence re-hearing:

- [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] remorsefulness of the offender
- [g] the possibility of reform and social re-adaptation of the offender
- [h] any other factor that the court considers relevant.

[15] The key findings of the lower court were that the Petitioner was in the company of one other person, and that they were armed with a homemade gun and a knife at the time of the robbery. Although the complainant was not physically wounded, it was his evidence that he was threatened with a knife immediately before the robbery. The proceedings and judgment of the lower court also show that the Petitioner herein was a first offender; and that although he was given an opportunity to address the court in mitigation, he opted instead to ask for a copy of the judgment. He has been in custody now for about 22 years.

[16] In **Douglas Muthaura Ntoribi vs. Republic** (supra) the Appellant had been sentenced to death for the offence of robbery with violence under **Section 296(2)** of the **Penal Code**. The death sentence was set aside on appeal and substituted with 15 years’ imprisonment on **25 January 2018**. The Court took into account that the Appellant therein had been in custody from the time of his arrest on **10 June 2004**, and had therefore been in custody for 14 years.

[17] In the case of **Robert Mutashi Auda vs. Republic, Nairobi Criminal Appeal No. 247 of 2014**, the Appellant had been convicted on a Charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. His appeal to the High Court against conviction and sentence was unsuccessful. In a second appeal, the Court of Appeal was urged to consider the sentence and the mitigating factors in accordance with **the Muruatetu Case**. The view of the Court of Appeal on the matter was thus:

**"We have considered the said mitigation and sentiments of the prosecution counsel. We have considered the circumstances in which the offences were committed and noted that there were no injuries inflicted on the victims. We also appreciate the fact that the appellant has already served 13 years in prison which in our view is sufficient retribution on his part. Taking all these issues into account, we are persuaded to interfere with the death sentence imposed on the appellant and reduce the same to the term already served. The appellant's appeal therefore succeeds in part only as far as the sentence is concerned as the conviction remains undisturbed. We order that the appellant be set at liberty unless he is otherwise lawfully held."**

[18] In the premises, having taken into account all the factors mentioned herein above, I am of the view that the period so far served by the Petitioner herein is sufficient retribution for the subject offence. I would therefore allow the Petition, and order, which I hereby do, that the Petitioner be released forthwith unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF FEBRUARY 2020**

**OLGA SEWE**

**JUDGE**