



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL PETITION NO. 83 OF 2018

ALBERT KITUR KIMAIYO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Petitioner herein has filed this petition requesting this court to consider resentencing him pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another =Vs= Republic [2017] eKLR** where the court held that:

“(69) 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.”

2. The Petitioner had been charged, convicted and sentenced to suffer death for the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code in ***Kitale Criminal Case No. 6 of 1998*** on 27/2/2002.

3. The Petitioner now wishes to take advantage of the Supreme Court decision in Francis Karioko Muruatetu (Supra) for a re-sentencing.

4. In support of his Petition, he has attached certificates to demonstrate that he has reformed having undergone various rehabilitative programmes such as theology studies and other life skill courses.

5. The Petition was opposed by Mr Omooria, state counsel who in his submissions dated 14/01/2020 urged this court not to interfere with the sentence imposed on the petitioner.

6. It is worth noting that the Supreme Court in the Muruatetu case, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable as a guide namely:-

(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 relation 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.

7. Under the ***Sentencing Policy Guidelines, 2016*** (“the ***Guidelines***”) published by the Kenya Judiciary state (at para. 4.1), the courts are

urged to consider that the sentence imposed must meet the following objectives;

- **Retribution;** To punish the offender for his/her criminal conduct in a just manner.
- **Deterrence;** To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.
- **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
- **Restorative justice:** To address the needs arising from criminal conduct such as loss and damages.
- **Community protection:** To protect the community by incapacitating the offender.
- **Denunciation:** To communicate the community's condemnation of the criminal conduct.

8. In determining this petition, it is imperative to look at the sentences which have been imposed by other Courts following the decision in the Muruatetu case in offences of this nature. The Court of Appeal decision post the Muruatetu Case provide some guidance on the appropriate sentence. In *Jonathan Lemiso Ole Keni v Republic NRB Criminal Appeal No.51 of 2016 (2018) eKLR* where the petitioner shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment. In *John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 (2018) eKLR*, the Court of Appeal upheld a sentence of 25 years in a case of murder where the petitioner assaulted the deceased several times causing his death.

9. In the instant Petition, I note that the Petitioner has been in custody for over 23 years. I have also considered the circumstances in which he committed the offence, having murdered the deceased by hitting him with a jembe and cutting his throat with a sharp object.

10. In my view, upon taking into account the mitigating and aggravating factors I do not think that the period he has served in prison is sufficient for the serious offence committed by the petitioner. I hereby re sentence him to twenty five (25) years imprisonment from the date he was convicted by the trial court, that is **27/2/2002**.

Signed, dated and delivered at Kitale on this 3rd day of March, 2020.

H.K. CHEMITEI

JUDGE

3/3/2020

In the presence of:-

Ms Kagai for the Respondent

Applicant – present

Court Assistant – Kirong

Ruling read in open court