



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL PETITION NO. 46 OF 2018

CALEB KIPROTICH SAWE.....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, CALEB KIPROTICH SAWE, was charged, convicted and sentenced to death for the offence of murder contrary to **section 202** as read with **section 203** of the *Penal Code (Chapter 63 of the Laws of Kenya)* at a trial before the High Court at Kitale in *Criminal Case No. 9 of 1997*. He appealed against the conviction and sentence to the Court of Appeal in *Nairobi Criminal Appeal No. 49 of 1999*. The said appeal was dismissed on 10/3/2000.

3. The Petitioner’s sentence has since been commuted to life imprisonment pursuant to the mechanism of Power of Mercy under Article 133 of the Constitution. The Petitioner now wishes to take advantage of the Supreme Court decision in Francis Karioko Muruatetu (Supra). The said Supreme Court 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.**

4. The Supreme Court in the Muruatetu case (Supra) held that although the mandatory death penalty having been declared unconstitutional, the death penalty still exists as the maximum sentence for murder under Section 203 and 204 of the Penal Code. The effect of this judgment was that courts now have jurisdiction to impose sentences without really having their hands tied by the sentences imposed by the Penal Code. As a result, the petitioner wishes to take advantage of the supreme court judgment for re-sentencing.

5. In re-sentencing, the courts are urged under the *Sentencing Policy Guidelines, 2016* (“the *Guidelines*”) published by the Kenya Judiciary state (at para. 4.1) 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.

6. 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.

7. In the petition before me, the Petitioner was incarcerated on 22/10/1994 and he was convicted and sentenced to suffer death on 18 /12/ 1998. I have also considered that the Petitioner has so far served approximately 22 years imprisonment. He was in custody for four years before his conviction and sentence. Consequently, he has been in custody since his arrest which means he has been behind bars for approximately 26 years.

8. Having considered the foregoing, I am satisfied that the period already served is enough punishment for the petitioner. In view of the foregoing, the court makes the following orders;

a) The sentence is hereby reviewed to the period already served in custody.

b) The petitioner be and is hereby set at liberty unless otherwise lawfully held.

Signed, Dated and Delivered at Kitale on this 3rd day of March, 2020.

H.K. CHEMITEI

JUDGE

3/3/2020

In the presence of:-

M/s Kagai for the Respondent

Applicant – present

Court Assistant – Kirong

Ruling read in open court