



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**PETITION NO. 47 OF 2019**

**JAMES GACHANJA NJOROGHE.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. In the petition dated 15<sup>th</sup> November 2019, the petitioner seeks for re-hearing on sentencing following the decision of the Supreme Court in the case of **Francis Kariuki Muruatetu & Another v Republic [2017] eKLR** that declared the mandatory nature of the death sentence to be unconstitutional. Reliance is placed on the case of **Peter Gitiye v Republic, Meru Petition No. 66 of 2018**.

2. The petitioner was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was convicted and sentenced to death. There is no record of an appeal having been filed against the sentence of the High Court.

3. It is the petitioner's case that the Supreme Court decision in the **Muruatetu** case comprises of new and compelling evidence warranting resentencing. The petitioner states that the complainant in the case against him in the trial court was not injured.

4. Ms. Mati for the respondent stated that the respondent was not opposed to the review of the sentence but urged the court to look at the circumstances under which the offence was committed as an injury was inflicted on the complainant and that the petitioner was armed.

**B. Analysis & Determination**

5. The record shows that the accused was convicted and sentenced to death for the offence of murder on the 23/10/2014 in Embu HCCR. No. 16 of 2010.

6. He submits that his sentence has caused him humiliation for he cannot make any decisions for himself or his family. The applicant has further submitted that he has undertaken various courses while in prison and as such he has been transformed and can serve as a warning to others with the intention of committing the same crime.

7. The applicant relied on the Supreme Court case of **Francis Kariko Muruatetu & another and Republic and Others [2017] eKLR** and submitted that the Supreme Court declared unconstitutional the mandatory nature of the death sentence and urged that this court could pass any other sentence.

8. The Supreme Court in the **Muruatetu** case, (supra) sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows: -

*“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:*

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.”*

9. At the time the applicant was sentenced, death sentence was mandatory for it was long before the Supreme Court decision of **Francis Muruatetu (Supra)**. It is in this petition that the mandatory nature of death sentence was declared unconstitutional.

10. It is further noted that the applicant in his mitigation stated that he was remorseful and regretted causing the deceased's death. In his submissions he has given his mitigation that he was a first offender and had learnt from his mistake.

11. The record shows that the applicant is the person who went looking for the deceased, pursued her and subsequently caused her grievous harm. The petitioner hit the deceased against the wall as well as on the cemented floor severally. The deceased later died of the injuries as the applicant was convicted of murder following a full trial.

12. The accused was a first offender as shown by the record. This is a factor that requires to be taken into consideration in review of sentence in addition to the other factors raised in mitigation before the trial court and in this petition. The applicant states that he regrets his action of killing the deceased.

13. I have considered all the foregoing factors including the Judiciary Sentencing Guidelines. Although the accused used excessive force in killing the deceased, he was a first offender and states that he regrets his action in regard to the crime. He further states that he has reformed while in prison. The court has considered all these factors and is inclined to allow the petition. I hereby allow this petition for re-hearing of sentence.

14. It is further ordered that the death sentence be and is hereby set aside. It is substituted with twenty five (25) years imprisonment to run from the date of arrest on 16/05/2010.

15. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> DAY OF APRIL, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**