



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 168 OF 2018

RICHARD MBAABU ITHALIE..... PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

R U L I N G

1. **RICHARD MBAABU ITHALIE (“the petitioner)**, was charged with murder contrary to *section 203* as read with *section 204 of the Penal Code*. It had been alleged that on 6/8/2008 at Naathu Location in Igembe District of the then Eastern Province murdered **David Mwiti (“the deceased”)**.

2. After trial, the applicant was convicted of the offence and sentenced to suffer death as per the law provided. He appealed to the Court of Appeal against both the conviction and sentence. Vide a judgment dated 10/10/2017, the Court of Appeal upheld both the conviction and sentence.

3. On 14/12/2017, the Supreme Court of Kenya held that, the mandatory nature of the death sentence under *section 204 of the Penal Code* was unconstitutional as it took away the constitutional discretion of the court. **See Francis Karioko Muruatetu & another v Republic [2017] eKLR (“Muruatetu case)**.

4. In view thereof, by a Motion on Notice dated 9/8/2018, the applicant applied that he be re-sentenced afresh. That he had been in custody for 9 years; that due to the mandatory nature of the death sentence, his mitigation was never considered. That by virtue of the **Muruatetu Case**, his sentence should be reviewed, his mitigation be considered and he be resentenced afresh.

5. He contended that for the 9 years he had been in custody, he had been rehabilitated, had undertaken various courses which had changed him. That he was now capable of being productive and of value to society.

6. On 28/11/2019, Chitembwe J gave directions that a report be made by the Meru Prisons where the petitioner has been held detailing the training the petitioner had undertaken. He also directed that the probation department do give a pre-sentence - report on the petitioner. Despite several orders, the probation department failed to file its report but the Meru Prisons did file its report on 21/5/2020.

6. The report from the Meru Main Prison was positive of the applicant. However, it would seem that the petitioner had not engaged in any trade or skill which if he was let out to the community would help him earn a living. It indicated however, that the petitioner has since reformed. **Mr. Namiti**, Learned Senior Prosecution Counsel left it to court.

8. I have considered the foregoing. I have considered that the petitioner was sentenced to death for reason that the offence of murder at the time carried a mandatory death sentence. The mandatory nature of the death sentence has since been outlawed by the **Muruatetu Case)**. The petitioner is entitled to have his mitigation considered.

9. In the premises, the death sentence is hereby set aside.

10. I have considered the mitigation put forth by the petitioner. He is a first offender as no records were produced regarding him. He never stated that he was remorseful of the offence either in his affidavit in support of the petition or on 3/10/2019 when he appeared in Court for mitigation. He may have reformed as stated in the Prison’s report but the justice looks both at the perpetrator and the victim.

11. I have considered the record. The evidence that was upheld by both this court and the Court of Appeal was that, on the 6/8/2008 at about 10.00am, the deceased was in his father’s *miraa shamba* when the petitioner came with a *panga*. He started chasing the deceased whereby the deceased fell down. The petitioner cut the deceased twice with the *panga* which occasioned the deceased injuries from which he died.

12. I have considered the foregoing and the mitigation given by the petitioner. It would seem that the applicant did his case while in custody,

the reason why he states that he has been in custody for 11 years now. He has been in custody since 2008.

13. Further, in view of the fact that he has not learnt any trade or skill that can benefit him if and when released, I set aside the death sentence and substitute therefore a sentence the 20 years imprisonment. The sentence is to run from the date he was first sentenced by this court on 11/11/2014.

Orders accordingly.

DATED and DELIVERED at Meru this 3rd day of June, 2020.

A. MABEYA

JUDGE