REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 36 OF 2019

FRED ONDIEKI.....PETITIONER

-VRS-

THE REPUBLIC.....RESPONDENT

JUDGEMENT

The petitioner was tried, convicted and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was the 4th accused in Keroka SRMCR No. 273 of 2016. His subsequent appeal to the High Court at Kisii **[Kisii Criminal Appeal Nos. 156, 157, 158, 159 and 162 of 2006 (consolidated)]** was dismissed. The Judges hearing the appeal stated: -

> ***"We are satisfied that the appellants were properly convicted and sentenced and dismiss each of these appeals."***

It is clear from the judgement of the trial Magistrate that the only reason he imposed the death sentence was because it was a mandatory sentence. In his words: - "***There is only one sentence in this offence."*** This is no longer the case. The journey to doing away with the mandatory nature of the sentences begun with the decision of the Court of Appeal in the case of **Godfrey Ngotho Mutiso v Republic [2010] eKLR** where the court held: -

> ***"36) We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognises the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.***
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> ***We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with section 204 of the Penal Code might well apply to them.***
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> ***37) ……***
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> ***We must re-emphasize that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case."***

This bold step suffered a temporary setback brought about in the case of **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** when a five Judge bench of the Court of Appeal stated: -

> ***"A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word 'shall'. It is not for the Judiciary to usurp the mandate of Parliament* and *outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so."***
>
> **……**
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> ***In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a***

pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.

We hold that the decision in Godfrey Mutiso v R to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carry the mandatory sentence of death."

However, the position in **Godfrey Ngotho Mutiso v Republic (Supra)** has since been restored by the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the court emphatically held: -

"[64] ***Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically; Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(q). That Section therefore cannot stand, particularly, in light of Article 19 (3) (a) of the Constitution which provides that the rights and fundamental freedoms in the Bill of Rights belong to each and every individual and are not granted by the State, and in light of Article 20 (1) and (2) which provide that: (1) The Bill of Rights applies to all law and binds all state organs and all persons and (2) Every person shall enjoy this rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. In light of these provisions therefore, the timing of the constitutional challenge to Section 204 of the Penal Code is propitious and will succeed."***

…….

(a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution……..."

It is however instructive that just as in **Godfrey Ngotho Mutiso v Republic (Supra),** the Supreme Court did not outlaw the death penalty, only its mandatory nature. The **Muruatetu case (Supra)** concerned the mandatory death sentence in murder cases **(Section 204 of the Penal Code)** but the courts, including this one, have imported the decision thereat to Robbery with violence **(Section 296 (2) of the Penal Code)** as well as in offences under the **Sexual Offences Act** where the law provides for minimum sentences.

After pronouncing itself on the constitutionality of the mandatory nature of the sentence, the Supreme Court remitted the case to the **High Court** (trial court) for **re-hearing on sentence only.** The court also ordered the **Attorney General** and **the Office of Director of Public Prosecution** and other **relevant agencies** to prepare a framework to deal with sentence re-hearing for cases similar to that of the petitioners. That has not been done and convicted persons who were sentenced to the mandatory death sentence have been coming to the High Court for sentence re-hearing. Such is the petition before me.

Because of the Covid-19 pandemic and MOH guidelines, this petition was heard virtually via Microsoft Teams. The petitioner was represented by Mr. Okerosi, Advocate instructed by the firm of Ms Ondieki & Ondieki Advocates while the respondent was represented by Senior Prosecution Counsel Mr. Majale.

The power of this court to re-sentence the petitioner is not in doubt. As I have stated, courts have imported the decision of the Supreme Court in the Muruatetu case to other offences with mandatory and minimum sentences and have re-sentenced the convicted persons where appropriate. Counsel for the petitioner having clarified that the petitioner has no interest in challenging the conviction, the only issue for determination is whether he qualifies for re-sentencing. Counsel for the petitioner submitted that the petitioner has served 15 years of the sentence imposed by the trial court and has urged this court to re-sentence the petitioner to the period already served. Counsel has also urged that the petitioner has since his incarceration learnt a lesson and reformed and as such has undertaken never to re-offend. The respondent has however opposed the petition on the ground that the petitioner was re-sentenced to life imprisonment by the Court of Appeal and that this court has no jurisdiction to interfere with that sentence. At the hearing, this court asked Counsel to confirm whether this was the position to which he confirmed it was correct. That means therefore that the petitioner is no longer on death row but is serving a sentence of life imprisonment imposed by the Court of Appeal. That is a game changer. In my view, the reduction of the sentence of death to life imprisonment by the Court of Appeal is a re-sentence and what the petitioner is doing by this petition is asking this court to determine the number of years the sentence should carry. In his view this court should find and hold that for him life imprisonment is equivalent to the period of fifteen years already served. This court very well understands it has power to ***"re-sentence"*** as indeed in the **Muruatetu case (Supra)** the Supreme Court remitted the case of the petitioners back to the trial court for re-sentences. However, this court also understands that it has no jurisdiction either to define what constitutes a life sentence or what number of years must be served by a prisoner on life imprisonment. In the **Muruatetu case (Supra),** the Supreme Court addressing its mind to the sentence of life imprisonment observed: -

"[94] We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature."

[95] We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence

should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

[96] We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing."

I need not say more on that issue save to state that a sentence of life imprisonment imposed by the Court of Appeal should be distinguished from one arising from commutation of the death sentence to life imprisonment by the Executive. In the former the court will have considered the nature circumstances, antecedents and mitigation of the convict before arriving the sentence and the convict will have received a fair trial. It is instructive that this court was not furnished with the proceedings and judgement of the Court of Appeal to be informed of the reasons for the re-sentence to life imprisonment. Be that as it may, it is also my finding that that court being superior to this court, I have no jurisdiction to interfere with the sentence it imposed. In the circumstances my finding is that the petition before me has no merit and the same is dismissed.

Signed, dated and delivered in open court this 2nd day of July 2020

E. N. MAINA

JUDGE

Judgement delivered virtually via Microsoft Teams