REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 5A OF 2019

GEOFFREY OBWOGE ONDIEKI.....PETITIONER

-VRS-

THE REPUBLIC.....-RESPONDENT

JUDGEMENT

The petitioner was tried, convicted and sentenced to death on several counts of robbery with violence contrary to Section 296 (2) of the Penal Code by the Senior Resident Magistrate's Court at Keroka in Criminal Case No. 273 of 2016. His appeal to the High Court at Kisii was dismissed with the Judges stating: -

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

That was on the 13th day of November 2008.

Before sentencing the petitioner and his co-accused, the trial Magistrate heard their mitigation and then observed - "***There is only one sentence in this offence."*** He then proceeded to sentence each of them to death. In effect the only reason the trial Magistrate sentenced the Petitioner to death was that it was a mandatory sentence. This position persisted for murder cases until the decision of the Court of Appeal in the case of **Godfrey Ngotho Mutiso v Republic [2010] eKLR** where it 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.***
>
> ***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."***

Then came the five Judge bench decision of the Court of Appeal in the case of **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** where the court categorically held that where the law provided for a mandatory death sentence then the trial court or the court sentencing the accused had no discretion. That court 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."***

……

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."

The issue of the constitutionality of the mandatory death sentence then moved to the Supreme Court which settled the issue in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the court observed inter alia: -

"[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."***

The court then emphatically held that: -

" ……

(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……..."

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.

In his submissions the petitioner has urged this court to exercise leniency in his favour based on the Muruatetu decision and also the following mitigating factors: -

"1. THAT, the honourable court has got the discretion on sentencing following the decision on FRANCIS KARIOKO MURUATETU AND another –V- REPUBLIC petition number 15 and 16 of 2015.

2. THAT, the hon. Court be pleased to find that was convicted as a first offender.

3. THAT, the hon. Court be pleased to find that I am a young man whose life is greatly affected by the imprisonment.

4. THAT, the hon. Court acknowledge the fact that while in prison I have taken full advantage of the rehabilitative programmes offered in the correctional facility as is evident in the attached documents.

5. THAT, the hon. Court be pleased while deciding on the sentence to be guided by the provisions of article 50 (2)(p) (q) as well as considering the time I have already spent in prison."

He has also urged this court to consider the time he has spent in custody.

This petition is similar to **Nyamira Constitutional & Human Rights Petition No. 36 of 2019 Fred Ondieki v Republic**. Indeed, the petitioners were co-accused in Keroka SRMCR 273 of 2006 and what the petitioner herein did not disclose to this court is that after the High Court dismissed their appeal and they appealed to the Court of Appeal, the appellate court while upholding the conviction set aside the sentence of death and substituted it with a sentence of life imprisonment. This fact was disclosed to this court by Counsel appearing for the petitioner in **Nyamira C & HR Petition No. 36 of 2019** although he did not furnish this court with the judgement. Therefore the petitioner

is no longer on death row but is serving a life sentence imposed by the Court of Appeal. A sentence of life imprisonment is not a death sentence and clearly this case is therefore unique in that this court is being asked to re-sentence the petitioner while he has already been re-sentenced by the Court of Appeal. It is as if the court is being asked to determine the number of years the sentence of the Court of Appeal should carry. In the **Muruatetu case (Supra),** the Supreme Court addressing the issue of life sentences observed as follows: -

> ***"[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."***
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> ***[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.***
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> ***[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."***

The Court of Appeal having so to speak re-sentenced the petitioner, this court cannot revisit that sentence firstly because as was held by the Supreme Court it is not the function of this court to define what constitutes a life sentence or what number of years must be served by a prisoner on life imprisonment. Secondly and more importantly, this court has no jurisdiction whatsoever to tinker with the decision or sentence imposed by the Court of Appeal much as there may be mitigating factors. It is also instructive that while admitting that he appealed to the Court of Appeal, the petitioner did not furnish this court with its judgement so as to inform it on the reasoning of the Court of Appeal in arriving at the sentence. Accordingly, the petition 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