



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL DIVISION

PETITION NO.28 OF 2020

EMBU CR. CASE NO.3 OF 2003 AT EMBU HIGH COURT

CRIMINAL APPEAL NO.96 OF 2007 AT NYERI COURT OF APPEAL

**IN THE MATTER REHEARING OF SENTENCE UNDER ARTICLE 23(1), 165(3)(B)(D)(1), 50(2), 25(C)(D), 51(1) AND 165(7) OF
THE CONSTITUTION OF KENYA 2010**

IN THE MATTERS ARISING FROM SECTION 203 AS READ WITH 204 OF THE PENAL CODE

BETWEEN

CYRUS KATHURI NJERU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. A brief outline of the case was that the petitioner **Cyrus Kathuri Njeru** was charged with the offence of murder c/s 203 as read with Section 204 of the Penal Code; after a full trial the petitioner was found guilty and convicted and the mandatory death sentence was imposed on the 23/02/2007; being aggrieved with trial court's decision the petitioner lodged appeal No.96 of 2007 in the Court of Appeal sitting at Nyeri which appeal was dismissed and the sentenced imposed was affirmed; in 2009 his death sentence was commuted to a life sentence vide a Presidential Decree;

2. The petitioner lodged this Petition seeking the following declarations;

i. A declaration that the DEATH sentence imposed by the Embu High Court vide Cr. Case No.3 of 2003 is inconsistent with Articles 25(C) and 50 of the Constitution of Kenya and Section 329 of the Criminal Procedure Code;

ii. A declaration that the imposition of the mandatory DEATH penalty constitutes to cruel and inhumane treatment thus inconsistent with Articles 25(b) and 50 of the Constitution of Kenya;

iii. A declaration that section 203 and 204 of the Penal Code are inconsistent with Articles 26(1), 27(1), 48 and 50(2) of the Constitution of Kenya;

iv. A declaration that the constitutional rights of the petitioner were highly violated in sentencing him to suffer DEATH;

v. An order rendering the petitioners case to the trial court for mitigation and determination of resentencing to an appropriate sentence that is in line with article 50(2)(q) of the Constitution of Kenya;

vi. A declaration in the alternative for the review of the petitioner's case in the interest of justice;

vii. An order that the DEATH sentence is cruel, inhumane and degrading thus unconstitutional;

viii. That this court be pleased to re-sentence the petitioner considering the mitigation, the facts and sentence pursuant to the Supreme Court's judgment in **Petition 15 & 16 of 2015 Francis Karioko Muruatetu and Anor vs Republic**;

3. At the hearing hereof the petitioner was unrepresented whereas the respondent was represented by Prosecuting Counsel Ms Chemenjo and both made oral submissions; hereunder are the parties respective submissions;

PETITIONER'S CASE

4. The petitioner submitted that he was charged with the offence of murder c/s 203 as read with Section 204 of the Penal Code; after a full trial he was found guilty and convicted on the 23/02/2007 and sentenced to death; being aggrieved with the decision he lodged appeal No.96 of 2007 in the Court of Appeal sitting at Nyeri which appeal was dismissed; in 2009 his death sentence was commuted to a life sentence vide a Presidential Decree;

5. He now seeks a re-sentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu vs Republic [2017] eKLR** that the court be pleased to re-sentence the petitioner and to take into consideration his mitigation, the facts and the sentence as declared therein;

6. To support his prayer for review of sentence the petitioner relied on the Probation Report which he states is extremely favourable; that he had made mistakes when he was younger; he annexed certificates for the court to take into consideration that he was a model prisoner and has now shown remorse for his deeds;

7. The applicant prayed that balancing mercy and justice his sentence be reviewed and reduced to a limited term as opposed to an indefinite life sentence; and upon the reduction of the new sentence imposed the period spent in custody be taken into account and an order be granted that it commences from the date of arrest.

RESPONDENT'S CASE

8. In response counsel stated that it was not opposed to the prayer for the review and reduction of the sentence and to the petitioner being granted a definite sentence; but urged the court to take into consideration the aggravating circumstances in which the murder took place; counsel submitted that the petitioner went to the home of the deceased and hacked him with a panga; he left him there alone to die and snuffed out the life of a young man who would have been aged 35 years today;

9. Counsel submitted that the Probation Report was also favourable and that it was apparent there from that the applicant had reformed; and also did not oppose the review of the commencement date of the sentence.

ISSUES FOR DETERMINATION

10. After hearing the rival submissions this court has framed only one issue for determination which is as follows;

i. Whether to review the sentence imposed and review of the commencement date;

ANALYSIS

Whether to review the sentence imposed to review commencement date of the sentence

11. The petitioner submitted that he was charged with the offence of murder c/s 203 as read with Section 204 of the Penal Code; after a full trial he was found guilty and convicted on the 23/02/2007 and sentenced to death; being aggrieved with the decision he lodged appeal No.96 of 2007 in the Court of Appeal sitting at Nyeri which appeal was dismissed; in 2009 his death sentence was commuted to a life sentence vide a Presidential Decree;

12. His sentence having been commuted to life imprisonment by virtue of a Presidential decree there is no longer a penalty or threat of death hanging over the petitioner's head; therefore this court will not belabor the issue of the unconstitutionality of the death sentence and shall proceed to address the last prayer in which the petitioner seeks for a review and reduction of his sentence pursuant to the given guidelines in the Supreme Court decision in **Francis Karioko Muruatetu vs Republic [2017]eKLR**; the Supreme Court in its decision made it clear that mitigation by the accused person must be entertained and applied by the trial court before sentencing is declared; that in the absence of mitigation courts can now re-hear and exercise its discretion on the aspect of sentencing;

13. This court notes that the petitioner has also exhausted all the available appellate processes;

14. The Supreme Court gave guidelines with regard to the mitigating factors to be applied in re-sentencing; which are as follows;

i. Mitigating circumstances of the petitioner;

ii. Mitigating circumstances of the offence;

iii. Mitigating circumstances of the victim's family

15. Starting with the **Mitigating circumstances** that are in the petitioner's favour; these include but are not limited to;

- i. Age of the offender;
- ii. Being a first offender;
- iii. Commission of the offence in response to gender based violence;
- iv. Remorsefulness of the offender;
- v. Character and record of the offender; and the possibility of reform and social adaptation of the offender.
- vi. Any other factors the court considers relevant.

16. In this instance the petitioner was relatively young when he committed the offence; he was a first offender; and the Report and certificates from the prison authorities have labelled the petitioner as being a model prisoner who has reformed and is now a changed person; he is also full of remorse for his deeds;

17. Mitigating circumstances of the offence; However, there are grave and aggravating circumstances that work against the petitioner; one being the circumstances and the manner in which the offence was committed; these aggravating factors that this court has taken into consideration are broken down as follows;

- i. The murder committed was brutal, cruel, grossly inhuman and was unprovoked; the crime was premeditated; the petitioner had gone to the deceased' house armed and ready to commit the offence; he found the deceased alone and attacked and harmed the young man;

- ii. **The choice of weapon;** was a panga which the petitioner was used to snuff out the life of the young man; the evidence adduced by a prosecution was that the petitioner then fled the scene leaving the deceased there alone to bleed to death; the murder was extremely brutal and heinous driven by hate and revenge and the petitioner was merciless; the manner the offence was committed is found to be very grave and serious; as there are no mitigating factors of the offence this calls for a deterrent sentence;

18. The mitigating circumstances of the victim's family; the Victim Impact Assessment Report is very favorable and brings out the fact that tension and bitterness does not exist between the victim's family and the petitioner; and to date there has been healing and forgiveness; the families also live miles apart and there are no fears of revenge or retaliation;

19. In the light of the above and after having taken into consideration the aspect of rehabilitation this court is satisfied that the appropriate deterrent sentence is a term of forty (40) years imprisonment; the life sentence is hereby reviewed and substituted with a term of forty (40) years imprisonment;

20. In reviewing the commencement date of the re-sentence this court has taken into consideration the provisions of Section 333(2) of the Criminal Procedure Code;

21. The record reflects that the petitioner had been arrested on the 5/06/2001 and was convicted on the 23/02/2007; the time spent in prison during the trial translates to a period of approximately five (5) years were spent in custody from the time of his arrest; this period shall be taken into account and the petitioners' sentence shall commence from the date of his arrest which was 5/06/2001; case law relied upon **Titus Ngamau Musila alias Katitu CR. Case No.78 of 2014.**

FINDINGS AND DETERMINATION

22. For the foregoing reasons this court makes the following findings and determinations;

- i. This court finds that the Petition has merit and it is hereby allowed.

- ii. The life imprisonment sentence is hereby substituted with a term sentence of forty(40) years to commence from 5th June, 2001 being the date of arrest.

Orders accordingly.

Dated, Signed and Delivered Electronically at Voi due to the Pandemic this 1st day of October, 2020.

HON. A. MSHILA

JUDGE