



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 28 OF 2019

FRANCIS GICHOVI MUTHONI PETITIONER

VERSUS

REPUBLIC RESPONDENT

Coram: Hon. Justice R. Nyakundi

The Petitioner

Mr. Alenga for State

RE-SENTENCING

The Petitioner, **Francis Gichovi Muthoni**, was initially charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. He murdered **Simon Muiruri Mwangi** on 22nd November, 2003.

After a careful assessment of the evidence on the record, in its judgement delivered on 29th July 2005, the Trial formed the opinion that the evidence pointed irresistibly to the guilt of the accused person to the exclusion of any other person. The Petitioner was found guilty of the offence of murder, convicted accordingly and sentenced to suffer death.

On appeal filed as **Mombasa Criminal Appeal 271 of 2006**, the Petitioner prosecuted his appeal on four grounds: that the learned Judge of the superior court erred in law and in fact in convicting the appellant on the evidence of the first prosecution witness's evidence whereas that witness was not an eye witness to the incident; that as the jembe which was alleged to be the murder weapon was not dusted for fingerprints to establish whether it was the murder weapon, the learned Judge erred in finding that the body of the deceased was found near the appellant's house where the jembe was found; that as some of the witnesses were not called particularly the arresting officer, there existed doubts in the prosecution case as to the guilt of the appellant, the benefit of which should have been given to the appellant; and that the learned Judge failed to consider adequately the defence case.

Sufficiently apprised of the submissions on appeal and upon applying the law to the Petitioners case, the Court of Appeal in its judgment rendered on 20th July 2007, while conceding that the evidence in the matter was largely circumstantial went on to note that the evidence irresistibly pointed to only the Petitioner as the person who murdered the deceased and that there were no co-existing circumstances to weaken or destroy that inference. Convinced that mens rea had been established, the Court found that the Trial judge's decision was sound and dismissed the appeal.

The Petitioner has now brought the instant petition in terms of the Supreme Court decision in **Francis Muruatetu & Another v Republic {2017} eKLR** which declared not only the mandatory nature of death sentence but also the commutation of the same to life imprisonment by an administrative fiat unconstitutional, null and void.

By the **Muruatetu** decision, judicial officers were empowered with the discretion to mete out sentences in accordance with the individual circumstances of each case. This was confirmed by the Court of Appeal in **William Okungu Kittiny v R {2018} eKLR** where it charged:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”

Corollary to **Muruatetu (Supra)**, the need for re-sentencing all persons previously sentenced to a mandatory minimum sentence arose.

Cognizant of this need, the Supreme had expressed itself as follows:

“(111) ...For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

(112) (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.

Pursuant to the Supreme Court’s directive, the **Hon. Attorney General**, vide Gazette Notice No. 2160 dated 15th March 2018 appointed a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act. The Taskforce returned its Report in October 2019. Key recommendations by the Taskforce on re-sentencing included taking into account the guidelines contained in the Sentencing Policy Guidelines, 2016 which provide that when passing a sentence, the court must look at:

- a. the circumstances or facts of the offence and degree of involvement of the offender;**
- b. the age of the offender at the time of the commission of the offence;**
- c. the character and record of the offence, including being a first offender;**
- d. whether the offender pleaded guilty, and the point at which the guilty plea was made;**
- e. any attempt by the offender to make reparation for the offence;**
- f. the possibility of reform and social re-adaptation of the offender;**
- g. any other mitigating circumstances of the offender such as social or economic circumstances at the time the offence was committed, including whether commission of the offence was in response to gender-based violence; and**
- h. the views of the victim, or where the victim is deceased or incapacitated, the victim’s representative, on psychological, emotional, economic or social impact of the offence committed.**

The Petitioner herein was convicted of the offence of Murder and sentenced to suffer death, which offence was commuted to life imprisonment by administrative fiat. The Taskforce recommended that taking into account aggravating and mitigating factors, the baseline re-sentence for murder be as follows:

- a. Aggravated murder — death or life with no possibility of parole**
- b. First degree murder — 25 years**
- c. Second degree murder — 20 years**
- d. Manslaughter — 15 years**

In the instance case, the circumstances surrounding the murder were that while there were no eye witnesses, **Michael Kimani (PW 2)** found the deceased lying down with a bleeding head next to the house of the Petitioner. The Petitioner conceded that he was neighbours and friends with the deceased but had beat the deceased because he was playing around with him. Only the Petitioner knows what he meant when said the deceased was playing with him but this is the motive that drove the Petitioner to beat the deceased to death. The extent of the deceased’s injuries were deep penetrating wounds next to the eye, a fracture on the right mandible, deep wound and fracture of the bone behind the ear, deep wound on the back of the head and fracture of the left hand which left the last finger hanging. As correctly surmised by the Court of Appeal, these injuries point at a person who intended to cause grievous harm to the deceased or to kill him.

The Petitioner when put on his defence had denied being at the scene of the crime and seeing the deceased on the day the offence was committed. He did not offer anything by way of mitigation.

In light of the anterior aggravating factors, being the fact that the Petitioner averred that he beat the deceased because he was playing around with him, and the extent of the injuries sustained by the deceased coupled by lack of mitigation on the part of the Petitioner, I find that the murder of the deceased was willful and deliberate and befitting of being termed murder contrary to Section 203 of the Penal Code.

In the upshot, based on the decision in **Muruatetu**, I set aside the death sentence imposed by the trial court and substitute it with a sentence of imprisonment for 25 years to run from the date of arrest and indictment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

R. NYAKUNDI

JUDGE