



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 2 OF 2018

RICHARD KIPTUM YEGO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] This is a Petition for Sentence Re-hearing. It was filed by the Petitioner, **Richard Kiptum Yego**, on **30 April 2018** pursuant to **Articles 19(3), 22, 25, 26, 27(1), 28, 29, 50(2), 160, 159(1) and 165(3)(b)** of the **Constitution** and **Section 261** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. The Petitioner prayed simply that the Court be pleased to reconsider his sentence. In his Supporting Affidavit, the Petitioner averred that he was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, and was sentenced to death; which sentence was later commuted to life imprisonment by the President. He conceded therefore that he had exhausted the appeal process as provided for in law.

[2] It was however the contention of the Petitioner that since the death sentence which was imposed on him has since been declared unconstitutional by the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, he is entitled, under **Articles 50(2)(q) and 165(3)(b)** of the **Constitution** to a sentence re-hearing so as to have an appropriate sentence imposed in his situation. He submitted, in urging his Petition before the Court, that he has reformed and to that end presented documentation by way of copies of certificates for the Court's consideration. The State had no objection to the documents being admitted for the Court's perusal. In addition to **the Muruatetu Case**, the Petitioner relied on the following authorities:

- [a] **James Tinega Omwenga vs. Republic [2014] eKLR;**
- [b] **Sebastian Okweru Mrefu vs. Republic [2014] eKLR;**
- [c] **HCMCRA No. 4 of 2015: Douglas Muthaura Ntoribi vs. Republic;**
- [d] **William Okungu Kittiny vs. Republic [2018] eKLR;**
- [e] **Republic vs. John Nganga Gacheru & Another [2018] eKLR;**
- [f] **Meru HC Pet. No. 53 of 2018: John Gitonga alia Kadosi vs. Republic; and,**
- [g] **Nairobi CRA No. 247 of 2014: Robert Mutashi Auda vs. Republic.**

[3] The Petition was opposed by **Ms. Kagali**, Learned Counsel for the State, whose contention was that, the Applicant having exhausted his right of appeal and had his sentence commuted to life imprisonment, is no longer under the death penalty; and therefore that he cannot validly rely on **the Muruatetu Case**. Accordingly, Counsel prayed for the dismissal of the Petition terming it an abuse of the process of the Court.

[4] I have carefully considered the Petition, the averments in support thereof as well as the submissions made by the Petitioner and Counsel for the State. I have also given consideration to the authorities relied on by the Petitioner (though it is not lost on the Court that not all of them are relevant to the facts at hand). There is no dispute that the Petitioner was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**; was found guilty and sentenced to death as by the trial Court. He conceded that he appealed the decision, the first appeal being to the High Court vide **Eldoret High Court Criminal Appeal No. 147 of 2001**; which was dismissed on **22**

April 2004; and that his second appeal to the Court of Appeal was dismissed on **23 February 2007**. The Petitioner further conceded that he thereafter benefitted from Presidential Clemency and had his sentence commuted to life imprisonment.

[5] Under the foregoing circumstances it is pertinent, first and foremost, to determine whether, the **Muruatetu Case** is applicable to the Petitioner's situation, granted that presently, he is not on death row, but is serving life imprisonment. In my careful consideration, the sentence, for purposes of sentence re-hearing is that which was imposed upon conviction by the trial court for the offence with which the Petitioner was charged, and for which he is presently in custody. That sentence was the death penalty, and therefore the Petitioner is, in my respectful view, entitled to a re-hearing following the **Muruatetu Decision**. I note that in **John Gitonga alias Kadosi vs. Republic** (supra), **Hon. Majanja, J.** was of the same view when he held that:

"...this petition is one for resentencing not clemency. The petitioner has already had the benefit of his death sentence commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under Article 133 of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional."

[6] In the same vein, there can be no gainsaying that the impact of the **Muruatetu Case** is not confined to murder cases. The Court of Appeal made this clear in **William Okungu Kittiny vs. Republic** (supra) as follows:

"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ...

[7] In the premises, I now proceed to consider what would have been appropriate sentence in the circumstances; and in this respect I have given due consideration to the authorities relied on by the Petitioner. In **Douglas Muthaura Ntoribi vs. Republic** (supra) the Appellant had been sentenced to death for the offence of robbery with violence under **Section 296(2)** of the **Penal Code**. The death sentence was set aside on appeal and substituted with 15 years imprisonment on **25 January 2018**. The Court took into account that the Appellant therein had been in custody from the time of his arrest on **10 June 2004**, a custodial sentence of 15 years was passed in his case.

[8] In the case of **Robert Mutashi Auda vs. Republic, Nairobi Criminal Appeal No. 247 of 2014**, the Appellant had been convicted on a Charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. His appeal to the High Court against conviction and sentence was unsuccessful. In a second appeal, the Court of Appeal was urged to consider the sentence and the mitigating factors in accordance with the **Muruatetu Case**. The view of the Court of Appeal of the matter was thus:

"We have considered the said mitigation and sentiments of the prosecution counsel. We have considered the circumstances in which the offences were committed and noted that there were no injuries inflicted on the victims. We also appreciate the fact that the appellant has already served 13 years in prison which in our view is sufficient retribution on his part. Taking all these issues into account, we are persuaded to interfere with the death sentence imposed on the appellant and reduce the same to the term already served. The appellant's appeal therefore succeeds in part only as far as the sentence is concerned as the conviction remains undisturbed. We order that the appellant be set at liberty unless he is otherwise lawfully held."

[9] In respect of this Petition, the Court called for the High Court file, namely, **High Court Criminal Appeal No. 147 of 2001** but the same is yet to be traced. Hence, whereas the exact particulars of the offence and are not explicit to the Court, it is nevertheless manifest that the Petitioner has been in custody from the year **2001**, a period of about **18 years**. In the premises, taking into account all the factors disclosed by the Petitioner in his Supporting Affidavit, including the annexures filed in support, I am of the view that the period served is sufficient retribution for the offence. I would therefore allow the Petition, and order, which I hereby do, that the Petitioner be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH 2019

OLGA SEWE

JUDGE