



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT MISC. APPLICATION CASE NO. 564 OF 2018

LESIT, J

RAHAB NJERI MBITUAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING ON RE-SENTENCE

1. The Applicant **RAHAB NJERI MBITU** was convicted by this court and sentenced to suffer death on 2nd August 2011.
2. The Applicant filed an appeal to the Court of Appeal. On the 7th November 2014 the appeal was dismissed and the death penalty confirmed.
3. After exhausting the appellate jurisdiction the Applicant’s sentence of death was commuted to life imprisonment by His Excellency the President. The date of commutation was not given.
4. In her application by way of Constitutional and Human Rights Petition No. 178 of 2018 the Applicant by way of a Chamber Summons dated 7th May 2018 seeks seven orders as set out below:

- (1) That this application/petition be certified as urgent and be heard on priority basis.**
- (2) That the substantive petition be heard on priority basis for the interest of justice.**
- (3) That the orders and findings of the court in petition No. 618 of 2010, Joseph Kaberia and others vs. the Attorney General dated 15th day of September 2017 invalidates Sec.204 to the extent it accorded a mandatory nature of death sentence as meted and currently being served by the petitioner.**
- (4) That, the Hon. Court be pleased to call for and review orders regarding Section 204 of the Penal Code Cap 63 Laws of Kenya since the appellate court (K.C.A.) and the Supreme courts found the said section 296(2) of the Penal Code among others to the extent that it accorded a mandatory nature of death sentence as unconstitutional hence occasioned prejudice to the petitioner.**
- (5) That, the petitioner be granted appropriate relief and directions pursuant to the findings of the Court in petition No. 618 of 2010, Joseph Kaberia and others vs. Attorney General and others (2016) and through the order number b) of the Supreme Court judgment in Petition No. 15 of 2015 of Francis Karioko Muruatetu and Anor. dated 14th of December, 2017 at Nairobi.**
- (6) That the petition is poor and unable to pay for the costs of this petition.**
- (7) Such other orders that the court may deem fit and just.**

5. The application was premised on four grounds namely:

- A. The respondent is bound by the provisions of the constitution and the Written Laws and acts in defence of the same.**

B. The Constitution contemplates that all persons in Kenya are bound by the provisions of the Constitution, Written Laws regulation and judgment findings and order of the Superior Court.

C. The findings of the Court in Petition No. 618 of 2010, Joseph Kaberia and Others vs. Attorney General and others (2016), and the order of the Supreme Court that declared the mandatory death sentence in capital offences Unconstitutional in the Francis Muruatetu and Wilson Thirimu Mwangi Petition No. 15 of 2015 be implemented, effected and given life and the petitioners be subjected to mitigation hearing and subsequent re-sentencing by the trial court.

D. It is the interest of justice that this application be allowed a prayed herein above.

6. The application is premised on two cases cited on the face of the Chamber Summons. The first one is **Joseph Kaberia and 11 others versus Attorney General Petition No. 618 of 2010**. Very briefly the importance of the cited case was the finding that it is mandatory for the court to first receive and secondly consider mitigation before passing sentence. Secondly that the death penalty should only be passed in the most serious of crimes.

7. The second case cited is **Francis Muruatetu and Wilson Thirimu Petition Nos. 15 and 16 of 2015** as consolidated. It is a Supreme Court Case in which the Learned Justices held that the mandatory nature of the death penalty was unconstitutional. The import of this decision is to give discretion to trial courts to consider any sentence in capital offences.

8. The first cited case was a decision of a three judge bench in which I was the Presiding Judge. It is persuasive. I agree to be persuaded by it.

9. The second judgment is binding on this court and is a binding judgment in sentences for capital offences. I am well guided by it.

10. I appreciate my own ruling on 2nd August 2011 while passing sentence against the Applicant where I observed that even if I had discretion to pass a different sentence except death, I would still not consider it. I am not bound by that remark now due to changing circumstances and I will explain.

11. The **Muruatetu Case**, supra is an authority to cases where mitigation before sentence was never taken, or where it was taken, was never considered. In the instance case I recorded mitigation from the Applicant but did not consider it because of the position I took then that I was bound to give a mandatory death sentence.

12. The circumstances of this case fits the situational Analysis in **Muruatetu case**, supra. What is therefore required now is to consider which sentence to pass after taking into consideration:

(a) Applicant's mitigation.

(b) The period the Applicant has spent in custody as prescribed under **section 333(2) of the Criminal Procedure Code**.

(c) Any other information available which is relevant to the case including victim Impact Statement.

13. I considered the mitigation given by the Applicant specifically that at the time she committed this offence she was young when she committed the offence. She urged that she had realized her mistakes and regrets her actions. She urged that she recognized that she has wronged her family and the family of the deceased and vows never to repeat such action even in life.

14. The Applicant has urged that she has undergone various courses while in prison including spiritual ones and skill building and enhancing ones. I have seen the recommendation letters from a Prison Chaplain and the Prison authorities confirming both.

15. The Applicant concluded by saying she had come to realize that anger is bad and had humbled herself before God for forgiveness. She says her child was in class 3 when she was arrested for this offence and remained in her mother who died recently.

16. Mr. Otieno for the Respondent urged court to find that inspite of **Muruatetu Case**, the law on death penalty had not been amended. He urged the court to look at the circumstances of the case relevant to sentence.

17. Before passing Re-sentence in this case, I called for and received a Re-Sentencing Report from Probation. Ms. Wainaina a Probation Officer has filed one dated 25th February 2019. It is quite elaborate. It contains reactions from the families of the accused person and the deceased.

18. The Report gives Applicant's personal history, attitude towards the offence and Rehabilitation she has gone through while in prison.

19. There is Victim Impact Statement from family members of the deceased. They are unhappy to-date for loss of their kin. They did not oppose Applicant's release from prison as long as she did not interfere with their lives.

20. I have noted that the Applicant's admits having murdered her husband, the deceased in this case. She acknowledges it was a serious crime and expresses regret and remorse for it. This is very significant as she was unrepresented in this application. I have taken that into account.

21. The Applicant was arraigned in court on 25th March 2008. During that time bond was not considered for capital offenders. She therefore remained in custody from that time until the case was concluded on 2nd August 2011. That was a period of 3 and a half years.
22. I have considered that the Applicant has been in prison since August 2011 to-date, a period of 7 years and 6 months.
23. In total therefore the Applicant has been in prison for the last 11 years or so.
24. Having taken all the factors and circumstances of this case as at this point, the period she has been in custody, for the offence she committed a prison term is still the appropriate sentence to impose.
25. I order that the Applicant should now serve a period of 16 years imprisonment from the date of arraignment in court on 25th March 2008.
26. For clarification this means that this order reduces the sentence imposed upon the Applicant after the commutation of her sentence from the death penalty to life imprisonment to the period of 16 years imprisonment.
27. After applying the computation above given (paragraph 25) the Applicant should serve the residue of the sentence of 5 years.
28. The application dated 2nd May, 2018 succeeds to the extent stated above and in terms of Relief Nos. 6 and 7 of the Petition. The Applicant advised to seek forgiveness from the deceased family.
29. Those are the orders of this court.

SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH, 2019.

LESIT, J.

JUDGE