



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 514 OF 2018

LESIT, J

IN THE MATTER OF: SECTIONS 216 AND 329 OF THE CRIMINAL

PROCEDURE CODE AND SECTION 204 OF PENAL CODE

AND

IN THE MATTER OF: SECTION 333 OF THE CRIMINAL PROCEDURE CODE

AND

AND IN THE MATTER OF: SUPREME COURT JUDGMENT PETITION NO. 15 OF 2015

FRANCIS KARIOKO MURUATETU AND WILSON THIRIMBU MWANGI

AND

IN THE MATTER OF: DECLARATION IN PETITION NO. 618 OF 2010

JOSEPH KABERIA KAHIGA AND OTHERS VS. ATTORNEY GENERAL (2016)

BETWEEN

ANN WAMBUI MUTHONI.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTOR.....RESPONDENT

RULING ON RE-SENTENCING

1. The Petitioner was charged with one count of murder contrary to **Section 203** of the **Penal Code**. Her case was heard by this court and on 25th February, 2011 she was convicted for the offence and sentenced to death.
2. Her appeal against the conviction and sentence filed and heard by the Court of Appeal was dismissed in its entirety on the 27th September, 2013.
3. Subsequent to the dismissal of the appeal, the Petitioner's case was presented to the Power of Mercy Committee following which her sentence of death was committed to life imprisonment by His Excellency the President in 2013.
4. The Petitioner has now filed a Petition dated 12th February 2019 brought under **section 216 and 329** of the **Criminal Procedure Code**; **Articles 22(1), 23(1), 25(a), (c) and (d); 19(1)(2) and (3); 20(1)(2)(3) & (4); 21(1); 24(1), 28, 47, 48, 165, 258 and 259** of the **Constitution**.
5. The Petitioner invokes the judgment of the **Supreme court in Petition 15 of 2015 Francis Karioko Muruatetu and Wilson Thirumbu Mwangi**. The correct case number for the Supreme Court case cited is nos. 14 and 15 of 2016 both consolidated.

6. In the Chamber Summons filed in this Petition, the Petitioner invokes the judgment of this court in **Joseph Kaberia and 10 others vs. Attorney General Petition No. 618 of 2010.**

7. The Petitioner asks the court to consider the two judgments cited herein above and grant appropriate relief and directions pursuant to the findings of both courts in the 2 cases cited.

8. Part of the grounds cited in support of the Petition is that pursuant to the findings in the cited cases, the Petitioner is entitled to be heard in mitigation and subsequently to re-sentencing by the trial court.

9. The Petitioner was allowed by this court to approach the court, and was heard as requested in her petition.

10. In her address in mitigation, the Petitioner urged the court to consider that she has come to appreciate the seriousness of what she did and that she regrets her actions. The Petitioner submitted that she admits she committed the offence with assistance from others. She appreciated that she wronged her family and the family of the deceased as well as the entire community.

11. The Petitioner urged that she has spent her time well while in prison and has earned over 20 certificates. She urges that the certificates will not benefit her unless she is released from prison.

12. Regarding her personal circumstances, she says she left her 9 month old baby with her mother who is a casual labourer. She urges that she was 27 years old when she committed the offence and was now 40 years old, sickly and in need of an operation. She also urges that her mother is old and sickly and in need of a helping hand.

13. I called for a Pre-Resentencing Report and one was filed. I have considered that the Petitioner readily accepts the offence and her mistakes. The Probation Officer's Report pretty much restates what I have already included in Petitioner's own submissions before me.

14. There is a Victim Impact Statement by family members of the deceased. They are totally against the Petitioner being released from jail or being shown any mercy at all. The mother of the deceased suffered depression upon hearing of her son's death and to-date still struggles with it. The Probation Officer reported that the mother of the deceased was yet to recover from the death of her only son, that she cried throughout the interview which initially she had declined to be part of.

15. The Prosecution filed a response to the Petition. In that response Prosecution Counsel Mr. Otieno urges the court to consider the circumstances of the case and be guided by the factors set out in Muruatetu case and thereafter give a sentence other than the death penalty. He summarized the factors to be considered as set out in Muruatetu case, *supra*. I will cite the relevant ones to this case as:

- Age of the offender
- Previous record of convictions
- Character and record of offender
- Whether offence was gender based violence
- Whether offender was remorseful
- Possibility of reform and social adaptations of the offender

16. I have taken all these factors, the Petition, the Pre-Resentencing Report and sentiments of the prosecution.

17. The court has also considered the Petitioner's age. The period she has spent in custody since her arraignment on 16th December 2006 is twelve years, six months. I have heard the Petitioner's plea for forgiveness and for leniency. Her health conditions, and documents in support have also been considered. She claims to have reformed and has been heavily trained while in prison.

18. The claims of heavy training are confirmed in the statement by the Prison authorities in the Recommendation filed in favour of the Petitioner. The recommendation report has included information regarding Petitioner's character while in prison. She is said to have settled in well after counselling and also to be cooperative and that she actively participate in all activities in prison.

19. I have considered that Petitioner left a child of tender years who has now since grown up. Her mother's flight is also considered.

20. The mother of the deceased has not recovered her son's death and has sunk into depression having lost her only son. She feels that Petitioner does not deserve a second chance.

21. I am guided by the **Muruatetu case**, *supra*. The Supreme Court in that case requires that before sentence a convicted person should be heard in mitigations. That way the court will not miss out on relevant information especially actual circumstances of the case from the convict's view point, per adventure there may be pathos in the mitigation statement which may guide the court to understand the case and pass the appropriate sentence.

22. The Petitioner in her submissions to the Probation Officer in the Pre-Resentencing Report told Ms. Abima that her husband was a

womanizer, drunkard and a waster of resources which drove her to seek counsel. She said that the counsel she got was not good as it led her to hire men to finish off her husband.

23. That is a classic example of Domestic Violence. The feeling that if you are wronged, or in your view rejected, or mistreated or ignored whether in an overt or covert manner, such a person must pay with his life. As a country we must come out of these kinds of thought patterns and belief system.

24. One need not die if they seem to have fallen out of love with you, or if they are double dealing you. That is why we have the Family Court for Divorce. And before going there we have Marriage Counsellors, Psychologists, Psychiatrists, religious leaders, family elders and the list goes on.

25. Murder should be nowhere in somebody's mind. The Petitioner can appreciate these sentiments as she can attest to the consequences of taking God's role by taking life. It does not pay and neither are the untold consequences worth the risk.

26. For the Petitioner, a life was lost without having any confrontation with the deceased, a non-violent, easy going man according to the Petitioner's own words. All these are factors I have considered and which I have to balance together with the other conflicting interests of deceased mother, public peace and security.

27. Having considered all, I find it is too early to release the Petitioner from prison. She should spend a little more time in order to appreciate the magnitude of what she did and the value of life.

28. The Petitioner should serve 20 years imprisonment from date of arraignment before this court on 6th December 2006. The Petitioner will now serve the 20 years imprisonment without remission. The life imprisonment she has been serving after the death sentence was commuted through the **POMAC** no longer applies and is accordingly set aside.

29. Those are my orders.

DATED AT NAIROBI THIS 21ST DAY OF MAY, 2019.

LESIT J

JUDGE