



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL MISC. NO. 28 OF 2018**

**WILFRED KARIUKI GITAHI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling is in regard to the undated application filed by the applicant on the 19<sup>th</sup> July 2018. The application seeks the following orders:

*a) That I the petitioner plead for the reduction of sentence under section 169 (1) (a) and 25 (a) (c) (d) in view of a recent decision by supreme court vide Petition numbers 15 and 16 of 2015 Francis Karioko Muruatetu & Another.*

*b) That it is within the rules of law for my prayer to be heard and considered by this honourable court.*

*c) That this application is grounded upon the annexed affidavit of I WILFRED KARIUKI GITAHI and other further ground to be adducted at the hearing of this application thereof.”*

2. The applicant was charged and convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was sentenced to death on 23<sup>rd</sup> February, 2007.

**B. Applicant’s Submission**

3. The applicant submits that the current sentence he is serving is humiliating as it limits his future prospects and renders him incapable of making any future decision. He further submits that since the primary purpose of sentencing is to rehabilitate, this court ought to consider the period of his incarceration and his age in coming to its decision on this matter.

4. The applicant further submits in mitigation that he has been in prison for 17 years and as such the court in arriving at its decision should be considerate of the fact that the applicant will be a warning to others intending to commit the same crime and as such the applicant urges the court to impose the appropriate sentence as per the Supreme Court directives in Petition No. 15 of 2015.

5. The applicant further submits that he has undertaken various courses in prison which have transformed him including, a Diploma in Health, Discover Bible Scripts, Carpentry and Joinery (Stages I, II and III), Bible Correspondence Course Certificates, Certificate of Participation in Detergents, Bleach Making, Finance Education for Women and Youth as well as being in charge of the Catholic Catechist.

**C. Respondent’s Submission**

6. The prosecution submitted that though they did not oppose the application to review the sentence, the court should take into consideration the circumstances of the death as well as the serious nature of the offence committed and further the fact that the sentence for a conviction of murder is death. The prosecution relied on the case of **Alex Mwaniki Njagi, Embu Appeal No. 10 of 2014 by Chitembwe J.**

**D. Analysis of the Law**

7. It is on record that the accused was convicted sentenced to death for the offence of murder. He has been in prison for twelve (12) years having been sentenced at the age of 35 years. He submits that his sentence has caused him humiliation for he cannot make any decisions for himself or his family. The applicant has further submitted that he has undertaken various courses while in prison and as such he has been transformed and can serve as a warning to others with the intention of committing the same crime.

8. I have also considered the circumstances of the offence. The facts of the case reveal a person who despite warning was hell bent on killing the deceased who was his father despite the attempts and pleas of his mother PW1, not to do so. It is worth noting that the applicant had told PW1, his mother, **“Today I am going to kill your husband.”** All these factors must be taken into consideration in re-hearing of sentencing.

9. The applicant relied on the Supreme Court case of **Francis Kariko Muruatetu & another and Republic and Others [2017] eKLR** and submitted that the Supreme Court declared unconstitutional the mandatory nature of the death sentence and urged that this court could pass any other sentence.

10. The Supreme Court in the **Muruatetu** case, (supra) sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

***“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***

***(a) age of the offender;***

***(b) being a first offender;***

***(c) whether the offender pleaded guilty;***

***(d) character and record of the offender;***

***(e) commission of the offence in response to gender-based violence;***

***(f) remorsefulness of the offender;***

***(g) the possibility of reform and social re-adaptation of the offender;***

***(h) any other factor that the Court considers relevant.***

11. At the time the applicant was sentenced, death sentence was mandatory for it was long before the Supreme Court decision of **Francis Muruatetu (Supra)**. It is in this petition that the mandatory nature of death sentence was declared unconstitutional.

12. It is further noted that the applicant did not give mitigation before the trial court. It was found unnecessary at the time since death sentence was mandatory.

13. In his submissions he has given his mitigation that he has learnt from his mistake that he failed to control himself as he murdered his own father. He says he left young children and had not laid a foundation for them. Further that the children need his care as a parent and also financial support. He states that he has suffered in incarceration.

14. The accused was a first offender as shown by the record. This is a factor that requires to be taken into consideration in review of sentence in addition to the factors raised in mitigation herein. The applicant states that he regrets his action of killing his father in cold blood and prays to be given a second chance to live life outside prison.

15. I am alive to the fact that the applicant had sworn to kill his father in the presence of his own mother. At that time, he was armed with a knife and when his father arrived, the applicant attacked him immediately.

16. The death caused trauma to the wife of the deceased and to the other siblings of the applicant some of whom witnessed the murder is immeasurable. However, this court must take into consideration that a deterrent sentence would contribute to social and economic development in society as opposed to punishment.

17. All considered, I hereby allow this application for re-hearing of sentence.

18. The death sentence is hereby set aside and replaced with twenty five (25) years imprisonment. The applicant has already served twelve (12) years and will therefore serve the balance of thirteen (13) years imprisonment sentence.

19. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21<sup>ST</sup> DAY OF MAY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Applicant present in person**