



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**PETITION NO. 9 OF 2018**

**IN THE MATTER OF SUPREME COURT PETITION NO.15 OF 2015**

**AND**

**IN THE MATTER OF HIGH COURT CRIMINAL CASE NO.18 OF 2015**

**ALEX MWANZA MUTANGILL.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The petition before me was dated on 11<sup>th</sup> January 2010 and received by the court on the 23<sup>rd</sup> of the same year and month. It was brought pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic & Others, Petition No. 15 & 16 of 2016 (consolidated)**, which declared mandatory death sentence for murder unconstitutional. This prompted the Petitioner to file the instant petitioner.

#### **Background**

2. The Petitioner was charged and convicted of the offence of murder contrary to section 203 as read with **section 204** of the Penal Code. He was found guilty of murder and sentenced to suffer death, which sentence was mandatory at the time of his conviction. He had lodged an appeal at the Court of Appeal but had not been served with an appeal number yet.

#### **The Petition**

3. The petition is based on supplementary grounds for mitigation arising from criminal no. 18 of 2015 at Kajiado High Court. The said grounds state as follows:

- 1. THAT, the petitioner begs this court to take into consideration that he is remorseful, which is a critical aspect that ought to be considered.**
- 2. THAT, the petitioner begs this court to take into consideration that he was a first offender.**
- 3. THAT, this court may consider the time spent in custody pursuant to section 333(2) of the Criminal Procedure Code as part of his sentence.**
- 4. THAT, the petitioner begs this court to invoke its powers under article 159 of the constitution and consider the efforts and efforts of reparation and reconciliation with the victim's family.**
- 5. THAT, he begs this court to consider the enormous deliberate achievements in rehabilitation and transformation that the petitioner has engaged in while serving time in prison.**
- 6. THAT, the petitioner prays that this court do order for review of section 46 of the prison act cap 90 and order for remission for the benefit of the petitioner.**

7. THAT, this court consider sentence awarded as harsh and excessive in the circumstances of this case and award time served as sufficient punishment for the petitioner.

#### **Jurisdiction of the Court**

4. The petitioner cited the case of Michael Kathewa Laichena & Republic (2018) eKLR where the court stated that:

**“in the Muruatetu’s case (supra) the Supreme Court, having declared the mandatory death sentence unconstitutional, directed that the petitioners’ case be remitted back to the High Court for re-sentencing in accordance with directions of the court.....as regards petitioners in other similar cases,**

**[111]....[They] 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.”**

5. Further reliance was placed in the case of **William Okungu Kittiny v Republic (2018) eKLR**, it was held that:

**“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.....The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”**

6. The Petitioner also relied on the case of **Michael Kathewa Laichena & Another v Republic (supra)** where the honourable court went further to state that:

**“Since the high court has unlimited jurisdiction in civil and criminal matters and is also the court imbued with jurisdiction to enforce fundamental rights and freedoms under Article 165 (3) of the Constitution, it is the proper forum for re-sentencing.”**

7. The Petitioner invited this court to consider the factor that he is a first offender and has consistently shown his remorsefulness. He relied on the case of **John Kirema Kaibi v Republic (2008) eKLR** where in consideration of the said mitigating factors, the accused person was resented to 13 years’ imprisonment. Further in the case of **John Kathia M’itobi v Republic (2018) eKLR** the accused person was resented to 15 years imprisonment.

#### **Petitioner’s Submissions.**

8. The petitioner brought to the attention of the court that he was arrested on 22<sup>nd</sup> September, 2013 and charged with an offence of murder. He was subsequently found guilty as charged and the learned Judge convicted and sentenced him to suffer death on 15<sup>th</sup> May 2017. He averred that there were no multiple victims, no lethal weapon used like a firearm and the petitioner was not in his right state of mind then and that he has completely recovered as attested by the medical records.

9. The petitioner strongly condemned the heinous act he committed and went further to ask for forgiveness from the court, the victim’s family, society, the nation and above all, God the creator. He stated that he has been in custody for six years within which he has rediscovered himself and the purpose of God for and in my life. He outlined the parameters which the instant court should consider when determining an appropriate sentence for him. These include:

**a. Whether the offender is remorseful,**

**b. Whether the petitioner was a first offender,**

**c. Whether section 333(3) is applicable,**

**d. What efforts have been made in regard to reparation and reconciliation and whether the same were factored under article 159 of the constitution,**

**e. Whether the offenders rehabilitation and reformation is satisfactory, and,**

**f. Whether time served should be considered sufficient.**

10. Counsel for the Petitioner submitted that following the Supreme Court decision in Muruatetu Case, the criminal justice system was given an opportunity to review the already passed sentences after consideration of the mitigation of the offender in respect to particular circumstances of each case. Counsel cited the decision in **William Okungu Kittiny v Republic (supra)** to advance the proposition that the same declared the necessity for re-sentencing at the trial court and subsequent appeal if dissatisfied in the hierarchy of the judicial system. It was asserted that the Petitioner herein was dissatisfied with the sentence awarded by the Chief Magistrates’ Court at Machakos hence this petition touches on sentence only.

11. Counsel for the Petitioner stated that the Petitioner is remorseful and he is a first offender. He urged the court consider this fact upon determining the appropriate sentence for the Petitioner. He placed reliance in the case of **Michael Kalewa vs Republic (2018)** which set out

the aggravating and mitigating circumstances which include among others the fact that the accused is a first offender and that he is remorseful.

12. To bolster his proposition, he further reliance was placed in the cases of **Mulamba Ali Mabanda vs Republic Criminal Appeal No 12 of 2013(2018); R v Otieno (1983)** which followed the decision of **R v Arrisol (1957)**. He therefore prays that this court subject him to the least possible severe sentence pursuant to article 50(2)(q).

13. Counsel further proposed that this court be inclined to take into account the time the Petitioner spent in custody which undergoing trial pursuant to the provisions of 333(2) of the Criminal Procedure Code. The cases of **Ahamad A. Mohamed in Criminal Appeal No, 135 of 2016 and Samson Njuguna Njoroge v Republic H.C.C.R App No.150 of 2016 (UR)** to bolster his argument. It was the Counsel's humble prayer that this court considers that the Petitioner herein has been in uninterrupted custody for 6 years and that the same had not been taken into account during his original sentencing.

14. In mitigation, the Counsel for the petition invites the court to consider that apart from what is required in law, he has made efforts to seek reconciliation from the victim's family as attested to by the probation officers report. He cited the case of **Oscar Lenard Carl Pistorious in Criminal Case No. 113/2013 in High Court of South Africa** to support his argument. It was further submitted that the Petitioner is ready to go an extra mile by way of compensating the deceased family.

15. He referred the court to the Probation officer's Report which states that there was concern that the deceased's father is yet to come to terms with the Petitioner. It was submitted that this process of reconciliation is a process and not an event hence he will ensure to make amends with the deceased's family. Counsel invited this court to take judicial notice that the same is at an advanced stage.

16. The counsel for the Petitioner averred that in imposing the sentence, this court is urged to strike a balance between the interest of the society, the petitioner, seriousness of the offence and the same should be geared towards promoting the offenders rehabilitation and transformation. He cited the case of **State v Warren Vorster CC NO. 125/2009** where the South Gauteng High Court in imposing the sentence had the following to say:

**“A court should strive for a balance between the interests of the society, the interest of the accused and the seriousness of the offence. A sentence which over-emphasises one element.....cannot be balanced and it is likely to be a wrong sentence.**

**Finally, in imposing a sentence, a court should be merciful. This means that it should sentence the accused with a full appreciation for human frailties and for the accused own particular circumstances at the time of the offence.”**

17. He brought to the attention of the court that the Petitioner has undertaken rehabilitative programs that have been beneficial to him, the prison, his family and the society at large. He cited the case of **Martin Bahati Makhoha vs Republic (2018), Hon. G.W Ngenye-Macharia J** having found the petitioners guilty of robbery with violence and where the victim was slightly injured and having been convicted and sentenced to suffer death, the court resented him to time served, which was ten years and 2days. It was therefore prayed that the court takes into account and find time served by the petitioner of 6 years to be sufficient punishment.

#### **Prayers Sought.**

- 1. That the court considers the time spent in remand custody pursuant to section 333(2) of the Criminal Procedure Code and the same be found to be sufficient punishment.**
- 2. That the court considers the petitioner's efforts to reconcile under article 159 of the constitution as positive steps in reconciliation.**
- 3. That the court takes into consideration that the petitioner's enormous deliberate achievements in rehabilitation and transformation as sufficient for reintegration.**

#### **Law and Analysis**

18. The Petitioner's main contention is that in view of the Supreme Court decision in **Francis Kariuko Muruatetu & Another vs Republic (supra)** the court should consider the sentence. I'm agreement with the Petitioner that the Supreme Court in **Muruatetu Case** declared the mandatory death sentence unconstitutional. Thus, death sentence remains legal but it's no longer mandatory. In **Muruatetu Case (supra)**, the Supreme Court stated as follows:

**“The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”**

19. The **Muruatetu Case** has necessitated re-sentencing of all persons who were previously sentenced to mandatory death sentence. In that case the court further addressed 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. (emphasis mine) 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.”**

20. I’m alive to the fact that pursuant to the Supreme Court’s directive, the Hon. Attorney General was required to appoint a Taskforce on the Review of the Mandatory Death Sentence under **Section 204** of the Penal Code Act and the same was done vide Gazette Notice No. 2160 dated 15<sup>th</sup> March 2018. It seems that the Supreme Court decision requires that the petitioner and all those in a similar position should wait a sentence re-hearing framework from the Attorney General and the taskforce. However, the Court of Appeal in *William Okungu Kittiny v R [2018] eKLR* expressed itself as follows;

**“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.”**

21. In view of the above provisions, it is abundantly clear that this court was clothed with jurisdiction to re-hear and resentence those that were convicted with capital offences whose sentence was mandatory death sentence. This is because the Muruatetu case outlawed mandatory death sentence in Kenya.

22. I now consider whether the relief sought by the petitioner herein is available for him. The facts of the case which culminated into the petitioner’s conviction and sentence were that petitioner murdered his wife by hitting her with harmer. Evidence adduced during the trial showed that the deceased was alive and in company of her relatives and the petitioner (her husband) on the night of 22<sup>nd</sup> September 2013. They retired under the same roof in the same house but in different rooms. In the early hours about 5.00 am, PW4 heard a loud bang next to her feet. The bang attracted attention and upon looking around she saw the Petitioner with a touch in his mouth.

23. In addition PW4, saw the accused armed with a harmer which was aimed at her but she screamed immediately as she feared for her life. Her screams awaked other people in the house who then handcuffed the accused with a string. The hammer was at the scene the offence was committed. As they discussed the incident the incident of the accused being armed and pointing the hammer at PW4, they realized the deceased had not responded to the screams. The deceased was found to have suffered severe injuries on the head from which she was bleeding profusely. In view of this, I will therefore proceed to determine the appropriate sentence.

24. In support of the petition, the Petitioner submitted that the absence of multiple victims, no lethal weapon used like a firearm and the fact that the applicant was not in his right state of mind should be considered by this court to come up with an appropriate sentence. He submitted that has undertaken programs in prison which have rehabilitated him since he started serving sentence.

25. He submitted that he regrets having committed the heinous act of murder and he seeks forgiveness from the victim’s family, the court, the society and to God. He then requested the court to consider that his remorsefulness and the fact that he is a first offender upon resentencing him. He cited several cases in support of this proposition.

26. He also submitted on section 333(2) of the Criminal Procedure Code which provides that:

**“subject to the provisions of section 38 of the penal code which states, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code, provided that were the person is sentenced under section (1) has, prior to such sentence, been held in custody, the sentence shall take into account the period spent in custody.”**

27. In light of the foregoing, the Petitioner averred that he has been in uninterrupted custody for 6 years and prays to this court to take the same into account upon rendering the appropriate sentence for him. The Petitioner brought to the attention of the court that there is need for this court to strike a balance between his interests, that of the society, the seriousness of the offence and the same should be geared towards promoting the offenders rehabilitation and transformation. He averred that he has since commenced with process of reconciliation and reparation and he is ready to continue the journey of reconciliation even after his release from prison as an ambassador of peace and reconciliation. He therefore prays that this court takes into account and find the 6 years period he has served to be sufficient punishment.

28. I now turn to the *Sentencing Policy Guidelines, 2016* (“the Guidelines”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- a) Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**

e) **Community protection: To protect the community by incapacitating the offender.**

f) **Denunciation: To communicate the community's condemnation of the criminal conduct.**

29. In light of the forgoing, Hon C. Kariuki in **Stephen Kimanathi Mutunga v Republic [2019] eKLR**, stated as follows:

**“23. The guidelines were published when the mandatory death sentence was still legal and as such, they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence.**

**24. To avoid a lacuna, the Supreme Court in the Muruatetu case gave guidelines with regard to applicable mitigating factors during sentence re-hearing in a murder charge. Since the mandatory death sentence was also applicable to convicts of robbery with violence, the Supreme Court guidelines are also applicable to such cases. They are;**

- 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.”**

30. The Supreme Court in the **Muruatetu Case** however clarified that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentencing hearings. They are also geared towards the promotion of public understanding of the sentencing process.

I have considered the circumstances of the case and the grounds of mitigation as couched in the supplementary grounds of 31. mitigation and the submission tendered before this court. The mitigating factors on record which include the fact that the Petitioner is a first offender, that he is remorseful, that he has undertaken rehabilitative programs in prison and that he has commenced the process of reconciliation and reparation with the deceased's family. I have also considered the

32. I have considered that the Petitioner's proceedings commenced before this court on the 14<sup>th</sup> of October 2013, having been arrested on the 22<sup>nd</sup> of the same year. I note that he was in pre-trial custody since then up to the time he was convicted and sentenced in May 2017, a period of approximately 4 years. He has also served 2 years imprisonment from the date of conviction and sentence to date. The court is entitled to take the 6 years period he has behind bars into consideration in terms of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).

33. I have also taken into account the Court of Appeal decision post the Muruatetu Case (supra) provide some guidance on the appropriate sentence. In **Jonathan Lemiso Ole Keni v Republic NRB Criminal Appeal No.51 of 2016 (2018) eKLR** where the petitioner shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment. In **John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 (2018) eKLR**, the Court of Appeal upheld a sentence of 25 years in a case of murder where the petitioner assaulted the deceased several times causing his death.

34. In view of the fact that the murder is a very serious offence which involves loss of life. Life cannot be compensated. The presentence report and the mitigation offered by the petitioner were undoubtedly strong. However the peculiar circumstances of this case show that the aggravating factors outweigh both the mitigation and presentence report. I hereby re-sentence the petitioner to 24 years' imprisonment from the date of arrest.

14 days right of appeal.

**Dated, signed and delivered at Kajiado this 7th June, 2019.**

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**REUBEN NYAKUNDI**

**JUDGE**

**In the presence of:**

**Mr. Mutunga for the petitioner present.**