



**THE REPUBLIC OF KENYA**

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

**PETITION NO. 6 OF 2018**

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

**IN THE MATTER OF COURT OF APPEAL NO.292 OF 2010 AT NAKURU**

**IN THE HIGH COURT OF KENYA AT NAKURU CR. APPEAL NO.58 OF 2009**

**IN THE MATTER OF CRIMINAL CASE NO. 512 OF 2004 AT KAJIADO**

**BETWEEN**

**JOSEPH MUSYOKA MUTUNGI.....PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The petitioner filed the petition together with an application under certificate of urgency. The Petitioner prays for resentencing in accordance with the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic, Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015**.

2. Briefly, the Petitioner was charged with an offence of robbery with violence in the Magistrate Court vide Criminal case No. 512 of 2006 at Kajiado. A full trial was accorded to the Petitioner and a conviction was entered as charged. He was subsequently sentenced to suffer death. During the time the Petitioner was charged, convicted and sentenced, death sentence was mandatory for the offence of robbery with violence.

3. As regards the jurisdiction of this court to grant the relief sought herein, the Petitioner directed the court to article 165(3)(a) of the Constitution which endows the High Court with unlimited original jurisdiction in criminal and civil matters. Having said so the Petitioner believes that this court is as well clothed with the jurisdiction to hear and determine the instant petition.

4. Further that the **Muruatetu Case** (*Supra*) also granted this court with the requisite jurisdiction to impose the appropriate sentence to be served as prayed herein. The petitioner further cited **article 50(1)** of the Constitution and asserted that the provision requires that every person is entitled to have his dispute resolved by the Application of law. The petitioner also brought to the attention of the court that he is not challenging his conviction but rather the sentence only.

**Relief Sought**

5. The Petitioner prays that this court be pleased to consider granting an appropriate sentence for him in light of the Supreme Court orders dated 14<sup>th</sup> of December, 2017 vide Petition No. 15 of 2015. He also prays that the court be pleased to grant an appropriate sentence to be served as prayed herein.

**Law, Determination and Analysis**

6. The Supreme Court of Kenya in **Francis Karioko Muruatetu** 's case declared mandatory death sentence in capital offences unconstitutional. Thus, in my view, what the Apex Court declared unconstitutional is the mandatory nature or aspect of death sentence. That means death sentence is still legal depending on case to case basis but however it's no longer mandatory in cases like murder and robbery with violence. This affords the requisite discretion upon judicial officers to impose alternative sentences to those convicted of offences which carry mandatory death sentence before the Muruatetu Case was delivered.

7. In the Muruatetu Case, the Supreme Court addressed itself in the following terms:

**(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.”**

8. I'm alive to the fact that pursuant to the Supreme Court's directive, the Hon. Attorney General was required to appointed 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 await 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.”**

9. I further note that High Court has unlimited jurisdiction in both civil and criminal matters and also has the mandate of enforcing fundamental rights and freedoms as enshrined in the Constitution. The above Muruatetu Case was on murder. I take the view that that the ratio *decidendi* is of *mutatis mutandis* application to cases of robbery with violence whose sentence was mandatory death sentence. In **William Okungu Kittiny Vs Republic , Kisumu Criminal Appeal No. 56 of 2013**, the Court of Appeal held the following in relation to the Muruatetu case:-

**“... We hold that the findings and the holding of the Supreme Court particularly in paragraph 69 applies Mutatis Mutandis to section 292(2) and 297(2) of the Penal Code. Thus the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum sentence.”**

10. The mandatory aspect of the death sentence having been declared unconstitutional, the High Court is the right forum for an aggrieved party to seek redress. (**Stephen Kimanathi Mutunga v Republic [2019] eKLR**). I'm in agreement with Justice Majanja's assertions in **Michael Kathewa Laichena & another –vs- Republic [2018] eKLR** that;

**“...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory death sentence...”**

11. What relief is available for the Petitioner herein? I now consider the facts which led to the conviction and sentence of the Petitioner herein. The Petitioner was arraigned in court on charge of robbery with violence contrary to section 296(2) of the Penal Code after which he found guilty of the charge and subsequently sentenced to suffer death. The accused in company of another person while armed with a pistol robbed PW1 of the items and money as alluded earlier herein. These allegations were not controverted by the Petitioner when he was given a chance to either cross-examine the witnesses.

12. The **Sentencing Policy Guidelines, 2016** (“*the Guidelines*”) published by the Kenya Judiciary, require that 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 communicates the community's condemnation of the criminal conduct.**

13. Further, Supreme Court in the **Francis Karioko Muruatetu** decision (supra) gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

**“[71]. 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.*

*[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:*

**“25. GUIDELINE JUDGMENTS**

***25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”***

14. The Supreme Court further endeavoured to clarify that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentencing hearings as well as to promote public understanding of the sentencing process.

15. I have considered other sentences which were meted after the Muruatetu case. In **Benjamin Kemboi Kipkone Vs Republic (2018) eKLR** where 3 robbers armed with an Ak 47 rifle robbed the complainants of Kshs. 250,000/= and a mobile phone, **Chimitei J** substituted the death sentence with 20 years’ imprisonment with effect from the date of judgment.

16. In **Paul Ouma Otieno Vs Republic (2018) eKLR** where the convict was armed with an AK 47 rifle and a kitchen knife and robbed the complainant of cash Kshs. 450,000/= and 3 mobile phones, **Majanja J** substituted the death sentence with 20 years’ imprisonment commencing on the date of the sentence by the trial court.

17. I have taken note of the fact that the accused visited violence on the complainant which caused him of considerable injuries and robbed him his mobile phone and cash. Further that he was armed with a pistol which he did not use and the injuries occasioned were not fatal. I have considered Section 333(2) of the Criminal Procedure Code requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence.

18. The Petitioner was incarcerated on 27/2/2006 and he was convicted and sentenced to suffer death on 9<sup>th</sup> February 2009. I have also considered that the applicant has so far served approximately ten years imprisonment. He was in custody for three years before his conviction and sentence. Consequently, he has been in custody since his arrest which means he has been behind bars for approximately 13 years. I have considered precedents of other judges in re-sentencing cases involving robbery with violence as indicated above.

19. Having considered the foregoing, I am satisfied that the period already served is enough punishment for the petitioner.

**Conclusion**

20. In view of the foregoing, the court makes the following orders;

- a) The sentence is hereby reviewed to the period already served in custody.***
- b) The petitioner be and is hereby set at liberty unless otherwise lawfully held.***

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 7<sup>TH</sup> JUNE, 2019, IN OPEN COURT.**

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**HON. R. NYAKUNDI**

**JUDGE**

**Representation:**

Appellant present

Ms Nkirote for the state present