



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MISC. CRIMINAL APPL. NO. 599 OF 2018**

**ARISING FROM HIGH COURT CRIMINAL CASE NO. 8 OF 2011**

**PETER MUSAU MUTUA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** in **High Court Criminal Case No. 8 of 2011** with the murder of **PAULINE WANJIKU KIMANI** on the 30<sup>th</sup> day December, 2010. He was tried and by a Judgement dated 24<sup>th</sup> November 2016 found guilty of murder and on 8<sup>th</sup> December 2016 the court passed a sentence of death against him in accordance to **Section 204** of the **Penal Code**.

2. After this court issued its sentence herein, the Supreme Court of Kenya in **Petition No. 15 Consolidated with No. 16 of 2015** issued its Judgement which seems to have opened flood gates in the criminal justice system in Kenya on what is now commonly known as re-sentencing hearing stated as follows:-

*“[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.*

*[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.*

*[49] With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.*

*[50] We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts’ mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.*

*[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not*

*in keeping with the tenets of fair trial.*

*[52] We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.*

*[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.*

*[56] We are therefore, in agreement with the petitioners and amici curiae that Section 204 violates Article 50 (2) (q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offence or offender. This also leads us to find that the right to justice is also fettered. Article 48 of the Constitution on access to justice provides that:-*

*“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”*

*[57] The scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.*

*[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.*

*[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.*

*[69] Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”*

3. The Supreme Court in paragraph 111 of its said Judgement stated as follows:-

*“[111] It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. 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. 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.”*

4. It is this Judgement of the Supreme Court that triggered the application filed on **19/10/2018** in which the Applicant relying on the said Judgement and the Court of Appeal's finding in **WILLIAM OKUNGU KITTINY v REPUBLIC [2018] eKLR** where they extended the Supreme Judgement to cover the mandatory nature of death sentence to the offence of robbery with violence, the Applicant applied to be re-sentenced by this Court supported by the affidavit thereon.

5. Since the determination by the Supreme Court in the **Petition No. 15/16 of 2015**, Superior Courts have issued several varying decisions in trying to understand what the Supreme Court had in mind, with the Court of Appeal in **WILLIAM OKUNGU KITTINY v REPUBLIC [2018] eKLR** stating as follows:-

*“[11] Although the Appellants' appeal was dismissed by the Court of Appeal on 20th June 2008, which was then the last Appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered*

its decision, this appeal was still pending.

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision did 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.

[12] From the foregoing, the learned judge having partly found in favour of the Appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. . .”

6. The Court of Appeal in **WYCLIFFE WANGUSI MAFURA v REPUBLIC [2018] eKLR** further clarified on the practice to be followed on sentencing re-hearing as follows:-

*“We also said in William Okungu Kittiny’s case (supra) that the decision of the Supreme Court in Muruatetu’s case has an immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts.*

Accordingly, since this appeal had not been finalized, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate’s court could have lawfully passed.

[12] *Although the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted. The Appellant gave mitigating circumstances but the trial magistrate considered that the hands of the court were tied. It is not therefore necessary to order a sentence re-hearing.” (Emphasis added)*

7. From the Supreme Court’s decision and the two Court of Appeal decisions cited herein above, it is clear and I find and hold that this court has the jurisdiction to re-open the case which was before it and look at the application by the Applicant in totality to find out if the same warrants sentencing re-hearing, noting that there has been diverse approaches by Superior Courts on the best approach in handling sentence re-hearing. In **MICHAEL KATHEWA LAICHENA & ANOTHER v REPUBLIC [2018] eKLR** the court stated as follows:-

*“Although the Supreme Court direction would seem to suggest that the Petitioners would have to await the outcome of the Taskforce, the Court of Appeal in the Kittiny Case (Supra) thought otherwise . . . The tenor and effect of the Court of Appeal decision is that the High Court may review and re-sentence Petitioners who come before by way of Petition or appeal as the Supreme Court did not foreclose that avenue of re-sentencing. Further, the Supreme Court underlined the fact that sentencing is a judicial task hence a Taskforce of the kind appointed by the Attorney General cannot review and re-sentence Petitioners. 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.”*

8. In this cause the Applicant submitted his mitigation but the court at paragraph 6 of the sentencing stated that the only sentence available to the accused having been convicted of the offence of murder and taking into account the Sentencing Policy Guidelines and the nature of evidence presented before the court on how the deceased was murdered, is death. This holding is not in tandem with the Supreme Court’s decision and therefore find merit on the application before me which I hereby allow.

9. I have taken note that I did not call for Pre-sentencing report and would therefore re-open the case in **Criminal Case No. 8 of 2011** and order the Probation Officer to prepare and present before the court Pre-sentencing report. The convict shall be at liberty to present further mitigating factors with leave given to the family of the victim to present if they so wish Victim Impact Statement for the court’s consideration to enable me pass an appropriate sentence.

10. The input of this Ruling is that the sentence passed by this court on 8<sup>th</sup> day of December 2016 is set aside pending the receipt of Pre-sentencing report and it is so ordered.

**Dated, delivered and signed at Nairobi this 18<sup>th</sup> day of June, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Applicant in person for the Applicant/Accused*

*Mr. Naulikha for the State*

*Accused - present*

