



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 4 OF 2018

STEPHEN NJAGI IRERI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. The petitioner was jointly charged with another not before this court with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code** and was handed the mandatory sentence of death.
2. The petitioner appealed to the Court of Appeal which upheld the conviction and sentence.
3. The instant petition brought by the petitioner seeks rehearing on sentence pursuant to the Supreme Court judgement in the Petition of **Francis Karioko Murwatetu**.
4. The petitioner filed submissions to which the rejoinder was by way of oral submissions.

B. Petitioner's Submission

5. The petitioner submitted that as a result of the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR** and that of **Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR** new and compelling evidence had emerged that necessitated the review of the sentence meted out against him.

C. Respondent's Submission

6. The prosecution highlighted the fact that the deceased's death was as a result of an unprovoked attack by the petitioner and urged the court to take his into consideration when making its decision.

D. Analysis of the Law

7. It is not in dispute that at the time of sentencing in the year 2008 the petitioner the practice of courts is that death sentence was taken as the only sentence available for capital offences as provided by the law. Almost all convictions in capital offences ended up in death sentences.
8. However, by the pronouncement in the Supreme Court case of **Francis Karioko Muruatetu and Another V. R. (2017) eKLR**, the Supreme Court rightly so found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since mitigation is an important congruent element of fair trial.
9. The petitioner states that he has acquired skills that will enable him re-build his life again and further that he has good relations with his family who are ready to help him re-start his life again. He further states that the deceased's wife had paid him a visit in prison on several occasions thus signaling good tidings from his family. The applicant further pleads that he was aged 27 years at the time of conviction.
10. The Prosecution did not oppose the application but urged the court to consider that the petitioner attacked the deceased unprovoked. I have also perused the record and it is clear that when asked to mitigate by the magistrate, the petitioner said he was a first time offender and was unremorseful.

11. In the premises, it is in the discretion of this Court to determine the appropriate sentence, considering the mitigations given by the Petitioner and having regard to the circumstances of each case.
12. In exercising such discretion, the Court must be guided by principles of sentencing and the Objectives of punishment.
13. In Fatuma Hassan Sato V. R (2006) eKLR, Makhadia – J (*as he then was*) observed:

“Sentencing is a matter for the discretion of the trial Court. The discretion must however be exercised judiciously. The trial Court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors ...”

14. The Sentencing Policy Guidelines for the Judiciary stipulate that:

“... The sentencing process, which entails the exercises of judicial discretion, must be in accord with the Constitution, as embodied in the Judiciary’s overall Mandate of ensuring access to Justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognized principles, particularly fairness, non-arbitrariness in decision making, clarity and certainty of decisions. The guidelines are (therefore an important reference tool for Judges and Magistrates that will enable them to be more accountable for their sentencing decision.”

15. In the Michael Kathewa Laichena & Another v Republic (2018) eKLR, a case expounding on the sentencing Guidelines it was stated:

“The sentencing policy guidelines, 2016 (“The Guidelines”) published by the Kenya judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows; (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.”

16. The Sentencing Guidelines thus provide a framework within which the Courts can exercise their discretion in a manner that is objective impartial, accountable, transparent and intended to enhance the delivery of Justice and Public confidence in the Judiciary.

17. In the Francis Muruatetu Case (supra), the Supreme Court citing Spence V. The Queen, Hughes V. The Queen (Spence & Hughes case) UR 2 April 2001 it was stated, citing Byron – C.J.

“In Order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislature or judicially prescribed principles and standards, and should be subject to effective Judicial Review, all with a view to ensuring that the death Penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the Death Penalty. Sections 216 and 329 of the Criminal Procedure Code makes mitigation part of the trial process.”

18. The Objective of sentencing as per the Judiciary of Kenya sentencing Policy Guideline No. 41 are:

- 1. Retribution: to punish the Offender for his/her Criminal conduct in a just manner.**
- 2. Deterrence: to deter the Offender from Committing a similar Offence subsequently as well as to discourage other people from Committing similar Offences;**
- 3. Rehabilitation: to enable the Offender reform from his/her Criminal disposition and become a Law abiding Person;**
- 4. Restorative Justice; to address the needs arising from the Criminal conduct such as loss and damages,**
- 5. Community Protection: to protect the Community by incapacitating the Offender;**
- 6. Denunciation: to Communicate the Community’s’ condemnation of the criminal conduct.**

19. However, considering that the petitioner was convicted together with his wife who was placed on probation due to family considerations, in addition to the mitigating factors advanced herein I am of the view that the sentence of death imposed on the petitioner ought to be reviewed.

20. In effect I hereby set aside the death sentence and substitute it with twenty (20) years imprisonment to run from the date of conviction 29/03/2012.

21. The petitioner has already served seven (7) years imprisonment and will now serve the balance of thirteen (13) years.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant in person