



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.12 OF 2018.**

**BETWEEN**

**BAYA MAZERA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

In the instant petition, the Petitioner seeks resentencing following the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 of (2017) eKLR** declared the mandatory nature of the death sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void.

The rationale is that the mandatory nature of death sentence as provided for under section 204 of the penal code deprived trial courts judicial discretion to consider aggravating and mitigating circumstances to enable the court to impose an appropriate sentence based on the peculiar circumstances of each case. Thus, a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution.

A brief background of the matter is that the Petitioner was arrested and charged with robbery with violence contrary to **Section 296 (2)** of the Penal Code which was given file No. 4113 of 2001 in SRM's court at Mombasa. He was tried, found guilty as charged and sentenced to death which was later commuted to life imprisonment by the former president of Kenya, Hon. Mwai Kibaki. The Petitioner also appealed against the conviction and sentence but the same was dismissed by both appellate courts.

The grounds of petition according to the Petitioner are that the imposition of mandatory death sentence was arbitrary and unconstitutional, the execution of the same herein would amount to denial of the petitioner's right to fair trial under **Article 50(2)** of the Constitution; that he is very remorseful to this incident and he promised he will not engage in recidivism; that he has been in custody for the past 16 years and learnt a lot which the society can benefit from him and that he has lived peacefully within the penal institution with fellow inmates as well as prison authorities.

**Analysis and Determination**

The Petitioner's main dispute is that in view of the Supreme Court decision in **Francis Karioko 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.”***

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.**

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.”***

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. 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:

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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 while with others not party to this petition, robbed the complainant of money to the tune of Kshs. 22, 000/=, a few other items and during such robbery, they visited violence upon the complainant a fact which was confirmed by the medical officer during the trial court. The degree of injury was considered to be “harm”.

I have considered the Petitioner's mitigation that he is a first offender, he is remorseful, he has reformed and been rehabilitated during the time he has been behind bars. I have also complied with the provisions of Section 333(1) which states 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.”***

I have noted that the Petitioner has been in custody for approximately 18 years. 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.*

*In light of the foregoing, 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.”**

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 precedents of other judges in re-sentencing cases involving robbery with violence as indicated above. In the premises, I am satisfied that the period already served is enough punishment for the petitioner.

I hereby make the following orders;

**a) The sentence is hereby reviewed to the period already served in custody for 18 years.**

**b) The petitioner be and is hereby set at liberty unless otherwise lawfully held.**

**Dated, delivered and signed in open court at Malindi this 12<sup>th</sup> July 2019.**

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**R. NYAKUNDI**

**JUDGE**