



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 503 OF 2018

LESIT, J

IN THE MATTER OF: ARTICLE 22(1) 23(1)25, (a) (c)(d), 50(6)(a), 165,258 and 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 296(2) AND 203 AS READ WITH 204 OF THE PENAL CODE

AND

AND IN THE MATTER OF: SUPREME COURT JUDGMENT PETITION NO. 15 OF 2015 FRANCIS KARIOKO MURUATETU AND WILSON THIRIMBU MWANGI

BETWEEN

RACHO KUNO HAMESO.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING ON RE-SENTENCING

1. The Petitioner was charged with one count of murder contrary to **Section 203** of the **Penal Code**. His case was heard by this court and on 25th February, 2011 he was convicted for the offence and sentenced to death.
2. He filed an appeal against the conviction and sentence. The same was heard by the Court of Appeal and was dismissed in its entirety on the 24th day of October, 2014.
3. The Petitioner has now filed an Application dated 30th August 2018, brought under **Articles 22(1), 23(1) 25(a)(c)(d), 50(6)(a) 165, 258 and 259 of the Constitution of Kenya; and sections 296(2) and 203 as read with section 204 of the Penal Code.**
4. The Petitioner has invoked the judgment of the **Supreme court in Petition 15 of 2015 Francis Karioko Muruatetu and Wilson Thirimbu Mwangi**. The correct case number for the Supreme Court case cited is **nos. 14 and 15 of 2016** both consolidated.
5. The Petitioner seeks that this court call for and review its orders pertaining the death sentence. The Petitioner seeks a relief pursuant to the order made by the Supreme Court in **Francis muruatetu case supra** with regards to the fact that the Petitioner was entitled to be heard in mitigation and subsequent thereto re-sentencing by the trial court.
6. The Petitioner was allowed by this court to approach the court, and was heard as requested in his Application.
7. The Petitioner who is self-represented in this petition in his address in mitigation urged the court to consider that he admits to having committed the offence; that he was remorseful for having killed a village mate and was seeking forgiveness. The Petitioner submitted that he had reformed and promised never to commit such an offence again. The Petitioner stated that his death sentence was commuted to life imprisonment by His Excellency the President.

8. Regarding his personal circumstances, the Petitioner urged that he was a family man with children who were suffering in his absence. He further urged that he has ageing parents who needed his care. He urged that he was therefore seeking a second chance so that he could be of help to his family.

9. Learned Prosecution Counsel Ms. Onunga in response urged that the life of a young person was lost unlawfully. She submitted that the deceased suffered injuries that were so severe because time was spent to forcefully remove the axe from the deceased head. Counsel urged that the Petitioner was not remorseful and that he went into hiding for 9 days before the police finally caught up with him.

10. Counsel further urged that the family of the deceased was duly affected by the death of the deceased. This was because he was their bread winner and was providing for them from the money he got from his casual labour. Counsel urged the Court to consider that the Petitioner had already benefited from the reduction of his death sentence to that of life imprisonment and the court should maintain the life imprisonment sentence.

11. I called for a Pre-Resentencing Report and one dated 28th June 2019 was filed. I have considered the Petitioner's personal background as outlined in the report. He is a 1st born in a family of 6 siblings and a class four school dropout. He is a polygamous man married to two wives and a father of five (5) children sired from both marriages. The report explains that the Petitioner admits the offence and further stated that he is remorseful for having killed a village mate. The report also states that the Petitioner has successfully reconciled with the deceased family through one of his brothers.

12. The Probation Officer's Report brought to light the fact that the Petitioner has while in prison acquired a certificate in Islamic Religious Studies. The report further explained that the petitioner and has been deployed as a facilitator in the mosque at Kamiti prison where he is charged with the responsibility of teaching Islamic classes and mentoring on Islamic matters. The Petitioner explained to the Probation Officer that he has learnt positive inter-personal skills, self-control skills, tolerance and anger management skills. He believes he is now fully rehabilitated.

13. There is a Victim Impact Statement by the brother of the deceased. He states that the family of the Petitioner and that of the deceased are now in good terms and were participating in several joint activities. The report explains that the deceased family and the Petitioner herein signed an agreement at the prompting of the probation office acknowledging the forgiveness by the deceased family.

14. The probation officers report has recommended for a favorable re-sentencing citing the facts that; there is no bad blood between the deceased family and that of the Petitioner and the fact that the petitioner herein has undergone character transformation and embraced what he termed as positive values.

15. I have taken into consideration all the relevant factors, the Petition, the Pre-Resentencing Report and sentiments of the prosecution and the Victim Impact Statement.

16. The court has also considered the Petitioner's age. He is 45 years old. The court has considered his health status. The court has also considered the time the Petitioner has been in custody since he was sentenced on 25th February 2011 to date, a period of 8 years and 4 months.

17. I have also considered that during the pendency of his trial, and having taken plea on 3rd April 2009, the Petitioner was in remand. This is because at the time, the law did not allow for grant of bail to persons charged with capital offences. The Petitioner has therefore been in custody for approximately 10 years and 3 months running from date of arraignment to date.

18. I have considered the fact that the Petitioner left 5 children of tender years some of whom have since grown up and are almost through with their education. I have also considered the fact that two of the 5 children who were newly born at the time are now 12 years and 10 years respectively and have been brought up by their uncle having been abandoned by their mother after the Petitioner was convicted.

19. The Supreme Court in the Muruatetu case, supra, provided that the trial court is required to hear a convicted person on mitigation before meting out a sentence. That way the court will not miss out on relevant information especially actual circumstances of the case from the convict's view point. There may be relevant information in the mitigation statement which may guide the court to understand the circumstances behind the offence and pass the appropriate sentence.

20. The Petitioner in his answers of inquiry from the Probation Officer in the Pre-Resentencing Report told Mr. Andrew Kanyutu that he was defending himself from the deceased who had come to support his father. He stated that he had picked an argument earlier with the latter.

21. I have considered the circumstances that led to the deceased death. The Petitioner hit the deceased once on the head with an axe. There was no apparent form of provocation. The axe got stuck on the deceased head and it took time to have it removed. One can only imagine the excruciating pain the deceased went through given the fact that he died three days later while undergoing treatment.

22. I have heard the Petitioner's plea for forgiveness and for leniency. I also appreciate and commend the effort of the petitioner to reach out to the family of the deceased for forgiveness. The family of the deceased seem to have buried the hatchet and forgiven the petitioner and are coexisting together in harmony.

23. Having considered all, I find that the Petitioner deserves to have the life sentence that he is currently serving interfered with. However, it is too early to release the Petitioner from prison. He should spend a little more time in prison in order to appreciate the magnitude of what he did and the value of life.

24. Consequently I hold the view that the Petitioner should serve 17 years imprisonment from date of arraignment before this court on 3rd

April, 2009 and without remission. The life imprisonment he has been serving after the death sentence was commuted through the **POMAC** no longer applies and is accordingly set aside.

25. Those are my orders.

DATED AT NAIROBI THIS 10th DAY OF JULY, 2019.

LESIT J

JUDGE