REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 4 OF 2018

JAMES MWANGI WANJAMA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the Respondent

Petitioner in person

RULING

The Petitioner brought this petition for resentencing pursuant to the landmark decision of the Supreme Court of Kenya in **Francis Muruatetu & Another vs Republic, Petition No. 15 & 16 of 2015** which declared death sentence and the commutation of the sentence by an administrative fiat to life imprisonment unconstitutional, null and void. The Supreme Court's view was that the mandatory nature of the death sentence under section 296(2) of the Penal Code jettisons the discretionary powers of the trial court forcing it to mete out pre-determined by the legislature. This interferes with the doctrine of separation of powers.

Further, the mandatory sentencing violates the right to a fair trial enshrined in terms of Article 50(2) of the Constitution of Kenya. This is because the sentencing process (which involves mitigation) is part and parcel of the right to a fair trial. The Supreme Court in coming up with the decision in **Muruatetu Case,** was also influenced by the case of **Godfrey Ngotho Mutiso v Republic, CRA No. 17 of 2008** where the judges of appeal reasoned that uniform sentences deprive the courts of the ability to consider mitigating circumstances and fail to appreciate that sometimes there may be unequal participation in a crime which would result in different charges and sentences.

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.***
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> ***(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 15th 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 principle of proportionality in sentencing requires that the sentence to be imposed by the court in exercise of discretion should correspond with the gravity of the offence.

I now consider whether the petitioner in the instant matter is entitled to benefit from the foregoing jurisprudence. The Petitioner is asking this court for this court to allow this matter to be remitted to the Principal Magistrate Court for re-sentencing after having received or heard evidence of mitigation. The Petitioner was arrested and charged in Malindi Criminal Case No. 378 of 2007. He was then tried, convicted and sentenced for the offence of robbery with violence contrary to section 296(2) of the Penal Code whereinafter was sentenced to suffer death.

The facts of the case which culminated into the petitioner's conviction and sentence were that the Petitioner and his colleagues robbed, while armed with pistols robbed several complainants of their personal items (including phones and money) at Flamingo House and during such robbery, they visited actual violence upon the complainants. I note that the Petitioner and his colleagues were charged with the offence of robbery with violence, the sentence of which was later declared unconstitutional by the Supreme Court in Muruatetu Case.

Sentence

The accused has submitted the following mitigating factors to warrant the sentence to be varied or substituted with any other sentence with that of the death penalty:

1. He is a first offender.

2. He is remorseful and regrets the offence.

3. Following his arrest on 15th February 2007 he was never released on bail and therefore in terms of Section 333 (2) of the Criminal Procedure Code a remission for that period should be taken into account.

4. That during the period under review he has undergone transformation and ready to reintegrate with his family and the community.

From the record, I consider the following to be aggravating factors as against the mitigation offered by the petitioner:

a) Robbery with violence is a serious offence by this nature and circumstances against the victims.

b) The offence was committed while armed with dangerous weapons.

c) There was infliction of physical harm to the victims of the robbery.

I agree with the submissions by the petitioner that the decision in **Muruatetu case** though founded under Section 204 of the Penal Code it has been endorsed in regard to specific sentences to apply to enable the trial court exercise discretion to impose an alternative sentence depending on the aggravating and mitigating factors of the offence. The sentencing court also looks at any other extenuating factors and personal circumstances of the offender likely to influence a fair, a just and proportionate sentence for the offence.

Having considered that am bound by the judicial precedent, it is my duty to apply the **Muruatetu** principle in re-sentencing the petitioner. There is no dispute that the balancing act in sentencing may nonetheless be a difficult one particularly taking into account one of the key objective of criminal law is to punish crime.

An appropriate sentence basing on the mitigating and aggravating circumstances in my view falls within the custodial sentences. As a result, the petitioner's death penalty is hereby varied and substituted to a term of imprisonment of 15 years with effect from the 15th of February 2007.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2019

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R. NYAKUNDI

JUDGE