



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 59 OF 2018

PETER MURIUKI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Petitioner, Peter Muriuki was with 5 other persons charged with 4 counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The charges against 3 accused persons were however withdrawn. The offence took place on 12.2.07. The Petitioner and others while armed with pistols raided Flamingo House at Kwa Domo, Malindi, ordered all the foreign house guests therein to lie down and robbed them and the employees of various items including money, mobile phones, jewellery and personal documents. They were convicted on counts 2, 3 and 4 and accordingly sentenced to death on 4.2.10. The sentence in respect of counts 3 and 4 were held in abeyance.

2. The Petitioner and one of his co-accused James Mwangi Wanjama appealed to the High Court but the appeal was dismissed on 21.9.10. The duo's further appeal to the Court of Appeal was similarly dismissed on 26.6.13.

3. Following the Supreme Court's decision in Francis Karioko Muruatetu & Another vs. R [2017] eKLR, the Petitioner has now approached this Court for seeking that his sentence be replaced with the period already served. The Petitioner's case is that when he was arrested on 14.2.07 he was 27 years old. He has been incarcerated for the better part of his youth. He appealed to the leniency of the Court. The Petitioner is remorseful and regrets the circumstances that led to the offence. During the period of his incarceration, he has exhibited good conduct and was given rank of trustee by the Commissioner of Prisons. He has also undertaken industrial and vocational training and is the Malindi Main Prison leader and patron of the Seventh Day Adventist Fellowship. He pleaded with the Court to give him a second chance at life.

4. The Respondent is not opposed to the Petition. In submissions filed on 10.9.19 and highlighted by Counsel on 11.9.19, the State urged the Court to be guided by the Muruatetu case and substitute the death sentence for a reasonable sentence.

5. In the Muruatetu Case, the Supreme Court declared the mandatory death penalty for murder as unconstitutional. The Court rendered itself thus:

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

a) 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.

6. At paragraph 69, the Court was careful to caution that it did not outlaw the death penalty but held that the penalty could still be meted out as a maximum punishment at the discretion of the Court. The Court stated:

[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.

7. The Court further set out mitigating factors to be considered during a hearing for resentencing but noted that they were advisory and not mandatory and did not take away the discretion of the Court. The Court stated as follows:

[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- 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.

8. The resentencing report by the probation officer dated 10.9.19 states that the Petitioner's family have been in contact with him and are eager to have him released. The Petitioner is remorseful and understands the consequences of committing the offence. He has been of good behavior and has gained skills in biblical studies, health, alternatives to violence and first aid. The officer in charge of Malindi Main Prison stated in a recommendation letter dated 9.5.19 that the Petitioner had been made a trustee which is the highest hierarchy stage among prisoners. He has not violated prison rules and regulations and has acquired skills while in prison.

9. The Court has considered the Petition, the submissions by the Respondent, the recommendation by the Prison authorities as well as the probation report. The Petitioner has been incarcerated since 2010. He has spent his youthful years behind bars. He has been of good conduct and is remorseful. The Court has considered that though he had a pistol when he committed the offence, the Petitioner did not use the same on any of the victims. It is further noted that the Respondent is not opposed to the Petition. The Court is of the view that after 19 years in prison, the Petitioner has paid his just debt to society.

10. Having considered all the factors herein and being duly guided by the holding of the Supreme Court in the Muruatetu case, this Court favourably considers the Petitioner's application for re-sentencing. The Petitioner's sentence is hereby commuted to the period already served. He is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED in MALINDI this 13th day of September 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondent**

..... **Court Assistant**