REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 17 OF 2016

(CORAM: NYAKUNDI. J)

IN THE MATTER OF ARTICLES 20(1), (2), (4), 22(1), (3)(C) OF THE CONTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER ARTICLES 23(1), (3), 25(A) (B) AND (C), 27(1), (2), (4), 28, 29(A) (C) (F), 35(1) (2), 48, 50(1), (2), 6(A) AND 23 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 258(1)(3) OF THE GENERAL PROVISIONS OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 204 AND 259 OF THE PENAL CODE AND SECTION 216 AND 329 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

SAID BAYA.....1ST PETITIONER

GUNGA BAYA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the Respondent

1st Petitioner

2nd Petitioner

RULING

The Petitioners herein were initially charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. They were tried and convicted as charged by the High Court sitting at Malindi (Meoli, J.) after which they appealed to the Court of Appeal were their conviction was upheld. They have now filed the instant appeal for re-sentencing pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic, Petition No. 15 & 16 of 2017* seeking several orders:

> **a) That this Honourable Court invokes its jurisdiction conferred to it by Articles 19(3) (a), 20(1), (2) and 27(1), (2), (4) of the Constitution and declare that the petitioner is entitled to the right and that the Petitioners qualify to benefit from the jurisprudence and order number (122)(a)(b) of the Supreme Court of Kenya decision in *Muruatetu Case (supra).***

b) That this matter be allowed to be remitted back to the trial court, so that the presiding judge may re-hear, receive and record such evidence and submissions as maybe presented and made for purposes of passing an appropriate sentence.

c) **That the individualized sentence should consider or take into account the jail period already served by the Petitioner, the order be compatible and applicable to remission rules on the re-sentence in compliance to section 46 Prisons Act Cap 90, that the order should take into account the individual age of the Petitioners as at the conviction was recorded up to the due date of the hearing and determination of this petition.**

The Supreme Court's view in *Muruatetu Case* 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.

(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.

In the instant matter, the Petitioners' sentence to death qualifies for review by this court following the decisions in the foregoing cases that I have considered. The facts are that on the 2nd day of August, 2012 at Bomani village, Magarini District within Kilifi County, jointly with others not before court murdered John Baya. Evidence suggests that the murder was orchestrated by a land dispute between the Petitioners and the deceased. It indicates that the deceased owned a piece of land upon which the mother of the two Petitioners lived and he seemed determined as he evicted the said mother and the wife of the 2nd Petitioner.

This action angered the 2nd Petitioner who vowed to one of his relatives (PW3) that he was going to finish him. On the night of 2nd August, screams were heard after which the deceased went missing for about three weeks. The decomposing body of the deceased was later recovered in a hole within a thicket packed in a gunny bag and, with legs trussed. The same was in the vicinity of the family home. The Petitioners were later arrested, charged and found guilty of murder after which they were convicted and sentenced to suffer death. Having been dissatisfied by the trial court judgement, the Petitioners appealed to the Court of Appeal against both conviction and sentence. The same was dismissed and the conviction and sentence upheld.

It is my view that the circumstances of this matter were quite aggravating considering the manner in which the murder was carried out. The Court requested for a re-sentencing report which was furnished to it. It avers that the 1st Petitioner is relatively young as he is 26 years of age and he was 19 years old when he committed the crime. He is a first offender and had no previous criminal record. He was a student at the time of committing the offence. The re-sentence report concludes that the 1st Petitioner exhibited remorse for the offence he committed saying that it was in the heat of passion since the deceased had been continually harassing his mother and had eventually tried to expel her from their land. It also concludes that the Petitioner committed the offence with his elder brother whom he looks up to and this would have influenced his actions.

Further the re-sentence report indicates that a letter from the officer in charge (SSP) dated 11/02/19 indicated that the 1st Petitioner is a hard

worker and has displayed good conduct while in prison. He has so far spent seven years behind bars since his arrest. It is also indicated that as a result of the offence and the incarceration, he has lost out on continuing with his education and productive years of his life.

The re-sentencing report of the 2nd Petitioner also shows that he is relatively youthful. He is thirty years of age and he was aged 23 at the time of the commission of the offence. He is a first offender with no previous criminal record. The rest of the account is identical to that of the 1st Petitioner.

I have also considered their mitigation filed on the 1st of February 2018. The Petitioners indicated that they are both first offenders, they prayed that the court do consider the seven years period already served, that their age at the time of the commission of the offence should also be taken into account, that they were of good character before the commission of the offence and that they are remorseful and regret having committed the offence. They vowed not to repeat committing any kind of atrocity again.

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 communicates the community's condemnation of the criminal conduct.

In light if the forgoing, Hon C. Kariuki in **Stephen Kimanthi 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 the circumstances under which the offence was committed, the submission on mitigation tendered before this court, the resentence report for both Petitioners. The court is entitled to take the seven years period that they have already served behind bars into consideration in terms of section 333(2) of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).

I have also taken into account the Court of Appeal decision post the Muruatetu Case (supra) provide some guidance on the appropriate sentence. In ***Jonathan Lemiso Ole Keni v Republic NRB Criminal Appeal No.51 of 2016 (2018) eKLR*** where the appellant shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment. In ***John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 (2018) eKLR,*** the Court of Appeal upheld a sentence of 25 years in a case of murder where the appellant assaulted the deceased several times causing his death.

In view of the fact that the murder is a very serious offence which involves loss of life protected under Article 26 of the Constitution. Life cannot be restored once terminated in unlawful circumstances like in the instant case. Weighing one factor after another within the range of aggravated and mitigation factors I re-sentence each of the petitioners to 30 years' imprisonment from the date of arrest.

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

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REUBEN NYAKUNDI

JUDGE