REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO. 711 OF 2018

BERNARD NJENGA MBUGUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Bernard Njenga Mbugua, the Applicant herein, was charged, convicted and sentenced for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He has now raised an application by way of Chamber Summons seeking re-sentencing. He has based his application on the Supreme Court decision ***Francis Muruatetu & another v. Republic [2017] eKLR.*** Before the application could be heard, the Mr. Solomon Naulikha, the Prosecution Counsel raised a Preliminary Objection. Counsel submitted that Article 165 of the Constitution of Kenya 2010 grants this court unlimited original jurisdiction in civil and criminal matters. He submitted that this court has powers on original matters; that the ***Muruatetu*** case did not take away the doctrine of *functus officio* nor did it amend Sections 347 to 352 of the Criminal Procedure Code with regard to appeals which sections are still applicable. He submitted that the ***Muruatetu*** case took away the mandatory nature of the death sentence. He submitted that the impact is that the ***Muruatetu*** case gave this court the discretion to pass any other sentence other than death. He submitted that Section 364 of the Criminal Procedure Code gives this court administrative power to call for and revise lower court matters. He submitted that a party with the opportunity to appeal a decision of this court cannot apply to have a matter re-opened by this court. He submitted that the accused was given 14 days to appeal the decision of this court and therefore he ought to move to the Court of Appeal which would then proceed to entertain the appeal or refer the case to the trial court. That order by the court of appeal would give this court the jurisdiction to entertain the matter. He submitted that revision is only applicable to active matters in court and not concluded matters. He urged that this application is pre-mature and that this court cannot entertain it because it became *functus officio* upon conclusion of this matter. He urged that without jurisdiction this court cannot proceed further and must down its tools.

Mr. Michuki appearing for the Applicant opposed the Preliminary Objection. He submitted that it is trite that sentencing is the jurisdiction of the trial court and that it a special discretion as the court has to consider several factors before imposing the sentence. He submitted that the Applicant came to court when it had no discretion to sentence him; that after the ***Muruatetu*** case the Applicant can now approach this court that would then consider the mitigation and pass the appropriate sentence. He submitted that the Attorney General is yet to set up a framework for re-sentencing and that parties have no recourse but to go back to the trial court. He submitted that the Court of Appeal is not the proper forum for this application and that for the Court of Appeal to come in it must find errors on this court in arriving at the sentence. He submitted that when the Applicant was sentenced, the law did not allow the trial court discretion in sentencing; that the Applicant's recourse to the Court of Appeal is curtailed. He urged this court to find that it is vested with the necessary jurisdiction and consider paragraph 41 of the ***Muruatetu*** case and hear this application.

I have considered the Preliminary Objection and the rival submissions in this matter. The import of the ***Muruatetu*** decision is that trial courts now have discretion in sentencing accused persons charged with offences that attract death sentences. Further death sentence still remains valid under the law but as the maximum penalty in deserving cases after the trial court has taken into account mitigating circumstances of each case.

The prosecution counsel in raising the Preliminary Objection submitted that this court lacks jurisdiction to entertain this matter because this court became *functus officio* after sentencing the Applicant. He submitted that this court can only take up a matter like this one and assume jurisdiction after the matter has been referred to it for re-sentencing hearing by the Court of Appeal. The Supreme Court, in the ***Muruatetu*** case, did not give guidelines as to how applicants should approach the trial court for re-sentencing hearing. In paragraph 111 of the ***Muruatetu*** judgment the Supreme Court stated as follows:

> ***It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentence 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. 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.***

As far as I am aware such framework is not yet in place, a fact alluded to by Mr. Michuki. The ***Muruatetu*** case therefore does not give guidelines on how to handle re-sentencing hearings. One would therefore argue that there is a lacuna. But this is not the case. Parties intending to have trial courts take on their matters on re-sentencing hearing were given that opening by the Court of Appeal sitting in Kisumu in ***William Okungu Kittiny v. Republic [2018] eKLR.*** In paragraph 11 of the ***William Okungu*** case, the Court of Appeal stated as follows:

> ***Although the appellants' appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.***

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.

It would seem that parties approaching the court for sentence re-hearing are properly before the courts. But this does not mean an automatic grant of the prayers they are seeking. Each case will have to be decided on its own peculiar circumstances. It is worth repeating that death sentence is still a valid penalty in deserving cases after the court has considered the mitigation of the party. Death penalty now remains as the maximum sentence a court can give.

In view of the reasoning above, I hereby dismiss the Preliminary Objection by the Learned Prosecution Counsel and direct that the application by the Applicant proceeds to hearing on merit because this court is seized with the jurisdiction to entertain it. Orders shall issue accordingly.

Dated, signed and delivered this 20th day of November 2019.

S. N. Mutuku

Judge