



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CONSTITUTIONAL PETITION NO. 14 OF 2019**

**JOSPHAT MURIITHI MBUYA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. The petitioner herein **Josphat Muriithi Mbuya** has petitioned this court to consider resentencing him pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.
2. The petitioner was convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code with the murder of Susan Karimi Mbuya. Having been found to be insane, the petitioner was sentenced to be held at the president's pleasure in accordance with Section 166 of the Criminal Procedure Code. Despite allegations by the petitioner, there is no evidence that the accused lodged any appeal or that the same have been entertained.
3. It is the petitioner's case that he had since healed of his mental illness as was evidenced by the report dated 14<sup>th</sup> May 2019; Dr. Thuo J.N. noted that the petitioner had been treated for a mental illness in Nyeri Level 5 hospital until 2008 and that he is currently "*good functioning in social and occupational functioning.*" He further stated that he was living well with fellow inmates.
4. Ms. Mati for the respondent did not oppose the petition but urged court to order a home inquiry report if it finds that the petitioner has served sufficient sentence. She relied on the cases of **Nairobi Constitutional Petition No. 570 of 2015** and the **Muruatetu (supra)** case.

**B. The Determination**

5. I have carefully considered the issue at hand. Under the proviso to **section 333(2)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, this Court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. I have noted that the Petitioner has been in custody for approximately seventeen (17) years since his arrest and first arraignment in court on the 16/10/2002.
6. The jurisprudence in death sentence has grown over the years making a milestone in the Supreme Court decision in the **Muruatetu case (supra)**. It was decided in that that mitigation in sentencing is part of the process of the right to a fair trial under Article 50(2) of the Constitution in offences of murder contrary to Section 203 as read with 204 of the Penal Code and of robber with violence contrary to Section 296(2) of the Penal Code.
7. The court is also alive to the judgment of the learned Mativo, J in **H.C. Constitutional Petition No. 570 of 2015- A.O.O& 6 Others v Attorney General & Another [2017] eKLR** which declared the sentence of holding a convicted person during the President's pleasure as unconstitutional. He held that it violated Articles 53(1)(f)(i) & (ii), 53(2) and 160(1) of the Constitution. The Articles relate to the rights of children and the manner by which judicial authority should be exercised. I need not restate them here as they were well articulated in that judgment.
8. That said though, the Petition related to instances in which the Petitioners were convicted of capital offence where death sentence was the mandatory penalty. I entirely concur with the learned judge in that a sentence to detention during the President's pleasure does not only amount to indeterminate sentence but implies that an accused remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the courts. Simply stated, it amounts to abdicating judicial authority to the executive. In buttressing this view Mativo, J cited **S v Tcoeib 1996(1) SACR 390 (NmS), 1996 (7) BCLR 996 (NmS)** in which it was held;

**“It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and unpredictable”**

9. I have carefully considered the Petition, submissions by parties and relevant judicial authorities on resentencing for similar offences. I have also considered the gravity and mental state of the accused and the time served in prison. I do find that it is judicious to give a definite sentence in cases concluded under Section 166(1) of the CPC. After so doing, the Court becomes *functus officio* and should let the executive carry out its obligation under Section 166(2) to (7) of the CPC.

10. In **Nelson Mwiti Gikunda & 2 Others v Republic [2018] eKLR** re-sentenced the petitioners to 25 years imprisonment commencing from the date of sentencing. The learned Judge had sought reliance in court of Appeal decisions in **John Ndede Ochola alias Obago v Republic -KSM C.A Criminal Appeal No. 120 of 2014 [2018] eKLR** and **Jonathan Lemiso Ole Keni v Republic – NRB C.A. Criminal Appeal No. 51 of 2016 [2018]** where the said courts upheld sentences of 25 and 30 years respectively. I am guided by the said authorities.

11. I have taken into account the mitigating and aggravating factors and giving credit to the time served as well as the time petitioner spent in custody pending the trial.

12. I also take into consideration the provisions of Section 46 of the Prisons Act which provides for remission of sentence for offenders other than capital offences. I am alive to the fact that Section 46(1) of the Act was declared unconstitutional for its exclusion of capital offenders from benefiting from remission.

13. Upon the court declaring Section 46(1) unconstitutional, the applicant herein who was convicted of a capital offence would have benefited from remission if he was to serve an imprisonment sentence upon this resentencing being allowed. Am aware that remission is within the mandate of the Commissioner of Prisons.

14. Having considered all the foregoing factors, I hereby set aside the sentence imposed by the trial court on 29/09/2006 and substitute it with twenty (20) years imprisonment. The sentence is hereby deemed to be fully served considering the seventeen (17) years already served by the petitioner.

15. The applicant is hereby set at liberty unless otherwise lawfully held.

16. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Lokorio for Respondent**

**Petitioner present**