



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL MISC. NO. 73 OF 2012

ALEX KATHURIMA MUTHURI.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

The applicant herein Alex Kathurima Muthuri was charged jointly with other suspects in Meru CMC CR.C. No. 1953 of 2001. At the conclusion of his trial he was found guilty. Convicted on 16th April 2002.

His appeal to the High Court CRA No. 85 of 2002 and to the court of Appeal No. 32 of 2004 were dismissed and conviction and sentence upheld on 23rd September 2004 and on 27th October 2006 respectively.

When he exhausted his rights of appeal the applicant file in this court a Notice of Motion dated 13th November 2012 pursuant to Articles 20(3), 8(4), 21(1)(3) and 4. 22 12(b), 3(c) as read with S.165; Article 50(6)(a) (b); S.19 of the 6th Schedule of the Constitution of Kenya 2010 as read together with supervisory Jurisdiction and protection of all rights and fundamental freedoms of individuals. He seeks that the court orders another hearing.

In the Notice of Motion dated 17th November 2017 the applicant seeks that the court requests for OB dated 14/15th August 2001 at Meru Police station and summon PW1 and PW2 who have been disturbed, aggrieved and seeking how the truth of this matter that has deprived them of peace can be settled, which is evident in prison visiting records where the family have been visiting him with apologetic sentiments which he would like them to tell the court.

He also sought that under Art 159(1) and (2) (a) (b) the court summons the Gikurwi elders or visit the villages to enable him produce new and compelling evidence because he was framed due to an approximately 2-3 months pregnancy of the complainants wife whom he was social with and on suspicion the complainant framed him to disable his progress and break suspected love triangle. The applicant supported the motion with an affidavit containing similar averments as the grounds on face of the motion. He also filed what he titles as supplementary submissions seeking that his sentence be revised in consideration of the Supreme Court decisions No. 4. 16/15 in Francis Karioko Muruatetu and Another vs Republic and No. 4 of 2015 Douglas Muthaura vs Republic.

Mrs Mwathi in response made oral submissions and send the applicant had not adduced any new evidence for the application to succeed or to warrant an opportunity to be heard again. That the High Court and Court of appeal were satisfied that the applicant was properly convicted and discussed widely the issue of sole witness Mrs Mwathi for state argued that application had moment. She further submitted that applicant had not given a reason for recalling PW1 & PW2 or even production of OB.

She argued that allegations of complaints pregnancy was not raised by applicant at trial or even on the 2 appeals and can't be relied upon now as it is an afterthought. The applicant in response said he was of tender age by the time he gave his defence of alibi and he panicked. Applicant said his new and compelling evidence is with PW1 and PW2 and the court should reconsider calling them. He said he had been in custody since 2001 after he was arrested together with his brother who released after investigation.

In consideration of the application herein and in consideration of the submissions thereto this court finds that the applicant has not established a case to warrant application of Article 50(6) of the Constitution of Kenya 2010.

However in consideration of the Supreme courts determination that the mandatory death penalty under S. 204 of the penal code deprives the court of the use of Judicial discretion in Petitions No. 15 and 16 of 2015 – Francis Karioko Muruatetu & Another vs Republic and inconsideration of the determination of the Court of Appeal CR.C.No. 56 of 2013 in which the case of Godfrey Ngotho Mutiso Mutiso vs Republic – CR. A. No. 17 of 2008 was referred to construing that the decision of the in respect Supreme Court to S.204 Penal code applies to

section 296(2) and 297 (2) of the penal code. I do find that this court has jurisdiction to reconsider resentencing of applicant and do hereby set aside the death sentence and replace it with imprisonment for 20 years considering he has already been in custody for a period of more than 17 years.

HON. A.ONG'INJO

JUDGE

Ruling Signed, Delivered and Dated this 10TH Day of MAY 2018.

In the presence of:

Applicant: Present in person

Mrs Mwathi for state/Respondent – Present in person

Applicant

I pray that I be supplied with a copy of the ruling.

Order

Copy of ruling to be supplied to applicant.

HON. A.ONG'INJO

JUDGE