



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. 40 OF 2018**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**JOHN KIREMA KAIBI.....PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The matter before the court is a petition for resentencing necessitated by the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR declaring the mandatory death sentence of the offence of murder unconstitutional.

2. The petitioner, **JOHN KIREMA KAIBI**, was charged, convicted and sentenced to death for the offence of murder contrary to **section 202** as read with **section 203** of the *Penal Code (Chapter 63 of the Laws of Kenya)* at a trial before the High Court at Meru in *Criminal Case No. 28 of 2004*. He appealed against the conviction and sentence to the Court of Appeal in *Nyeri Criminal Appeal No. 117 of 2011*. The appeal was dismissed on 4<sup>th</sup> July 2013 hence this petition.

3. The case against the petitioner is that he murdered his wife, Rose Makena, on 10<sup>th</sup> December 2013 at Lachathuriu Sub-location, Athwana Location, Meru North District of Meru County. The testimony of the various witnesses was that the petitioner and his wife would quarrel, fight and make up from time to time. On the night in question, the petitioner's sister and mother told the court that he became violent and started beating the deceased with a stool until it broke. They also witnessed him beat her with a stick. They tried to stop him but the petitioner locked himself in his house with the deceased. It is only later that the deceased was found lying dead in the matrimonial bed. The trial judge came to the conclusion that the evidence irresistibly pointed to the petitioner as the person who murdered the deceased

4. In the plea before this court, the petitioner told the court that he had been in prison for 14 years and that he had reformed. He further stated that he had young children. He pleaded for leniency on the ground that on the night he committed the offence, he was under the influence of alcohol. Counsel for the State submitted that a life sentence in this case was most appropriate as a life had been lost and that there was nothing to show that he had reformed.

5. I wish to emphasise that the petition is one for resentencing not clemency. The petitioners have already had the benefit of their respective death sentences commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under **Article 133** of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional.

6. The *Sentencing Policy Guidelines, 2016* ("the *Guidelines*") published by the Kenya Judiciary state (at para. 4.1) that the sentence imposed must meet the following objectives;

- Retribution; To punish the offender for his/her criminal conduct in a just manner.
- Deterrence; To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.
- Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

- Restorative justice: To address the needs arising from criminal conduct such as loss and damages.
- Community protection: To protect the community by incapacitating the offender.
- Denunciation: To communicate the community's condemnation of the criminal conduct.

7. As the **Guidelines** (para. 4.2) state, “*These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality.*”

8. The **Guidelines** provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fifth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact the death penalty would be declared unconstitutional, the Court in the **Muruatetu Case (Supra at para. 71)**, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (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.

9. The Supreme Court emphasized that the **Guidelines** do not replace judicial discretion. They are intended to promote transparency, consistency and fairness in sentencing. In addition, the court noted the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

10. I now turn to the sentence to be imposed on the petitioner. The starting point of this inquiry is that although the mandatory death penalty has been declared unconstitutional, the death penalty still exists as the maximum sentence for murder under **section 204** of the **Penal Code**. From the record, the petitioner was a first offender and although the fight between the parties would ordinarily be considered a mitigating factor, the violence inflicted on an intimate partner is in my view, an aggravating factor.

11. I also note that petitioner was in pre-trial custody from 2004 when he was charged upto the time he was convicted and sentence in 2011, a period of 7 years. The court is entitled to take this period into consideration under **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

12. Finally, some Court of Appeal decision post the **Muruatetu Case (Supra)** provide some guidance on the appropriate sentence. 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 **Jonathan Lemiso Ole Keni v Republic NRB CA 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.

13. I have taken into account what I have stated. I re-sentence the petitioner to **13 years' imprisonment** commencing the date of sentence in before the trial court that is from **26<sup>th</sup> May 2011**.

**SIGNED AT KISII**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MERU this \_\_\_\_12<sup>th</sup> \_\_\_\_ day of \_\_\_\_July \_\_\_\_ 2018.**

**A. MABEYA**

**JUDGE**

Petitioners in person.

Mr Kiarie, Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.