



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL PETITION NO. 12 OF 2018

PAUL KOSGEI KIBET.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner (**PAUL KOSGEI KIBET**) has petitioned this court seeking orders for resentencing having exhausted all his avenues of appeal and failed,

b) A declaration that based on the Supreme Court's decision in ***Francis Karioko Muruatetu and two others v Republic (Pet No 15 of 2015)*** and the Court of Appeal decision in ***Kisumu Criminal Appeal No.56 of 2013 William Okungu Leting V Republic***, he is entitled to have the death sentence meted in **Eldoret H.C.C.R case No. 20 of 2007** reviewed and set aside, incidentally the sentence was commuted to life sentence by dent of presidential clemency.

c) A declaration that under Art 50 (2) (P) and Section 333(2) of the CPC the period he has spent in custody prior to the sentence hereof i.e from the year 2007 to date, making it a total of 11 (eleven) years be deemed as adequate punishment.

2. It is his contention that this court's jurisdiction to hear and determine application for redress on denial or infringement of a threat to a right of breach of fundamental freedom in the Bill of Rights is well enshrined in Article 165(3) of the Constitution which provides;

Subject to clause (5), the High Court shall have-

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation.

Moreover that article 258 (1) of the Constitution, recognizes the right to institute such proceedings.

The background to this petition arises from **HCCRC case No. 29 of 2007 R VS PAUL KOSGEI KIBET**, where the petitioner was charged

with murder Contrary **Section 203** as read with **204** of the **Penal code**.

The particulars were that on the night of 23rd and 24th March 2007 at **NDULELE** Sub-Location, **KABIYET** Location in **NANDI NORTH** district within **RIFT VALLEY** province, he murdered **EMMY JEMUTAI**. Incidentally he had initially been charged for the offence of manslaughter vide Kapsabet Crc. No. 1402 of 2007 before the same was substituted to murder.

3. The deceased was asleep in house where the petitioner was also sleeping when **LUCY SIGEI** who was sleeping in an adjacent house heard the deceased shouting.

“Sigei come and help me for I am being killed.”

When Lucy ventured out, she found the accused stepping on the deceased who lay on the floor. Attempts by Lucy to rescue the deceased by pulling her away from the petitioner failed – instead the petitioner pulled the deceased to a grazing area three metres away. The deceased begged Lucy not to leave her alone, but the petitioner pulled the deceased away – although eventually she managed to pull the deceased to a place where there was a barbed wire fence.

4. This was confirmed by **CECILY KIPLEKEI KEINO** (PW2) who arrived at the scene after being woken up by shouts and she saw the petitioner beating the deceased, who was calling out for help. When Cecily requested the petitioner not to beat the deceased he said he was doing his own things. Cecily cautioned the petitioner saying it was bad to kill and he should not kill his wife.

5. The cries of the deceased also attracted **GEOFFREY TERGAT** (PW3) who found the petitioner and deceased fighting. The deceased was crying and asking for help but the petitioner warned those at the scene, not to venture into his compound.

Even attempts by one **EMMANUEL KIPCHIRCHIR BOIT** (PW4) to intervene failed and the petitioner continued beating the deceased, it was only at 4.30 a.m that the petitioner upon realizing the extent of his actions, went to seek help to take her to hospital. She succumbed to her injuries which involved deep cut wounds on the forehead, hips and multiple injuries all over the body – she also had a broken leg.

6. The petitioner’s defence was that when he woke up to smoke a cigarette he heard movements and murmurs from his wife’s bedroom and as he went towards the bedroom, he found his wife and another man. He attacked the man who managed to escape. A fight then erupted between him and his wife, who managed to slip from his grip and flee.

In the process she stumbled and fell into a ditch and injured her leg. He maintained that he did not intentionally kill his wife, as he had never had any confrontations with her in the past, and he was not armed.

7. The judge found that the injuries inflicted on the deceased were so severe and serious, they could not have been just a mere fight or domestic brawl between a husband and wife. The injuries were described as being inflicted by a person bent on executing grievous harm if not death, and the medical report clearly indicated the deceased was beaten to pulp.

8. I have alluded to this background, because in a re-sentence hearing, it is important to consider the circumstance’s surrounding the incident and weigh whether perhaps a sentence other than death would be apt to the situation.

9. After sentence, the petitioner appealed to the Court of Appeal vide **CA No. 126 of 2011** which was dismissed as lacking merit. The death sentence was commuted to life imprisonment by the Head of State.

10. In opposing the petition, **MISS MUMO** on behalf of the State submitted that this court is functus officio as the petitioner was duly tried and sentenced, and the sentence was re-affirmed by the court of appeal thus rendering this court functus officio.

11. It is her contention that there is no evidence of fundamental rights or freedom being infringed or interfered with. Further that the Muruatetu case only declared that the mandatory nature of the death sentence was illegal but not the validity. She urged this court to be guided by decision of ***Kimondo ‘J’ in Eld. Misc. Cr. Appeal No. 79 of 2013*** which held that no rights or fundamental freedom had been violated in sentencing an individual to death.

12. The petitioner in response pointed out that Kimondo (J) decision was made in June 2015 and has been overtaken by the recent pronouncements of the Supreme Court and the Court of Appeal. The petitioner pointed out that when he filed an application before the court of appeal, he was given a go ahead to come to the High Court to be heard on the issue of sentence. I will not re-invent the wheel, the Supreme Court already rendered itself on the matter, in ***Francis Karioko Muruatetu and Anor’ V Republic [2017]*** eKLR- alluding to the United Nation Commissions on Human Rights recommendation regarding the abolition of the death penalty as a mandatory sentence in Human Rights Resolution 2005/59, and the right to life as a fundamental right under the Constitution of Kenya, as well as the sentencing policy guidelines. The matter is thus properly before this court.

13. At paragraph 71 in the Muruatetu case (supra) the court gave guidelines with regard to mitigating factors applicable be in re-hearing sentence for the conviction of a murder charge being:-

- 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.

14. These guidelines are not intended to take away the discretion of the court but are geared towards promoting consistency and transparency in sentencing hearings, and promoting public understanding of the sentencing process.

15. With regard to the death sentence, then this is an academic exercise since the petition sentence has already been commuted to life imprisonment. But even if this court were to consider the initial sentence and treat it as the basis of the petitioner's incarceration, it becomes apparent that he has not satisfied the guidelines observed by the Supreme Court – this was obviously a gender based violent situation where the hapless wife pleaded for help, and attempts to intervene by other third parties, including caution and pleas, fell on deaf ears. The petitioner has not suggested that he is remorseful instead finding fault for the sentence meted.

I do not think he is deserving of any further intervention.

16. As to whether the indeterminate nature of the life sentence also violates the right to dignity under Article 28 and subjects the petitioner to psychological torture, cruel, inhuman and degrading treatment or punishment as referred to under Article 29 of the Constitution of Kenya, the Supreme Court of Kenya considered the arguments on the matter, within the Muruatetu context.

17. The Supreme Court considered the practice in other jurisdictions which have refined their legislation on the life sentences so as to have a determined period constituting life imprisonment. The court pointed out that such an exercise is a legislative and not a judicial exercise – that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole.

Taking into account the circumstances under which the offence occurred, the nature of violence meted out – beating his wife to pulp (as described by the trial court), and also taking into account the upsurge of gender based violence, I am persuaded that the life sentence is apt and acts as a deterrent sentence.

18. Consequently the petition has no merit and is dismissed.

DATED, SIGNED and DELIVERED at ELDORET this 14th day of November 2018.

H. A. OMONDI

JUDGE