



REPUBLIC OF KENYA



KENYA LAW
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**Kitheka v Republic (Criminal Appeal 60 of 2016)
[2021] KECA 123 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 123 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 60 OF 2016
RN NAMBUYE, AK MURGOR & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

JOSEPH MUSYOKA KITHEKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Machakos delivered by (Thuranira, J.) on the 30th May, 2014 in High Court Criminal Case No. 66 of 2008)

JUDGMENT

1. Joseph Musyoka Kitheka, the appellant, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 5th day of July, 2008 at about 2 p.m. at Thua Location, Ngungi Sub Location, Nguuni Village, within Kitui County, he murdered James Kitheka (the deceased).
2. After hearing the case, and finding that the charge was proved to the required standard, the High Court convicted and sentenced the appellant to death as by law prescribed. Dissatisfied with that decision, the appellant has appealed to this Court against the High Court's decision.
3. When the appeal came up before us on a virtual platform owing to the Covid 19 Pandemic, learned counsel for the appellant, Mr. Ong'anya submitted that he would be relying solely on the grounds set out in the supplementary memorandum of appeal, which were in relation to the appellant's sentence. He submitted that the trial court sentenced the appellant to death because at the time, the court was not at liberty to exercise its discretion when sentencing under section 203 as read with section 204 of the Penal Code; that following the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015*, courts are now empowered to apply the principles that were laid out in that case to impose a custodial or other sentence instead of mandatorily imposing the death



penalty. Counsel urged that considering that the appellant was only 44 years old, the sentence of death should be set aside, or replaced with a custodial sentence having regard to the period already served.

4. On her part Mrs. Matiru, learned counsel for the State did not object to the appellant's submissions for review of the sentence to a custodial sentence, provided counsel submitted, that the term of imprisonment imposed was not less than 25 years.
5. We have considered the submissions of counsel, on the question of the sentence. Following conviction, the trial court sentenced the appellant to death. But since delivery of the High Court's judgment, the Supreme Court in the Muruatetu case (supra) concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. The Court explained itself thus;

“ Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.”

6. In the instant case, the High Court was restricted to sentencing the appellant with the mandatory death penalty as by law provided. Given that the Supreme Court has since found this to be unconstitutional, applying the principles set out in that case to the circumstances of this case, we find it necessary to review the sentence in accordance with the advisement set out above by the Supreme Court.
7. The record shows that the appellant had an opportunity to plead in mitigation where he stated that he was married with five children, and that his mother was a widow, all of whom depended on him; that his children were no longer in school. He further stated that the deceased was his younger brother, and that he was remorseful and suffered depression due to the loss of his younger brother; that the Court should also take into account that he was a first offender.
8. In view of the decision in the Muruatetu case (supra), we set aside the death sentence imposed and substitute it therefore with a custodial sentence of 25 years which period shall run from the date the appellant was taken into custody.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL



I certify that this is a true copy of the original

DEPUTY REGISTRAR

