IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED JJ.A.

CRIMINAL APPEAL NO. 56 OF 2013

BETWEEN

WILLIAM OKUNGU KITTINY.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya

at Kisumu, (Chemitei, J.) dated 28th January, 2013

in

CONST. PETITION NO. 2 OF 2011)

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JUDGMENT OF THE COURT

[1] This is an appeal against judgment of the High Court at Kisumu, *(Chemitei, J.)* in **Constitutional Petition No. 2** of **2011**. The petition was filed by seven persons including the appellant who had either been convicted for offence of murder contrary to **Section 203** as read with **Section 204** of the Penal or for robbery with violence or attempted robbery with violence contrary to **Section 296 (2)** and **297 (2**) of the Penal Code and each sentenced to death. Each had appealed to the High Court and the High Court had dismissed the respective appeals. A second appeal by each to the Court of Appeal had also been dismissed. However, by the time the joint constitutional petition was filed, the respective sentences of death had been commuted to life imprisonment by the President in accordance with the law.

[2] The petitioners challenged the constitutionality of **Sections 204, 296 (2)** and **297 (2)** of the Penal Code and sought an order that their cases be remitted to the High Court so that they can be afforded an opportunity to offer mitigating circumstances before sentencing. The High Court said in **paragraph 38** of its judgment:-

> **"It is my humble view that the death penalty and the sections of the laws that prescribe death sentence are not inconsistent or in contravention of the Articles 25, 26 and 29 of the Constitution."**

In particular, the High Court made a finding that **Sections 204, 296 (2)** and **297 (2)** of the Penal Code are not inconsistent with the constitution. In addition, the High Court said in paragraph 52:

> **"I am persuaded beyond any shadow of doubt that the words "shall" found under Section 296 (2) and 297 (2) are therefore unconstitutional. The same does not accord the convict an opportunity to mitigate and thus attain a fair trial."**

The Court made a specific finding that the word ***"shall"*** under the provisions of **Section 204, 296 (2)** and **297 (2)** of the Penal Code should be construed as **"may'.**

Nevertheless, the High Court rejected the prayer that the cases be remitted to the High Court for re-sentencing holding that finalized cases cannot be remitted to the High Court.

[3] All the seven petitioners filed notice of appeal. However, six of them except the appellant herein withdrew their respective notices of appeal and an order to that effect was made on 18th January, 2016. Subsequently, the Court assigned a counsel to the appellant.

[4] The memorandum filed by the appellant in person contains five grounds but only two are directly relevant. In ground 2, the appellant states that the High Court erred by finding that **Sections 204**, **296 (2)** and **297 (2)** of the Penal Code are not inconsistent with the Constitution without any clear interpretation. Further, in grounds 3, the appellant states that the High Court erred in finding that finalized cases could not be re-opened.

[6] At the hearing of the appeal, **Mbeka Alex**, learned counsel for the appellant referred to the recent decision of the **Supreme Court of Kenya** in **Francis Karioko Muruatetu & Another V Republic – Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015** *(Muruatetu's case)*. He submitted that in accordance with that decision, the matter should be referred to the High Court for hearing on the question of sentence. **Evans Ketoo**, the Prosecution Counsel concurred.

[7] In Muruatetu's case **(supra)**, the appellants had been sentenced to death for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. **Section 204** of the Penal Code provides:

> **"Any person convicted for murder shall be sentenced to death."**

After their appeals were dismissed by the Court of Appeal, they appealed to the Supreme Court. The main issue canvassed in the appeal was whether or not the mandatory death penalty is unconstitutional. The Supreme Court said at paragraph 48:

> **"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"**
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> At **paragraph 52**, the Supreme Court again said:-
>
> **"We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed."**

The full name of Mutiso case is **Godfrey Ngotho Mutiso V Republic – Criminal Appeal No. 17 of 2008**. The *ratio decidendi* of the **Muruatetu's** case is at **paragraph 69** where the Supreme Court stated:

"Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides the mandatory death sentence for murder. For avoidance of doubt, *this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment."

[8] Robbery with violence as provided by **Section 296 (2)** and attempted robbery with violence as provided under **Section 297 (2)** respectively provide that the offender:-

"…shall be sentenced to death."

The appellant was sentenced to death for robbery with violence under **Section 296 (2)**. The punishment provided for murder under **Section 203** as read with **Section 204** and for robbery with violence and attempted robbery with violence under **Section 296 (2)** and **297 (2)** is death**.** By **Article 27 (1)** of the Constitution, every person has *inter alia*, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

In the **Mutiso case** which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of **Section 203** as read with **Section 204** of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in **paragraph 111** referred to similar mandatory death sentences.

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in **paragraph 69** applies *mutatis mutandis* to **Section 296 (2)** and **297 (2)** of the Penal Code. Thus, the sentence of death under **Section 296 (2)** and **297 (2)** of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution. The judgment of Chemitei, J., appealed from is four years earlier than the decision of the Supreme Court. That decision is in conformity with the decision of the Supreme Court. Thus, the finding of Chemitei, J., that death penalty per-se under **Section 204** of the Penal Code is not inconsistent with the Constitution has been affirmed by the Supreme Court. By parity of reasoning the death penalty under Sections **296 (2)** and **297 (2)** is not inconsistent with the Constitution as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of **Section 204, 296 (2)** and **297 (2)** of the Penal Code on the death penalty fails.

[10] By paragraph 111 of the judgment, the Supreme Court allowed sentence re-hearing only for the two petitioners in the matter before it and said:

"In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidance for the disposal of the same. The Attorney General is directed to urgently set up a frame work to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence which is similar to that of the petitioners in this case."

[11] Although the appellants' appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By **Article 163 (7)** of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.

[12] From the foregoing, the learned judge having partly found in favour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the

Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu- **Criminal Case No. 181 of 2004** as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate.

Orders accordingly.

Dated and Delivered at Kisumu this 8th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.