Kimotho v Republic (Miscellaneous Criminal Application E269 of 2024)
[2025] KEHC 11991 (KLR) (Crim) (13 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11991 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION E269 OF 2024

AB MWAMUYE, J

AUGUST 13, 2025

BETWEEN

DANIEL NJOROGE KIMOTHO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein filed an application dated 16th July, 2024 seeking that he be granted a mitigation and resentencing hearing.

2. The Application is anchored on the grounds on its face and further supported with the annexed affidavit sworn by Daniel Njoroge Kimotho on 16th July, 2024 to which he avers that he was charged at the High Court at Milimani vide criminal Case No. 97 of 2006 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code.

3. The Applicant was arrested on 23rd June 2004 and was convicted and sentenced to death on 1st April, 2014. Upon being convicted, he appealed to the Court of Appeal at Nairobi vide Criminal Appeal No. 178 of 2016. On 8th February, 2019, the Appeal was dismissed. The record indicates, and the Respondent does not dispute, that the Applicant was in custody from the date of arrest to date.

4. Having exhausted all avenues of appeal, the Applicant has now moved this court for a mitigation and resentencing in accordance with the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR. He avers that he has been in prison since he was arrested in 2006 and that he has under gone various rehabilitative programs while in prison and thus urges this Honourable Court to review his sentence to a lenient one and consider the provisions of Section 333 (2) of the Criminal Procedure Code considering the fact that he has been in prison since 2006.

5. The Application was canvassed by way of written submissions and both parties complied by filing their respective submissions.

Applicant's Submissions

6. In support of this application, the Applicant filed his written submissions dated 4th December, 2024 to which he submitted that this court consider he is a first-time offender. He avers that he has been in prison for 21 years since he was arrested and that he has re-evaluated on his past life and greatly learnt from his past actions and he has turned over a new leaf.

7. The Applicant on his mitigation submitted that he is remorseful for having committed the offence. He further submitted that he is now 60 years old and he was married and had seven (7) children who all depended on him. He further alludes to have undergone various rehabilitative programs and he is now reformed. He argues that the skills he learnt will not only be useful to him but also the community at large as he will be able to teach other young people enabling them to be self-sustainable and prevent them from falling committing crimes. He therefore urged the court to consider Section 333 (2) of the Criminal Procedure Code.

8. With regard to sentence review, it was submitted that the court should consider the Applicant's interests geared towards promoting the offender's rehabilitation, transformation and reintegration. The Applicant relied on various authorities and thus urged this court to have mercy and humanity in meting out a sentence that will grant him an opportunity to rehabilitate and reintegrate back to the society.

9. The Applicant further submitted that this court should consider the circumstances of the offence and that the time served is sufficient. He argued that the he should be granted a lenient sentence and should it grant a higher sentence than the time already served in prison, it should grant him a non-custodial sentence for the remaining period.

Respondent's Submissions

10. The Respondent in its written submissions dated 12th February, 2025 submitted that the Applicant has not demonstrated that the trial took into account an irrelevant factor or a wrong principle was applied while being convicted and sentenced to warrant this Court's interference with the sentence. Moreover, it was argued that the Applicant has not demonstrated how the sentence is harsh and excessive considering the law provides for a death sentence for the offence committed.

11. It was submitted that the trial court was lenient while sentencing the applicant as he did not raise a concern that an irrelevant factor or wrong principle was applied while being sentenced. Additionally, it was argued that the trial court took into consideration the time spent in custody by the applicant since he was arrested as well as his mitigation.

12. The Respondent averred that pursuant to the findings of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, the Court despite declaring the mandatory nature of death sentence unconstitutional, it further stated that the order does not disturb the validity of the death sentence as contemplated under Article 26(3) of *the Constitution* and argued that death sentence is permissible if there has been a fair trial. The Court was thus urged to dismiss the applicant's application for lack of merit as the sentence was proper within the law.

Analysis And Determination

13. Having carefully considered the Application, the respective submissions, I find the issue arising for determination is whether this Court should interfere with the death sentence imposed on the Applicant.

14. This Court is being called upon to review and resentence the Applicant. The chronology of events as noted is that; the Applicant was convicted and sentenced on 1st April, 2014. He lodged his appeal before the Court of Appeal and on 8th February, 2019 the Court of Appeal dismissed it. The Applicant now seeks to rely upon the case Francis Karioko Muruatetu & Another vs Republic (Supra) to have this Court resentence him.

15. This Court notes that on 6th July 2021, the Supreme Court gave guidelines on the application of the Francis Karioko Muruatetu & Another vs Republic (Supra) decision. The apex Court issued the following directions: -

    16. To the extent directly relevant to the matters under review in these directions, we note the Attorney General in his Report, together with the Task Force recommended, that:

        a. Life imprisonment be substituted where the Penal Code previously provided for the death penalty, with the option of life imprisonment without parole for the most serious of crimes; and that if not abolished, the death penalty should only be reserved for the rarest of rare cases involving intentional and aggravated acts of killing.

        b. All offenders, subject to the mandatory death penalty, including those convicted and sentenced prior to 2010, who are serving commuted sentences, will be eligible for re-sentencing, including all offenders sentenced to death as at the time of the decision which was made on December 14, 2017.

        c. Where an appellant has lodged an appeal against a conviction and/or sentence, the appellate court must, at any stage before judgment, remit the case to the trial court for re-sentencing....."

    18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

        i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;

        ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;

        iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

        iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re- sentencing upon being satisfied that the appeal has been withdrawn.

        v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;(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)The manner in which the offence was committed on the victim;(g)The physical and psychological effect of the offence on the victim's family;(h)Remorsefulness of the offender;(i)The possibility of reform and social re-adaptation of the offender;(j)Any other factor that the court considers relevant.viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.ix.These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.

16. The effect of the above was that the apex Court clarified that the decision of Muruatetu 1, apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.

17. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.

18. The primary consideration in reviewing the Applicant's sentence is whether the imposition of the death penalty, in the specific circumstances of this case, was lawful, fair, and just in light of evolving constitutional standards.

19. In the present case, the Applicant has served 21 years in prison, is now 58 years old according to the records available and 60 years old by his own account and submissions, and has actively engaged in rehabilitative programs. He has demonstrated remorse, taken responsibility for his actions, and undergone a personal transformation. These factors are essential considerations under the modern sentencing framework, which emphasizes restorative justice and the potential for reformation.

20. The Respondent argues that the trial court properly exercised its discretion and that the Applicant has not demonstrated that a wrong principle was applied in sentencing. However, in light of Muruatetu's dicta, the Court must independently assess whether the death sentence imposed was a result of mechanical application or if genuine judicial discretion was exercised.

21. The Muruatetu decisions by Kenya's Supreme Court significantly altered the legal landscape on the mandatory death penalty. The first ruling, Muruatetu 1, delivered on 14 December 2017, declared the mandatory death sentence for murder under Section 204 of the Penal Code unconstitutional. The Supreme court held that judges must have discretion to consider mitigating and aggravating factors before imposing the death penalty, though it did not abolish capital punishment altogether.

22. The Supreme court also laid down guidelines for resentencing, requiring convicts to file individual applications in the High Court, with the involvement of the DPP and victims, while judges were to weigh relevant factors before deciding on new sentences.

23. In summary, Muruatetu 1 ended the automatic death penalty for murder, while Muruatetu 2 confined its application strictly to murder cases, excluding other offences. The death penalty remains lawful in Kenya, but its imposition is no longer mandatory, giving courts flexibility in sentencing based on the circumstances of each case.

24. The Court of Appeal in Thomas Mwambu Wenyi v Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Mahareshtra where the Court held the following on sentencing: -

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on the proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

25. It is the act of balancing the mitigating and aggravating factors that will guide me in determining what in my view is the appropriate sentence in the circumstances of the case. The Applicant has urged this court to grant him a lenient sentence, the learned counsel for the Respondent, urged this court to maintain the death penalty. Undoubtedly, the death sentence is still legal and can be handed down in deserving cases. The question that I must still answer therefore is whether this is a case deserving of the death penalty as submitted by the Respondent or whether I should impose a term sentence as proposed by the Applicant.

26. The Indian Supreme Court in Bachan Singh vs. State of Punjab (Bachan Singh) Criminal Appeal No 273 of 1979 AIR (1980) SC 898 aptly captured the issues at play when it held that:

> " But what are the special reasons for which the court may award death penalty is a matter on which Section 354 Sub-section (3) is silent nor is any guidance in that behalf provided by any other provision of law. It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide. the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers...Even if

considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty or to award the life sentence. But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the Court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die."

27. The court went further to discuss the circumstances under the ultimate death penalty may be imposed and opined that: -

> " A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

28. In my view the death sentence should not be meted simply based on the side of the bed the judge has woken up from. I would agree with the Supreme Court of India that such a life-ending sentence should be reserved for the rarest of rare cases. The question still remains whether the death penalty is befitting in the circumstances of this case.

29. The jurisprudence since Muruatetu has also emphasized the necessity for sentencing courts to assess an offender's prospects for rehabilitation. Sentencing courts must also consider proportionality and the principle that the punishment must fit not only the crime but also the offender. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. The said discretion however should only be exercised in deserving cases. (See Republic v Ruth Wanjiku Kamande [2018] eKLR). The Court must further have in mind the objectives of sentencing as laid down in the Sentencing Policy Guidelines, 2023 published by the Kenya Judiciary and which includes: retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration.

30. The emerging jurisprudence is an imprisonment to a period of between 20 to 40 years when resentencing a death penalty sentence to a determinate term, with the placement on the scale depending on the individual factors and circumstances of each particular case.

31. Having considered the records before me, the Applicant's advanced age, time already served, family obligations, his remorsefulness and rehabilitation evidence, all strongly tilt the scale toward a more proportionate sentence that upholds the rights of the convict while respecting public interest and justice. I also agree with the arguments that indeterminate life imprisonment and its related challenges.

32. From the foregoing, the Applicant's plea for sentence review is not only legally tenable but morally and constitutionally justifiable. The death sentence in this case, while still lawful under *the Constitution*, must be assessed in the lens of evolving human rights standards and recent jurisprudence, particularly the requirement of individualized and proportionate sentencing. The Applicant's rehabilitation, remorse, being a first-time offender, and time served make a compelling case for this Court to interfere with the original sentence.

33. Flowing from the above, I find that the death sentence was not appropriate in the circumstances of this case. As such, I set aside the death penalty, and in place substitute the sentence with twenty-three

(23) years imprisonment. Considering that the Applicant was in custody throughout the trial and to date, the sentence shall, in accordance with the proviso to section 333(2) of the Criminal Procedure Code, run from when the Applicant was first arrested, being the 23rd June, 2004.

Orders accordingly. File Closed Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS THIRTEENTH DAY OF AUGUST 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of:

Applicant – Daniel Njoroge present at Kamiti Maximum

Respondent: Ms Ntabo

Court Assistant: Ms Neema