



REPUBLIC OF KENYA



**Kisaka v Republic (Criminal Petition E033 of 2023)  
[2024] KEHC 760 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 760 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL PETITION E033 OF 2023**

**DK KEMEL, J**

**JANUARY 31, 2024**

**BETWEEN**

**CLEMENT WAFULA KISAKA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner herein Clement Wafula Kisaka filed the present Petition seeking for a re – sentencing in respect of Bungoma High Court Criminal Case (Murder) No. 36 of 2010. His case is that he was convicted and sentenced to death. That following the decision of the Supreme Court to the case of *Francis Karioko Muruatetu & 2 Others – VS- Republic* [2017] eKLR, he is entitled to have his sentence reviewed and he be given a definite sentence. That at the time of his conviction and sentence, he was still a minor and ought not to have been sentenced to death contrary to the provisions of article 53 (1) (2) of *the constitution* and the *children Act*. That he is a first offender, remorseful and has reformed while in prison.
2. Miss Mwaniki for the Respondent submitted that the circumstances of the offence were aggravating which justified the sentence. It was also submitted that even though the petitioner was aged 15 years at the time of arrest, he was an adult during the time of conviction and sentence. It was finally submitted that in the event that the request is allowed then the court should impose sentence of 40 years' imprisonment.
3. I have considered the petitioner's application and the oral submissions presented. It is not in dispute that the petitioner, upon conviction was sentenced to death by Aroni J (as she then was) on 2.11.2017 on the grounds that the sentence then provided by law in offence of murder is death. There was thus no mitigation offered and or considered by the court. It is not in dispute that the decision of the Supreme Court of Kenya in the *Muruatetu* case ( Supra) declared the mandatory nature of death sentence as unconstitutional and that the courts were no longer hamstrung as they had power to consider



mitigating circumstances of offenders before passing an appropriate sentence . It is not in dispute that at the time of the sentence in 2017, the mandatory sentence for murder was death. It is not in dispute that the petitioner has not lodged an appeal to the Court of Appeal. That being the position, the only issue for determination is whether the application has merit.

4. It is noted that the Petitioner was not given an opportunity to offer his mitigation before the sentence was meted. As the Supreme Court has opened a window for offenders serving sentences for murder vide its guidelines dated 6.7.2021, i am satisfied that the petitioner has properly approached this court. In order for this court to conduct a re-sentence hearing properly, it is necessary to call for a social enquiry report on the petitioner which will guide the court in arriving at an appropriate sentence.
5. In view of the foregoing observations, i find merit in the petitioner's application for re- sentencing. The same is allowed in the following terms;
  - a. The County Probation Officer Bungoma do file a social enquiry report on the Petitioner within 14 days from the date hereof.
  - b. Mention on 26.2.2024 for the sentence re- hearing.

**DATED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF JANUARY 2024**

**D KEMEI,**

**JUDGE**

**In the presence of:-**

Clement W Barasa Petitioner

Kibet for Respondent

Kizito Court Assistant

