



REPUBLIC OF KENYA



**Alara v Republic (Criminal Petition E014 of 2023)
[2024] KEHC 608 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL PETITION E014 OF 2023
DO OGEMBO, J
JANUARY 30, 2024**

BETWEEN

MESHACK ODUOL ALARA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant has moved this court by way of a Notice of Motion application dated 8.3.2023. The said application seeks that the Applicant be resentenced.
2. The application is supported by the Affidavit of the Applicant sworn on 8.3.2023 in which the Applicant has deponed that he was charged, tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. That he was sentenced to death.
3. The Applicant has filed submissions in support of his application. He has relied on Francis Karioko Muruatetu & Another v R (2017) eKLR. In his view, death sentence under Section 203 as read with Section 204 of the Penal Code is unconstitutional. Noting the Muruatetu case, he stressed:

“The mandatory nature deprives the courts of thier legitimate jurisdiction to exercise discretion not to impose death sentence in appropriate cases where a court listens to mitigating circumstances but has nonetheless, to impose a set sentence imposed fails to conform to the tenets of a fair trial that accrue to accused person under Article 25 of the Constitution and absolute right and...”
4. He further relied on several decided cases where death sentences have been substituted including:
 - i. Robert Achapa Okello v R, Kisumu Petition No. 63/2018
 - ii. Juma Antony Kukai v R, Nairobi Criminal Appeal No. 189/2016



- iii. *Joseph Mumo v. R*, Kisumu Criminal Appeal No. 19/2010
 - iv. *State v Scott Crossley*, 2008 (1) SACR 223 (SCA)
 - v. *Joseph Kimani Njau v R*, Criminal Appeal No. 375/2011
5. He further gave mitigating factors that he is 56 years old and weak in health. That he had a family of 10 children who were going to school. He was the sole bread winner. That he has completed 7 years in prison. He had urged the court to review his sentence to a prescribed sentence.
 6. The Prosecution has not made any substantive response to the application of the Applicant.
 7. I have considered the application of the Applicant. I have also considered the authorities relied on by the Applicant. I have similarly considered the record of proceedings of the trial of the Applicant.
 8. The record of the proceedings show that the Applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He took plea on 5.10.2016. He was tried and convicted of the offence as charged. He was sentenced to death on 2.2.2018.
 9. Prior to the sentence, the record show that the Applicant was accorded the opportunity to mitigate. He did his mitigation through his counsel Mr. Ochieng who stated:

“The accused is an orphan and supports 11 children of his brothers and plus his own. He is the sole breadwinner of his family. He is a first offender. In the recent Supreme Court’s decision, it did away with a mandatory sentence of death.”

The court in sentencing the Applicant went on to note;

“I have seriously considered the mitigation in favour of the accused that he is a first offender and has a big family that he supports. I have also considered the circumstances surrounding the commission of the offence and painful death that was suffered by the deceased who had committed no wrong by acting as a land broker for PW1, who was not related to the accused and the land which was being sole in which the accused has no claim. The deceased lost his life suddenly and his family lost his support. This court in view of the above found the only suitable sentence to impose upon the accused is death. I accordingly sentence the accused to suffer death as provided by Law.”

10. The issue therefore is whether the claim for re-sentencing based on the Supreme Court finding in the *Muruatetu* case can lie. From the submissions of the Applicant, it is clear that the Applicant is well versed with the *Muruatetu case* on which he has put great reliance. Similarly, it is clear that even as at the time of the sentence, the accused and his counsel in mitigation, drew the attention of the court on the unconstitutionality of the mandatory nature of the death sentence as enshrined in the statutory provision. And in passing the sentence, the Honourable Judge noted that considering the mitigation of the accused and the circumstances of the case, he found that the only suitable sentence to impose upon the accused is death.
11. The Applicant seeks re-sentence based on the *Muruatetu case*. It is otherwise worth noting that in the *Muruatetu case*, the Supreme Court ordered for resentencing on the basis that the Applicants had not been accorded the opportunity to mitigate in their trial. That the mandatory nature of the death sentence provided ousted the discretionary powers of the court on sentencing. That the Applicants be presented before the trial court to enable them make their mitigation, the court to consider the same and re-sentence them accordingly.



12. But is this the same situation that pertains in this matter? I think not. In our case, the Applicant was accorded the opportunity to mitigate, which he did. He duly referred the court to the Supreme Court decision of the Muruatetu case. And in the sentence proceedings, the Honourable Judge accordingly noted the mitigation of the Applicant as well as the directions of the Supreme Court given in the Muruatetu case.
13. This Applicant's application seeking resentencing based on the *Muruatetu case* is therefore lacking merit because the court already considered the directions of the Supreme Court given in the Muruatetu case. The court obviously sentenced the Applicant to death, not because of the mandatory nature, but rather after considering the circumstances of the case and forming the opinion that the only suitable sentence to impose upon the accused is death.
14. In the circumstance, I dismiss this application of the Applicant dated 8.3.2023 wholly. It is so ordered.

DATED, SIGNED AND DELIVERED AT SLAYA THIS 30TH DAY OF JANUARY, 2024

D.O. OGEMBO

JUDGE

30/1/2024

Court:

Ruling read out in presence of applicant and Ms. Mumo for State.

D.O. OGEMBO

JUDGE

30/1/2024

