Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)

Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR

Neutral citation: [2021] KESC 31 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 15 & 16 OF 2015

MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA, N NDUNGU & W OUKO, SCJJ

JULY 6, 2021

BETWEEN

FRANCIS KARIOKO MURUATETU ..... 1ST PETITIONER

WILSON THIRIMBU MWANGI ..... 2ND PETITIONER

AND

REPUBLIC ..... RESPONDENT

AND

KATIBA INSTITUTE ..... AMICUS CURIAE

DEATH PENALTY PROJECT ..... AMICUS CURIAE

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ... AMICUS CURIAE

INTERNATIONAL COMMISSION OF JURISTS-KENYA CHAPTER ... AMICUS CURIAE

LEGAL RESOURCES FOUNDATION ..... AMICUS CURIAE

ATTORNEY GENERAL ..... AMICUS CURIAE

(Being an appeal from the Judgment of the Court of Appeal sitting in Nairobi (E.O. O'Kubasu, P.N. Waki & J.W. Onyango Otieno JJ.A) delivered on 11th July, 2014 in Civil Appeal No. 93 of 2014)

Supreme Court issues guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the Muruatetu case.

The Supreme Court, in this case, issued guidelines for its earlier decision on the constitutionality of the mandatory death sentence for the offence of murder in the Francis Karioko Muruatetu & another v Republic [2017] eKLR.

Reported by Beryl Ikamari

Criminal Procedure *- court orders - orders of the Supreme Court - where the Supreme Court made a finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional - whether the Supreme Court's decision was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences - whether the Supreme Court's decision was an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the law - whether it was necessary for specific matters to be instituted before appropriate courts to determine the question as to whether the imposition of a mandatory death sentence for other capital offences including treason, robbery with violence and attempted robbery with violence were constitutional.*

Jurisdiction *- jurisdiction of Magistrate's Courts - jurisdiction to conduct a re-hearing on sentencing and revise sentences that had been confirmed at the High Court and/or the Court of Appeal - whether Magistrate's Courts had jurisdiction to conduct a re-hearing on sentencing and to revise sentences that had been confirmed at the High Court and/or the Court of Appeal.*

Brief facts

The appellants were convicted of murder and sentenced to death. They were challenging the legality of the mandatory nature of the death sentence imposed by the High Court and affirmed by the Court of Appeal. They also challenged the indeterminate nature of a life sentence and asked whether the court ought to assign a definite number of years of imprisonment, subject to remission rules, which would constitute life imprisonment.

The court issued a judgment dated December 14, 2017, which stated that it could not determine the issues related to the sentence of life imprisonment as they were not canvassed before the High Court or the Court of Appeal. In its judgment, the Supreme Court found that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional. However, that would not disturb the constitutionality of the death sentence as contemplated under article 26(3) of the Constitution of Kenya, 2010. The court ordered for the appellants' matter to be re-heard on the question of sentencing only on a priority basis. The court also ordered the Attorney General, the Director of Public Prosecutions (DPP) and other relevant agencies to prepare a detailed professional review in the context of the judgment and order made with a view to setting up a framework to deal with sentence re-hearing of cases similar to that of the petitioners herein. The Attorney General was granted twelve (12) months from the date of the judgment to give a progress report to the Supreme Court in that regard.

In its judgment the court directed that the judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, urgently, for any necessary amendments, formulation and enactment of statute law, to give effect to the judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

The progress report on the framework proposed for the re-hearing of similar cases was not filed within 12 months as ordered by the court but it was filed on October 11, 2019. The reason for the delay in filing the progress report, offered by counsel for the DPP, was that there were no re-sentencing guidelines necessary to address the numerous pending matters on re-sentencing. On behalf of the 1st *amicus curiae* Katiba Institute, it was stated that the delay in filing the report resulted in the inability of the Supreme Court to confirm compliance with its orders and it compounded violations of the appellants' constitutional rights. It was stated

that the absence of the anticipated guidelines had created inconsistency, confusion and uncertainty within the criminal justice system about the death sentence.

Issues

i. Whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences.

ii. Whether Magistrate's Courts had jurisdiction to conduct a re-hearing on sentencing and to revise sentences that had been confirmed at the High Court and/or the Court of Appeal.

iii. Whether the decision of the Supreme Court finding that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional was an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the law.

iv. Whether it was necessary for specific matters to be instituted before appropriate courts to determine the question as to whether the imposition of a mandatory death sentence for other capital offences including treason, robbery with violence and attempted robbery with violence was constitutional.

Held

1. Contrary to the orders of the court, the appellants had not been afforded a re-sentencing hearing by the High Court.
2. As the progress report was being waited for, courts below the Supreme Court had embarked on their own interpretation of the judgment in question and had applied it to section 296(2) of the Penal Code and to sexual offences, while assuming that the decision was equally applicable to other statutes prescribing mandatory or minimum sentences. That assumption of applicability was never contemplated in the context of the decision in question.
3. The course that courts below the Supreme Court had taken had resulted in incertitude and incoherence in the sentencing framework in Kenya and it had given rise to an avalanche of applications for re-sentencing. Sentences that were confirmed at the High Court and the Court of Appeal, had been returned to the Magistrate's Courts by appellants and they had been revised. Magistrate's courts had entertained such applications for re-sentencing without jurisdiction. Additionally, some appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that were pending hearing and determination, either in the High Court or the Court of Appeal, had also had their sentences revised by the Magistrate’s Courts without disclosing the fact that pending appeals existed in superior courts.
4. There was no harmony when the revision of sentences was done by the courts. Sentences imposed after re-sentencing ranged from commutation to the period served, probation, reduction of sentences to some specific period, or the preservation of the maximum sentences.
5. The Supreme Court's decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. The decision was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution.
6. In paragraph 71 of its judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts had to impose the death sentence in all capital offences in accordance with the law. The nullified paragraphs were no longer applicable.
7. In respect of other capital offences such as treason under section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under section 297(2) of the Penal Code, a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached.

8. The recommendations of the Task Force report went beyond the terms of the orders of December 14, 2017, and dealt with, for example, matters that were within the legislative province of Parliament or in the court's exclusive jurisdiction and judicial discretion.

9. To obviate further delay and to avoid confusion, the court issued the following guidelines: -

a. The decision of *Muruatetu* and the guidelines herein were applicable to sentences of murder under sections 203 and 204 of the Penal Code only.

b. The Judiciary Sentencing Policy Guidelines were to be revised in tandem with the new jurisprudence enunciated in *Muruatetu*.

c. All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.

d. 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.

e. In the re-sentencing hearing, the court had to 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 a suitable sentence.

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

g. In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court: -

    i. Age of the offender;
    ii. Being a first offender;
    iii. Whether the offender pleaded guilty;
    iv. Character and record of the offender;
    v. Commission of the offence in response to gender-based violence;
    vi. The manner in which the offence was committed on the victim;
    vii. The physical and psychological effect of the offence on the victim's family;
    viii. Remorsefulness of the offender;
    ix. The possibility of reform and social re-adaptation of the offender; and,
    x. Any other factor that the court considered relevant.

h. Where the appellant had lodged an appeal against the sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

i. The guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They would also apply to sentences imposed under section 204 of the Penal Code before the decision in *Muruatetu*.

Guidelines issued

Citations

Cases

Kenya

Muruatetu, Francis Karioko & another v Republic & 6 others Petition 15 & 16 of 2015; [2017] KESC 2 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya article 25 - (Interpreted)
2. Criminal Procedure Code (cap 75) section 329- (Interpreted)
3. Penal Code (cap 63) sections 40(3); 203; 204; 296(2); 297(2) - (Interpreted)
4. Sexual Offences Act (cap 63A) In general - (Cited)

Advocates

Mr Hassan for the Director of Public Prosecutions
Mr Ochiel for the Katiba Institute (amicus curiae)

DIRECTIONS

Directions of the Court

1. It is common factor that this appeal specifically involved the two appellants, Francis Karioko Muruatetu and Wilson Thirimbu Mwangi, whose conviction and sentence of death for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* was upheld by the Court of Appeal on a first appeal. All they challenged before this court, was not their conviction but the mandatory nature of the sentence of death imposed upon them by the High Court and affirmed by the Court of Appeal, arguing that it was inconsistent with the *Constitution* and therefore void.

2. Two other issues were raised; whether the indeterminate nature of a life sentence is also inconsistent with the *Constitution*, and whether this court ought to assign a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment.

3. In considering these questions, the court confined its determination to the following issues:

    a) Whether the mandatory nature of the death penalty under section 204 of the Penal Code is contrary to the *Constitution*,

    b) Whether the indeterminate life sentence was equally unconstitutional, and

    c) Whether this court could define the parameters of a life sentence.

4. By our judgment rendered on December 14, 2017, this court (though differently constituted), readily accepted that the last two questions (b) and (c) above, not having been canvased before the two courts below, were not available for the court's determination. On the first question, however, the court made the following declarations and orders:

    "a) The mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26(3) of the *Constitution*.

    b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.

    c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this judgment and order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this court on the same.

    d) We direct that this judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment". (Our emphasis).

5. Despite the Attorney General, the Director of Public Prosecutions and other relevant agencies having 12 months within which to present a progress report on the framework proposed, to deal with sentence re-hearing of cases similar to this, that report was not filed until October 11, 2019. Prior to the filing of the said report, the court had on its own motion mentioned the matter on October 8, 2019, as a follow up on the progress of the directions given on December 14, 2017. At that point Mr Hassan, learned counsel representing the Director of Public Prosecutions, drew the attention of the court to the confusion in the courts below occasioned by lack of re-sentencing guidelines. He pleaded that there was need to have the guidelines issued promptly to address numerous pending applications, petitions and appeals on re-sentencing.

6. On his part, Mr Ochiel, learned counsel for Katiba Institute, expressed concern that the delay occasioned by the Attorney General in filing the status report had resulted in the inability for the court to ascertain whether or not its judgment was being complied with; it had compounded the violations to the appellants' constitutional rights; and the absence of anticipated guidelines had created inconsistency, confusion and uncertainty within this aspect of criminal justice.

   The appellants, on the other hand, confirmed that, contrary to the orders of the court, they had not been afforded, up until that time, a resentencing hearing by the High Court.

7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the *Penal Code*, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.

8. While it is regrettable that the report was not filed timeously and these directions not issued immediately, there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing. Appellants whose sentences were confirmed by the High Court and the Court of Appeal have returned to the magistrate's courts, where, without reference to the decisions of the two superior courts, have had those sentences revised. The magistrate's courts have also, in some instances entertained applications for re-sentencing in murder cases, clearly without jurisdiction. Likewise, some appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that are pending hearing and determination, either in the High Court or the Court of Appeal, have also had their sentences revised by the magistrate's courts without disclosing the fact that pending appeals exist in superior courts.

9. In addition, there is no harmony in the revised sentences by the courts. The sentences which have been imposed after re-sentencing hearing range from commutation to the period served, probation, reduction of sentences to some specific period, or the preservation of the maximum sentences.

10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although *Muruatetu* specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

    > 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 appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, 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".

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".

11. The *ratio decidendi* in the decision was summarized as follows;

> 69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this court's decision in *Muruatetu*, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

12. Likewise, our orders set out in the previous paragraphs specifically directed the Attorney General to prepare a detailed professional review "in the context of this judgment.... with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein", and no other case.

We stated fairly clearly too, at paragraph 111 of the Judgment, the extent to which our holding was applicable as follows:

> " It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework 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."

13. Further, at paragraph 71 of the judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts must impose the death sentence in all capital offences in accordance with the law. In view of our holding in the judgment in question, those paragraphs were no longer applicable.

14. It should be apparent from the foregoing that *Muruatetu* cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery

with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. *Muruatetu* as it now stands cannot directly be applicable to those cases.

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.

    We note that the other recommendations in the Task Force report go beyond the terms of the orders of December 14, 2017, and deal, for example, with matters that are in the legislative province of Parliament or in the courts' exclusive jurisdiction and judicial discretion.

17. The appellants in this matter, we have since learnt, were presented to the High Court and heard on their plea for re-sentencing; therefore, we make no further comment on them.

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*.

19. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY, 2021

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

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