Case Number:	Petition 3 of 2019
Date Delivered:	20 Dec 2019
Case Class:	Civil
Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Samuel Kilile Musembi v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kajiado
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

PETITION NO 3 OF 2019

SAMUEL KILILE MUSEMBI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. In a petition dated 7th February, 2019 and filed in court the same day, the petitioner moved this court praying that it reconsiders the sentence it meted against him and met out an appropriate sentence other than the death sentence imposed on him on 15th May, 2017. The petition is supported by the ground on the face of the petition and the facts thereto.

2. The petitioner was charged in criminal case No.26 of 2015 (**Formerly criminal case No. 61 of 2014-Machakos**) with murder contrary to section 203 as read with section 204 of the Penal Code. He was tried, convicted and sentenced to death. That is the sentence that he wants this court to reconsider. According to the appellant the law now recognizes sentence other than death for the offence of murder and therefore the court should allow his petition.

3. The respondent through Mr. Meroka, learned Principal Prosecution Counsel relied on their submissions the filed before the court during the trial of the petitioner. Counsel submitted that although the law allows the court to give any other sentence, he urged the court to consider the circumstances of the case against the petitioner and the rights of the victim's family in determining whether to pass any other sentence or not.

4. The petitioner has urged this court to reconsider the sentence that was imposed against him by the trial court and met any other sentence but death, in essence e, the petitioner urges this court to review the death sentence that was passes against him on grounds that death sentence is a violation of his human rights. He relied on the Supreme Court decision in ***Francis Karioko Muruatetu & Another***, Supreme Court Petition No. 15 of 2015**,**[2017] eKLR***;*** ***Joseph Kaberia Kahiga & Attorney General*** petition No. 618 of 2010 [2016] eKLR***;*** ***Samson Njguna Njoroge*** Cr. Appeal No. 150 of 2010 and ***William Okumu Kithony v Republic*** [2018] eKLR.to support his quest for a review of the death sentence to any other sentence.

5. According to the petitioner he was convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code and section 204 provided for death penalty then. The petitioner's argument for review of the sentence stems from the Supreme Court decision I the Muruatetu case(supra)_

6. I have considered the petition and submissions by the petitioner as well as those by the respondent. I have also considered the authorities relied on. The petitioner was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The facts were that on the night of 28th and 29th September,2014 at Kimana-Oloile village within Kajiado County the petitioner with another person who is not party to this petition murdered Namunyak Meele.

7. The petitioner underwent a trial and was convicted of on 24th April, 2017. The court then conducted a hearing for purposes of sentencing and after mitigation he was sentenced to suffer death as prescribed by law. This was on 15th May, 2017. That was the sentence allowed under Section 204 of the code which provides that any person convicted of murder shall be sentenced to death.

8. The petitioner has now come to this court not to challenge his conviction but asks the court to review the sentence that was imposed against him and met an appropriate sentence. The petitioner has relied on a number of decisions to support of this quest. Major among them is the Supreme Court decision of Muruatetu. The Muruatetu case was a petition before the Supreme Court challenging the death penalty as a violation of human rights. After considering the petition, the Supreme Court agreed with the petitioners that the death penalty violated their human rights.

9. The court stated at paragraph 45;

"[45]To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless"

10. The Supreme Court further stated that section 204 violates the right to fair trial in the following words;

"[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse."

11. The Court then held that the mandatory death sentence deprives courts discretion to impose appropriate sentences. The Supreme Court stated:

[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 Articles 25 of the Constitution; an absolute right"

12. The above holding re affirmed the earlier holding by the Court of Appeal in ***Godfrey Ngotho Mutiso v R,*** Criminal .Appeal No. 17 of 2008, stating:

"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. We also agree with the High court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty. If mitigation reveals an untold degree of brutality and callousness…"

'If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused criminal culpability. Further imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict…"

13. The jurisprudence arising from the ***Muruatetu case*** is that death sentence is no longer mandatory and courts have discretion to impose appropriate sentence depending on the circumstances of each case. Although the Supreme Court gave timelines for the Attorney General to come up with guidelines for dealing with cases that had already been concluded by the time the ***Muruatetu*** decision was handed down guidelines have not been actualized. It has left convicts to approach courts on their own and courts deciding these cases as they come. That is what the petitioner has done in this petition.

14. In this petition, the petitioner does not challenge conviction. He has only asked the court to reconsider sentence. This is not therefore an appeal against this court's own decision. Being a decision of its own, the court has jurisdiction to reconsider the sentence it meted out against the petitioner in terms of the ***Muruatetu*** decision.

15. There are circumstances under which the court can vary or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The

petitioner's counsel offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

16. Having considered the circumstances of the offence and mitigation recorded by the court and considering the fact that death penalty is a violation of human rights and fundamental freedoms of an individual, I am satisfied that there is reason to review the death sentence e imposed against the petitioner.

17. As to what sentence to impose, it is up to the court considering sentence to impose an appropriate sentence depending on the circumstances of the case. In ***Republic v Ruth Wanjiku Kamande*** [2018] eKLR. Lesiit J was of the view any other sentence other than death should be imposed only in deserving cases. And in ***Misheck Ireri Njagi v Republic*** [2019] eKLR, Muchemi, J reduced a death sentence to 15 years imprisonment. Applying the above in the present petition, I am of the view that a sentence of 25 years will be appropriate in the circumstances of this case.

18. The record shows that the petitioner was presented to court on 9th October 2014 while he was sentenced on 18th May 2017. Section 333 of the Criminal Procedure Code requires the court to consider the period an accused spent in remand or custody when passing sentence. The section 333 provides as follows;

"(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."(Emphasis).

19. The position in the above section was clarified by the Court of Appeal in ***Ahmad Aboifathi Mohammed & another v Republic*** (Criminal Appeal No. 135 of 2016 [2018] eKLR, where the appellants had spent time in custody but the court did not consider that period when passing sentence and the High court failed to appreciate this on appeal. The Court of Appeal observed:

"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."

20. It is clear from the record that the petitioner was in remand custody between 9th October 2014 and 18th May 2017 when he was sentenced. That period should as a matter of law be taken into account in this sentence.

21. As I have already said, taking into consideration, the circumstances of the case, the serious nature of the offence including the violence meted out on the victim, the petitioner deserves sentence other than death penalty but must be a deterrent one to act as a lesson to other would-be offenders.

22. Consequently, the petition is hereby allowed. The death sentence imprisonment against the petitioner is hereby set aside. The petitioner is hereby sentenced to serve twenty five (25) years' imprisonment. The sentence to run from the date the petitioner was presented to court, that is; 9th October 2014.

Dated Signed and Delivered at Kajiado this 20th Day of December 2019.

E C MWITA

JUDGE