

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ.)

PETITION NO. 15 & 16 (CONSOLIDATED) OF 2015

— BETWEEN —

FRANCIS KARIOKO MURUATETU1ST PETITIONER
WILSON THIRIMBU MWANGI.....2ND PETITIONER

— AND —

REPUBLIC.....RESPONDENT

KATIBA INSTITUTE.....

DEATH PENALTY PROJECT.....

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....

INTERNATIONAL COMMISSION

OF JURISTS-KENYA CHAPTER.....

LEGAL RESOURCES FOUNDATION.....

ATTORNEY GENERAL.....

AMICI 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)*

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 14th December 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 11th October 2019. Prior to the filing of the said report, the Court had on its own motion mentioned the matter on 8th October 2019, as a follow up on the progress of the directions given on 14th December 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 Articles 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:

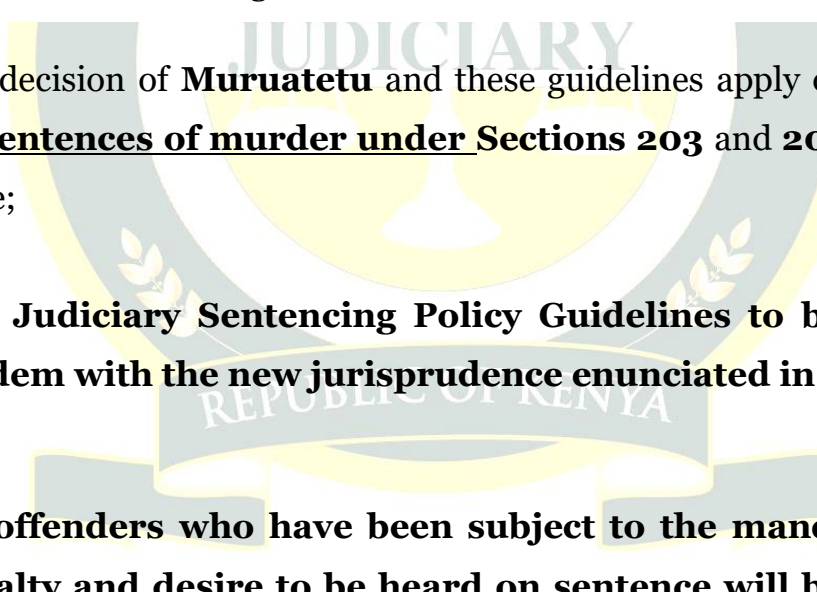
- a) Life imprisonment be substituted where the Penal Code previously provided for the death penalty, with the option of life imprisonment without parole for the most serious of crimes; and that if not abolished, the death penalty should only be reserved for the rarest of rare cases involving intentional 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 14th December 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 14th December 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:

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- 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

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P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

