



**Kimeto v Republic (Miscellaneous Criminal Application 45 of 2019)  
[2023] KEHC 21662 (KLR) (23 August 2023) (Resentence)**

Neutral citation: [2023] KEHC 21662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION 45 OF 2019**

**GL NZIOKA, J  
AUGUST 23, 2023**

**BETWEEN**

**SAMWEL KIBET KIMETO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Arising from Naivasha High Court Criminal Case No 3 of 2014)*

**RESENTENCE**

1. The applicant was charged vide Criminal Case No 3 of 2014 at Naivasha High Court, with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the offence are that, on the 12<sup>th</sup> day of November 2014 at Sogoo village in Narok South Sub-County within Narok County murdered Mercy Chebet.
2. He pleaded not guilty to the charge and the case was fully heard. He was subsequently found guilty, convicted and sentenced to suffer death.
3. However, by notice of motion application herein he seeks for re-sentencing. The application is supported by his affidavit in which he avers that the court has jurisdiction under Article 165 (3)(b) of the *Constitution of Kenya, 2010* to determine the matter and that the mandatory death sentence is unconstitutional as held by the courts in *Francis Karioko Muruatetu & others vs Republic* Supreme Court Petition No 15 of 2015, *Douglas Muthaura Ntoribi* Misc App No 4 of 2015 at Meru High Court, and *John Nganga Gacheru & another* HCCR. Case No 31 of 2016 at Kiambu High Court.
4. The application was disposed of by filing of submissions. The applicant filed his submissions on November 25, 2021, in which he submitted that he is a first offender and that the offence occurred due to a fight with the deceased over a suspected lover affair and he was driven by rage, jealousy and anger. That, they were friends with the deceased and did not have a pre-existing grudge.



5. Further, he has been in custody for a period of seven (7) years during which period he has felt the effects of the offence. Further, he has undergone soul searching and reflection and takes full responsibility for the crime. Furthermore, he is remorseful and greatly regrets having committed the offence.
6. Similarly, while in custody he has undergone rehabilitation through various courses obtaining certificates in Prisoner's Journey, Theological course, Baptismal certificate and Mechanic Grade II. That, he is reformed, hardworking, God-fearing and has no indiscipline issues. In the circumstances, there is no fear of him reoffending or posing a danger to the society if released.
7. That the court in *Francis Opondo v Republic* [2017] eKLR stated that in determining the appropriate sentence to mete out it should consider factors such as the nature of the offence, attitude of the accused person, prevalence of the offence, seriousness of the offence, circumstances the offence was committed, effects of the offence on the accused and the maximum sentence is intended for the worst of offenders. That, the court went on to state that the sentence meted out should reflect that the accused is a first offender and it is to encourage reform and discourage recidivism.
8. He also placed reliance on the case of *Douglas Muthaira Ntobiri v Republic* [2014] eKLR where the court held that a good working prison should reform convicts.
9. He further submitted that the mandatory nature of the death sentence had been declared unconstitutional by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Others vs Republic* Petition N0(s) 15 and 16 of 2015 (2017) eKLR. Further, under Article 50 (2) (p) of the *Constitution* he should benefit from the least severe punishment.
10. That, the trial court failed to take into consideration the period he spent in custody contrary to section 333 (2) of the *Criminal Procedure Code* and the decision of the Court of Appeal in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR.
11. He urged the court to reduce his sentence to time already served or in the alternative to issue a fair and just sentence that is subject to remission or to serve the remainder of such sentence on probation.
12. However, the Respondent on its part filed submissions dated May 12, 2022 and opposed the applications on the grounds here below reproduced verbatimly that: -
  - a. The deceased was the wife of the applicant with whom they had six children.
  - b. The appellant assaulted the deceased and noting she was bleeding so much opted to call his neighbours to take her to hospital.
  - c. That witnesses who were neighbours adduced evidence that upon enquiring on the issue at hand, the appellant informed them, that he had beaten the deceased up.
  - d. The appellant ran away on arrival at the hospital
  - e. Upon conviction, proper sentencing procedure was following including of filing of submissions on mitigation and pre-sentence report.
  - f. That the applicant was heard by the court on mitigation and the same was considered by the judge prior to sentencing.
  - g. The Honourable Judge sentenced the applicant to 20 years imprisonment in light of the circumstances of the offence mitigation and pre-sentence report.



- h. The applicant is not entitled to resentencing under Francis Kariako Muruatetu Supreme Court Judgment since he was not sentenced to the mandatory death sentence whose mandatory nature was ruled unconstitutional.
  - i. That the sentence of 20 years is sufficient in light of the circumstances of the case.
  - j. The applicant if dissatisfied should appeal to the court of appeal since this court is *Functus Officio*.
  - k. We urge this court to dismiss his application forthwith.
13. Addition, the court ordered the Probation Department to file a pre-sentence report which was filed dated October 17, 2022, which indicating that the applicant is aged forty-seven (47) years, and the first born out of six (6) siblings. That his father is deceased while his mother is elderly and ailing. Further, that he dropped out of school in class 7 due to lack of interest in education and started rearing and selling cattle that enabled him to buy land at Narok where he relocated with his family.
  14. He was married to the deceased and has six (6) children. That, the five of the children are in the custody of the applicant's mother while the fifth born is in the custody of the paternal uncle. Further, the first born dropped out of school due to lack of school while the other five children are sponsored through a CDF, the catholic church and the applicant's siblings.
  15. The applicant is stated to be remorseful, stating that it was not his intention to kill the deceased and he has written to the victim's family through his home area local administration seeking forgiveness. That, he has good relationship with his family who are ready and willing to accept him and plead for a non-custodial sentence stating that they believe he has learnt his lesson, and that they have a challenge supporting his children.
  16. The Local Area Administration states that the applicant has no previous record of misconduct and there is no hostility towards him. The report indicates that the victim's family was not opposed to the application stating that they have forgiven the applicant and a traditional ceremony was conducted. Furthermore, the applicant's family paid dowry before being allowed to bury the deceased on the applicant's family land and took custody of the children.
  17. The report further indicates, the applicant while in Prison has trained in motor vehicle mechanics and obtained a Grade III certificate from the National Industrial Training Authority and is undertaking Grade II certification. Further, he was baptised in the Seventh Day Adventist faith and through spiritual welfare has learnt to control and manage his anger. He has never been reported for any misconduct.
  18. The Probation Officer, Ms. Njeri Kahuma recommends the applicant be considered for review of his sentence to enable him continue with rehabilitation through an individual treatment plan.
  19. Be that as it were, the power of the court to entertain the application herein is founded on the Supreme Court's decision in the case of *Francis Karioko Muruatetu & another vs. Republic* (*supra*) where the court stated thus:

“ [110] We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to



the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.

(111) 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.

20. Having considered the aforesaid, I note that, the law that governs sentencing is settled. Article 50(2) (p) of the *Constitution of Kenya, 2010*, provides the right of the convict to benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.

21. In the same vein the objective of sentence must be considered. Paragraph 4.1 of the Judiciary *Sentencing Policy Guidelines*, stipulates the objectives of sentencing as follows: -

- a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
- b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
- d. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
- e. Community protection: To protect the community by incapacitating the offender.
- f. Denunciation: To communicate the community's condemnation of the criminal conduct.

22. In giving directions on the factors to consider while exercising the power of resentencing the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) stated as follows: -

- “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.”

23. Having considered aforesaid I find that in determining the sentence herein, the following factors are crucial which I have taken into account

- a. The age of the applicant stated to be forty-seven (47) years.
- b. The family background and in particular his six (6) children who are school going.
- c. That he is a first offender and said to be remorseful.
- d. The indication in the pre-sentence report that, the two families (that is the applicant's and the victim's) have reconciled.
- e. The parameters set in Muruateteu's case in resentencing.
- f. The period he has been in custody since the November 25, 2014, when he was first arraigned in court.

24. However, the views of the victim's family are not the main determining factor in such a serious crime. The unfortunate issue which alludes the parties and sometimes is overlooked in such cases is the fact that, the crime is irreversible. Indeed, the voice of the victim will never be heard. The relatives voice(s) cannot tell the victim's story. Further, a human being is not just a family member but a citizen of a country, an asset to the entire community. The loss is thus great.

25. In this case, the plight of the children who are now growing up under the care of foster parents cannot be ignored. Therefore the applicant too must pay for the crime.

26. It is against that background that I order, after considering and taking into account the nine (9) years the applicant he has been in custody, he will serve a further six (6) years which will not be the subject to remission; to bring his total sentence to fifteen (15) years imprisonment. Put in other words, he will serve twenty-five (25) years with remission with effect November 25, 2014.

27. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF AUGUST 2023.**

**GRACE L. NZIOKA**



## **JUDGE**

### **In the presence of:**

The applicant present virtually

Mr. Atika for the respondent

Ms. Ogutu: court assistant

