REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 185 OF 2018

ALEX DIMBA ADHOLA.....APPLICANT

VERSUS

DPP.....RESPONDENT

R U L I N G – (S E N T E N C E)

1. The applicant filed an application seeking re-sentencing under the principle laid down by the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR.**

2. He was charged with the offence of murder c/s 203 as read with 204 of the Penal Code. After a full trial he was found guilty and convicted of the murder of MIRIAM NJOKI THIGE on the night of 21st/22nd February 2008 at Mount Sinai Lodge, in Nakuru Town, within Nakuru District in the Rift Valley Province. On 10th December 2013, he was sentenced to death

3. The record does show that the applicant through his advocate Mr. Kipkoech made his mitigation. That he was very very sorry and extremely remorseful for what had happened, that he had learnt a lot while in prison and had fully appreciated that crime did not pay. That he had made amends with his maker and had sought forgiveness. He urged the court to consider Article 26(3) of the Constitution and consider the death sentence as an exception to the right to life. He further sought the court's forgiveness and lenience, consideration of his young age at the time of committing the offence, the period he had spent in custody, and sought a non-custodial sentence.

4. The Court took all this into consideration, including that he was 1st offender. The court, finding that it was bound by both statute and precedent, sentenced the applicant to death.

5. In support of his application the applicant filed on 6th October 2021 *Written Submissions for the Mitigation and Resentencing in the High Court of Kenya at Nakuru.*

6. After hearing the application, I delivered a ruling on 30th June 2021 where I clearly indicated found that it was necessary, to have the benefit of a pre-sentence report.

7. I requested for the report which was filed by the Probation and After Care Services Nakuru. The report indicates that applicant was born in 1981, he is forty (40) years old. He is the second born in a family of five. He has an impressive academic record. He is a graduate of the Egerton University, and had enrolled for a 2nd degree in Agricultural Economics when he committed the offence.

8. He was married and had one child with his wife but the child died in January 2021.

9. His father is deceased. His mother is elderly and ailing. His siblings are going on with their lives. The report indicates that it is his mother and his wife who were interviewed.

10. The family of the victim are reported to have healed both psychologically and emotionally. With respect to the Victim Impact statement, the probation officer's report states:

> "*Family of the victim were adversely affected by the death of their kin. Since it happened way back in 2008, family has been able to heal gradually both psychologically and emotionally. During the inquiry a meeting was convened in the presence of the area chief to deliberate and come up with a common stand on the matter. Their conclusion was that they have no issue with the accused"*

11. In another part of the report the officer states:

Victim's family though they do not forgive him directly want the matter to be dispensed with by court as it deems fit.

12. The applicant is reported to be remorseful. He now admits having committed the offence and seeks pardon.

13. He has had no disciplinary issues in prison. He is highly regarded at the prison as a trustee, and an academician, and is the Principal of Naivasha Inmates Education Centre.

14. In the community it is reported that they are waiting for him, ready to receive him back. With his credentials, and the academic achievements while in prison, he will readily get employment.

15. The Probation Officer recommends a non-custodial sentence of three (3) years' probation supervision saying that;

> "*It is against this background I find more prudent to give the petitioner a chance to pick up the spoils, reconstruct his life, proof (sic) himself a reformed person, and ultimately contribute to the development of our country*".

16. There is no doubt that the applicant has a brilliant mind. He has an above average intellectual capacity and is very persuasive when he speaks. But what kind of person is he? This is a case where the applicant committed a heinous crime, and not only attempted to conceal it and more still attempted to implicate an innocent man. Although he attempted a plea agreement which was rejected by the state, and he went through the full trial process. At the end of the trial when he was found to have a case to answer, and was put on his defence, the applicant continued to deny the offence stating on oath that he was not in Nakuru at the time of the offence. This was despite his earlier attempt to plead to a lesser charge.

17. The report emphasises that the applicant is a brilliant person, who can use his mind and abilities to serve society out there. However even at this stage of the proceedings the applicant continues to exhibit inconsistency in his statements. He denied the murder and testified on oath that he never committed the same. He now admits to causing the death in his submissions. He testified that he was out of town on the date of the death, but now submits that he was present with the deceased, but took too much alcohol leading to the death. He said he knew the deceased for five years, and had intended to take their relationship to the next level to settle down as a family, yet he was already married. More importantly, there is no evidence of nay reaching out to the family of his girlfriend and lover through friends or family.

18. In ***Muruatetu*** the Supreme Court at paragraph [71] provided guidance as to the factors to consider *re-hearing sentence* in murder cases.

> *As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:*
>
> *(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) remorsefulness of the offender;*
>
> *(g) the possibility of reform and social re-adaptation of the offender;*

19. I have taken into consideration the foregoing in light of the pre-sentence report. The report has a glaring gap; no indication as to what led the murder, as this is what the probation supervision period would be addressing. The applicant submits that he killed his girlfriend of 5 years. There was no provocation, no fight, no confrontation, nothing. The submission that it was out of drunkenness appears unbelievable considering the circumstances of the offence. What is it that led him to kill his girlfriend, what is it that made him commit the offence, that issue is not addressed and there lies the risk, that has not been addressed.

20. It is evident from the report that the problem with the applicant was not academics or lack of education, he already had that, and would still have excelled out there.

21. The Probation Officer has not told this court what exactly he will be doing with the applicant while on Probation Supervision. What treatment does the applicant need? He does not have any social problems; he is the perfect person. The report does not persuade on that direction.

22. I find it instructive here to quote some of the cases the petitioners in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** relied as they were analysed by the Supreme Court. The court observed;

> *Besides The petitioners relied on Articles 1(1), 1 (3), 2(4), 19(3), 201(1), 25, 26 (1), 27 (1), 28, 29, 50(2), 159 (1), 160 (1), the petitioners relied on a number of authorities in case law, including the decision in* ***Patrick Reyes v the Queen [2002] 2 App. Case 235 (Reyes)*** *in support of submissions. Like in this appeal, the Privy Council was called upon to consider the mandatory death*

sentence imposed on the appellant upon his conviction for the offence of murder. It unanimously quashed Reyes's death sentence. In reaching that conclusion, the Privy Council cited with approval the 1989 House of Lords Select Committee's Report on Murder and Life imprisonment which had concluded that murders differ so greatly from each other and as such it is wrong to prescribe the same punishment for all murders and the observation of the Inter-American Commission that the mandatory imposition of the death sentence is unconstitutional as it disregarded an offender's personal circumstances thus robbing him of personal dignity.

[9] The Privy Council also referred to decisions of other courts. The first one was the US Supreme Court decision in ***Woodson v The State of North Carolina (Woodson) (1976) 428 US 280*** *in which it had been held that a statute that prescribes a mandatory sentence on conviction has the effect of 'treating all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death'. The second authority was another US Supreme Court decision in* ***Robertson v Louisiana (1977) 431 US 633*** *which declared a statute that prescribed the mandatory death penalty on conviction of certain classes of murder as unconstitutional. The third decision was that of the Indian Supreme Court in* ***Mithu v State of Punjab [1983] 2 SCR 690 (Mithu)*** *which had held that a standardized mandatory death sentence that excludes the involvement of the judicial mind fails to take into account the facts and circumstances of each particular case and must therefore be stigmatized as arbitrary and oppressive. (Emphasis mine)*

23. The mandatory nature of the death sentence denied the courts the opportunity to do what I am doing here. To scrutinise the circumstances of the offence and the offender, and exercise discretion in sentencing while addressing my mind to all the offence, the offender and the offended.

24. The offence was heinous, the offender has not been forthright and the offended were not treated properly during the inquiry. There is no requirement for a common stand whatever that means. It is expected that the report will give a report of the impact of the offence on them

25. The applicant mitigated before the trial judge. The only difference now is that he is seeking a non-custodial sentence based on his achievements while in custody. While that matters a lot, and I must commend him for his good work, it appears to me that there is a part that remains unaddressed, and hence a non-custodial sentence will not be suitable.

26. It is my considered view that the period of eleven (11) years is insufficient for the offence committed and the manner in which it was committed. The sentence of death is set aside, and substituted which sentence of thirty (30) years imprisonment to run from 26th March, 2008.

27. Right of appeal within 14 days hereof

DATED, SIGNED, AND DELIVERED THIS 14TH DAY OF JANUARY 2022.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant Edna

Applicant present

For state: Ms Mumbe