REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NO. 6 OF 2019

FCK.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. FCK was charged with **Murder Contrary to Section 203 as read with 205 of the Penal Code.** She was charged jointly with one PSE alias N, with the murder of their two (2) year old son FKE.

2. The accused had separated with the said E and married one PK. The offence was committed at the time she was married to PK.

3. On 29th October 2007 the accused left home carrying the child to go and fetch her mother's goats from the grazing field. She did not return. She was to be found in the house of PK three (3) days later without the baby. Asked about the whereabouts of her baby, her explanation was that the said PK had killed the child. The decomposed body of the child was later to be retrieved from a shallow grave where the accused led the police. On 19th July 2011 she was found guilty of the murder of her son, convicted and sentenced to death.

4. The accused now comes for resentencing under the principle in **Francis Karioko Muruatetu & Another [2017] eKLR**. She filed a Chamber Summons dated 31st December 2018 seeking orders;

1. THAT this Honourable Court be pleased to certify this petition as extreme urgent and be heard in the first instance.

2. THAT this Honourable Court be pleased to grant re-sentencing hearing in the decision of the High Court at Nakuru.

3. THAT this Honourable Court be pleased to receive mitigation from I applicant for consideration of an appropriate sentence devoid of mandatory death sentence which has since been declared unconstitutional by Supreme Court of Kenya, may this court be pleased to issue any other order that it may deem fit in the interest of justice.

4. THAT this application is supported by the affidavit of FCK Langata Women Prison P.O. Box 44679-00100 Nairobi.

Supporting the application was her affidavit where she deponed inter alia;

"2. THAT I was the accused person in the High Court Case No. 114 of 2007 in the Nakuru High Court.

3. THAT I was charged, convicted and sentenced to suffer death for the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convicted on 2nd of August 2011.

4. THAT I have never lodged an appeal at the Court of Appeal since then.

5. THAT the decision of Supreme Court in Muruatetu and another vs Republic (2017) in Petition No. 15 and 16 in the Supreme Court of Kenya has since declared the mandatory nature and the death sentence unconstitutional.

6. THAT this Honourable Court is bound by the decision of supreme under article 165(7) of constitution.

7. THAT orders of Supreme Court in Muruatetu's petition did not bar the court below from conducting sentence review in already

concluded capital cases tried in their jurisdiction.

8. THAT this Honourable Court, being the original trial court of High Court Criminal Case Number 15 of 2015 has original jurisdiction to conduct a re-hearing sentence and mete out an appropriate sentence in line with the guidelines set out in the Muruatetu and another case and in recent decision of Court of Appeal on William Okungu Kitinny vs Republic [2018] KLR.

9. THAT this Court will be discharging its constitutional obligation pursuant to article 20(3) (a) (b), article 21, 163(7) of the Constitutional as read with the principles in Muruatetu's Petition and the guide lines relating to active case management of Criminal cases in the Magistrate's Court and High Courts as gazette notice no. 1340 dated the 29th day of February, 2016 by retired Chief Justice Hon. Willy Mutunga.

11. THAT the applicant will be relying on the following case laws and authorities in persuading this court to conduct a re-sentencing hearing.

- *Francis Karioko Muruatetu and another vs Rep. [2017] KLR*
- *John Njenga Gacheru and another vs Rep [2018] KLR*
- *William Okungu Kittiny vs Rep [2018] KLR"*

5. During the hearing of the application Florida relied on her application and the Supporting Affidavit together with the authorities she cited.

6. On its part, the state through the ODPP Ms Murunga in opposing the application, submitted that the applicant did not deserve the court's mercy because she had caused the death of her own child. She had strangled her own three (3) year old child who looked up to her for protection. That the accused even pleaded not guilty, wasting court's time, yet she was now here seeking court's forgiveness.

7. In response the applicant submitted that she was remorseful, was seeking court's forgiveness and would never repeat the offence.

8. The only issue is whether the applicant's application is tenable.

9. The Court in **Muruatetu** declared the mandatory nature of the death sentence unconstitutional and opened a window for persons who had been given the death sentence to come back to court and seek a of review of that sentence to a sentence that was commensurate with the circumstances of the offence.

10. From the medical assessment form filled on 26th November 2007 the applicant was eighteen (18) years old at the time of the offence. The Probation Officer's Report indicates that she was born in 1982, the prison authorities indicated in her committal warrant that she was nineteen (19) years and so does the judgment.

11. Clearly at the time the applicant had the baby she was in her teens, around sixteen (16) or thereabouts and that was not her first born child. By then she had another child. The applicant was also the last-born child out of six (6) siblings and had dropped out of school at class three (3). Her other son is now aged sixteen (16) years and in form three (3).

12. From the pre-sentence report it is evident that the family are ready to see her back home. There are allegations of low mental intelligence but without evidence, however the psychiatrist did note a lack of memory which he attributed to lack of education. The Probation Officer also found that the applicant had not in the nine (9) years she had been in prison, learnt any skills she can apply outside, and this was attributed to her alleged low mental intelligence.

13. From the case of **Muruatetu,** and the sentencing guidelines set out therein, it is evident that the applicant was a first offender, she was a child mother having born two (2) children before she turned eighteen (18) years old. She was evidently, the victim of either early marriage or sexual abuse taking into consideration her special needs, which also contributed to her not having obtained any education.

14. The Probation Officer has identified her needs and risks and recommended that what she needs is social rehabilitation and they are ready to support her in that. I am persuaded that a non-custodial sentence would be beneficial to her, as keeping her in custody longer may not serve any other purpose.

15. I have carefully considered the submissions of the state. The applicant has served time. It is evident that other than just holding her in prison custody, there is no other rehabilitation that can take place within the confines of prison because of her mental capabilities. She is not a danger to herself or the society should she be let out.

16. Taking into consideration the circumstances of the offence and the offender, and her family's attitude, I consider the period she has served in custody to be sufficient custodial sentence. For purposes of social re-integration, I order that she be place on probation supervision for a period of two years (2) years.

17. During this period, she is to abide by the Probation Order and to know that breach could lead to incarceration.

18. This ruling be served on Probation and After Care Services Nakuru for compliance.

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

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

For state; Ms Mumbe

Applicant: Present