



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CRIMINAL APPLN. NO. 8 OF 2020

JKN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant, *JKN*, was charged, tried and convicted of the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The particulars supporting the offence were that on 5th December 2003 at Majengo Estate in Thika District, the applicant, jointly with another person not before the court, murdered *Simon Kamande Njoki*.

2. Upon his conviction, the applicant was sentenced to death. He appealed to the Court of Appeal against his conviction and sentence but his appeal was dismissed on 1st July 2011. His conviction and sentence were thus upheld. The death sentence was subsequently commuted to life imprisonment by His Excellency the President.

3. The applicant has now approached this court through an undated chamber summons filed on 2nd March 2020 seeking resentencing on the strength of the Supreme Court's decision in *Francis Karioko Muruatetu & Another V Republic, [2017] eKLR* which declared the mandatory death sentence prescribed for the offence of murder in *Section 204* of the *Penal Code* unconstitutional mainly because it deprived the trial court of its discretion in sentencing, that is, discretion not to impose the death sentence in appropriate cases. The court was emphatic that convicted persons should be given an opportunity to mitigate and the mitigation offered should not be advanced as a mere formality but should be taken into account by the trial court in deciding on a suitable sentence.

4. The Supreme Court proceeded to set out the criteria or the factors that should guide a court in determining an application for resentencing. Those guidelines were adopted and reinforced by the same court in the directions issued in the second *Muruatetu* decision dated 6th July 2021 in which the court 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.”

5. In his application and written submissions, the applicant advanced his plea in mitigation for consideration by this court. He stated that he is a first offender; that he is remorseful and greatly regrets having committed the offence and the pain his actions must have caused the victim’s family. He claimed that in the 17 years he has been in prison, he has learnt his lesson and has undergone positive transformation and deserves to be given a second chance in life; that he was 25 years old when he committed the offence and was not married; that at the time of filing the application, he was 42 years old. He beseeched this court to commute his life sentence to the period already served so that he could go out and start his family and also take care of his elderly mother.

6. He attached to his written submissions several certificates showing that during the period of incarceration, he had undertaken some spiritual courses which have made him a better person. He promised to use the knowledge acquired from the said courses to motivate and counsel others upon his release.

7. During the hearing, the applicant sought for leniency claiming that he was HIV positive and prayed for variation of his life sentence to a determinate sentence. He did not however avail any evidence to substantiate his claim that he was HIV positive.

8. The application is not opposed by the state. Learned prosecuting counsel *Ms Akunja* in her oral submissions averred that she was not averse to the court substituting the applicant’s life sentence to a determinate sentence considering the period he had spent in custody during the trial but urged the court to take into account the seriousness of the offence in making its decision.

9. The court called for a presentence report which was filed on 10th September 2021. The report confirmed that the applicant was a first offender and that he was remorseful for having caused the deceased’s death which he blamed on the usage of alcohol and hard drugs. The report also confirmed that the applicant has reformed having gone through guidance and counselling and rehabilitative programmes in prison; that his family was willing to accept him and reintegrate him back to the society if his application was successful. The community in Majengo area was also not opposed to sentence review.

10. The report also contained a victim impact statement. The deceased’s brother was interviewed. He was opposed to the applicant’s application stating that the applicant and his family have never made amends with the victim’s family; that the deceased’s death was a huge loss to the family and continued to weigh heavily on their hearts since he was at the time the family’s breadwinner and had great potential.

11. I have carefully considered the mitigating factors advanced by the applicant in his written and oral submissions and in the detailed presentence report. I have taken cognizance of the fact that the applicant is a first offender, his current age, his attitude towards the offence he committed and the rehabilitative programmes he has undertaken in prison. I have also considered the fact that he was in remand custody throughout his trial and that he has already served slightly over 18 years in prison.

The above mitigating factors must however be weighed against the aggravating factors which can be discerned from the circumstances in which the offence was committed. The views of the victim’s family must also be considered.

12. The evidence presented before the trial court shows that the applicant for undisclosed reasons stabbed the deceased on the chest with a sharp knife causing a penetrating wound which cost the deceased his life a short while thereafter. To inflict such a fatal injury, the applicant must have used great force in stabbing the deceased.

The facts and circumstances of this case leave no doubt that the applicant’s attack on the deceased was deliberate, premeditated and was intended to cause his death. An innocent life was lost as a result of the applicant’s unlawful action. The deceased’s life cannot be restored and the gap left in the lives of his family can never be filled. It is clear from the presentence report that the family is yet to recover from the loss of the deceased about nineteen years later.

13. I have taken into account both the mitigating and the aggravating factors in this case and persuasive authorities in similar cases, for instance, *Stephen Mwiti V Republic, [2020] eKLR*; *Joseph Mwangi Maina V Republic, [2020] eKLR* and *Irene Nekesa Peter V Republic, [2019] eKLR*, where the applicants who had been sentenced to death for the offence of murder were resented to serve 20 and 25 years imprisonment.

14. Although I am persuaded to find that a sentence of life imprisonment will not serve the ends of justice in this case, I am unable to agree with the applicant that the period he has already served in prison constitutes sufficient punishment for the serious crime he committed.

15. Taking all relevant factors into consideration, I find merit in the application and it is hereby allowed on terms that the sentence of life imprisonment the applicant is currently serving is set aside. It is substituted with a sentence of 25 years imprisonment which shall take effect from 11th February 2004, the date the applicant was first arraigned before this court to answer to the instant charge.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present

Mr. Mutuma for the respondent

Ms Karwitha: Court Assistant