REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CRIMINAL APPLN NO. 296 OF 2018

DAVID MUNYI MBURUKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was tried and convicted of the offence of murder contrary to *Section 203* as read with *section 204* of the *Penal Code*. The particulars were that on 13th December 2010 at Rangau area, Kajiado District in the Rift Valley Province, he murdered *Joseph Muringu*.

2. After his conviction, he was sentenced to death. In sentencing the applicant, the Hon. Judge *(Lesiit J as she then was)* stated as follows:

> ***"as counsel for accused noted the court's hands are tied. There is only one sentence in law. The accused is sentenced to death as by law prescribed."***

3. The court record shows that the applicant filed an appeal to the Court of Appeal but when the Supreme Court pronounced itself in ***Francis Karioko Muruatetu & Another V Republic, [2017] eKLR*** and declared the mandatory death sentence prescribed by the law for the offence of murder unconstitutional and opened a window for resentencing, the applicant filed both a petition and a chamber summons application on 19th June 2018 seeking re-sentencing and thereafter withdrew his appeal to the Court of Appeal. This was done through a notice of withdrawal dated 24th June 2020 which was validated by the Court of Appeal on 17th September 2020.

4. In his petition and application, the applicant deposed that his death sentence was commuted to life imprisonment by His Excellency the President. He urged the court to note that he had been incarcerated since 2015 and sought resentencing under the ***Muruatetu case [supra]***. He implored me to replace his indefinite life sentence with a term of imprisonment commensurate to his criminal responsibility taking into account the time he had spent in custody during the trial.

5. The court record shows that the learned trial judge gave the applicant, through his learned counsel *Mr. Wamwayi*, an opportunity to mitigate. *Mr. Wamwayi* in his plea in mitigation on behalf of the applicant told the trial judge that the applicant was extremely remorseful; that he was 36 years old and was suffering from duodenal ulcers for which he was receiving treatment; that he was the sole bread winner for his three school going children and his sick mother.

6. In the written submissions filed by learned counsel *Prof. Nandwa*, it was submitted on the applicant's behalf that he was remorseful and regretted commission of the offence which he attributed to the influence of alcohol and hard drugs. It was claimed that he was now fully rehabilitated and ready to rejoin the society.

7. Other mitigating factors advanced by the applicant were that he was a first offender; that his duodenal ulcer disease contracted in 2010 had become chronic and was difficult to manage in custody; that his family was in dire need of his support including his elderly mother.

8. The respondent through written submissions filed on its behalf by learned prosecuting counsel *Ms Maureen Akunja* did not oppose the application. The respondent left it to the court's discretion to determine the appropriate sentence to mete out to the applicant taking into account the seriousness of the offence.

9. The court ordered that a presentence report be filed and this was done on 16th February 2022. The presentence report replicated the applicant's submissions and plea in mitigation with regard to his personal circumstances and attitude towards the offence. It also included views of the victim's family. The deceased's brother was interviewed. He acknowledged that the applicant, through his family had initiated reconciliation with the deceased's family which was a welcome move. He expressed the view that the deceased's family had completely forgiven the applicant and had no objection to him being considered for a non custodial sentence.

10. I have considered the application as well as the written submissions filed by both parties. I have also read the record of the trial court.

I note that resentencing hearings were introduced in our jurisprudence by the Supreme Court in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR.*** As stated earlier, this decision declared the mandatory death penalty prescribed under *Section 204* of the *Penal Code* unconstitutional as it denied an accused person an opportunity to mitigate. It also denied the trial court discretion to impose an appropriate sentence after considering both the accused's mitigation and the circumstances of the case in question.

11. The Supreme Court gave guidelines which courts should consider during resentencing. These are:

(a) Age of the offender;

(b) Whether the offender was a first offender;

(c) Whether the offender pleaded guilty;

(d) The 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.

12. In this case, it is clear from the trial judge's notes on sentencing referenced earlier that the applicant was sentenced to death because at the time, the court did not have discretion in sentencing. Discretion has now been restored by the Supreme Court in the *Muruatetu* decision and that discretion is what I am being called upon to exercise in resentencing the applicant taking into account the mitigating and aggravating factors in this case.

13. I have considered the mitigating factors advanced by the applicant both before the trial court and in his written submissions including the fact that he is a first offender and was only 36 years old at the time he was sentenced.

I note that the applicant has been in prison for slightly over 6 years considering that he was sentenced on 14th July 2015.

The above mitigating factors must be weighed against the aggravating factors disclosed in the evidence adduced before the trial court.

14. The evidence shows that the applicant stabbed the deceased with whom he was sharing a house several times on various parts of his body then set the house ablaze with the intention of burning him alive. The applicant committed this heinous and inhuman attack on the deceased just because of a quarrel over their cooking arrangements, a matter they would have sorted out amicably had the applicant been patient and explored dialogue instead of attacking the deceased. The applicant appears to have had very little value for human life given the manner in which he committed the offence. And as a result of his unprovoked and unlawful action, an innocent life was lost which cannot be restored.

15. I have taken into account the views expressed in the presentence report by the deceased's brother. The report shows that the deceased was survived by a wife and three children and it is not stated why the probation officer did not interview them to get their views with respect to the applicant's application especially the deceased's wife. She lost a husband and the father of her children and it would have been important to get her views on how the loss of the deceased impacted on her life and that of her children.

Be that as it may, it is my view that given the aggravating factors in this case and the period the applicant has been in prison, a non-custodial sentence will not be appropriate in this case.

16. It is not lost on me that rehabilitation and reform of offenders are part of the objectives of sentencing. However, retribution, community protection and denunciation are matters that sentencing also aims to achieve.

17. After considering all the material placed before me, I find that the life sentence currently being served by the applicant does not serve the ends of justice. I find a sentence of 20 years imprisonment most appropriate for the applicant in this case.

18. In the premises, I hereby set aside the applicant's life sentence and substitute it with a sentence of 20 years imprisonment which shall take effect from 17th December 2010 when the applicant was first arraigned before this court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2022.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present

Prof. Nandwa for the applicant

Mr. Kiragu for the respondent

Ms Karwitha: Court Assistant