



**Kenga v Republic (Miscellaneous Criminal Application E034 of 2020)  
[2022] KEHC 17155 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION E034 OF 2020  
GL NZIOKA, J  
DECEMBER 19, 2022**

**BETWEEN**

**JULIUS MUTHOI KENGA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By an application filed in court on December 28, 2020, the applicant is seeking for re-sentencing following the decision in the case of *Muruatetu Francis Karioko Muruatetu & another v Republic* [2017] eKLR. The application is supported by an affidavit of even date sworn by the applicant.
2. He avers that, he was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code (Cap 63)* Laws of Kenya, *vide* Criminal Case No. 4 of 2016 at Narok High Court. He was then sentenced to death. However, he seeks for re-sentencing pursuant to the decision in Muruatetu's case which declared the death sentence unconstitutional.
3. The application was served and opposed by the respondent *vide* submission filed on May 20, 2021, in which the Respondent states
  - a. The appellant had an ample time to rethink his actions and he opted not to relent and/or exercise his restraint on his temperaments.
  - b. The deceased was a village elder who exercised his freedom of speech and made a fair comment on an issue at the baraza which the appellant did not take kindly.
  - c. That the act of hacking the deceased with a panga was inhuman, barbaric and cold in the circumstances.
  - d. That after the heinous act, the appellant ran away leaving the deceased on the ground where no mercy was exercised on him by the appellant.



- e. That even after the sentence by the trial court, the appellant has not reached out to the deceased family in a bid to reconcile and show remorse for the loss of their kin. This shows that the appellant is not remorseful at all.
  - f. We implore the court to sentence the accused to life imprisonment based on the way he hacked the deceased to death with no mercy.
4. In the same manner the applicant has filed long submissions referred to as “mitigation submissions”
  5. The court also ordered for a pre-sentence report which has been availed.
  6. The factual background of the matter is that

The factual background of the matter is that a report of defilement had been made against the applicant and the applicant’s family wanted the matter to be settled by the elders and called for a baraza. However, the deceased, who was a village elder, and another member opposed the proposition by the applicant’s family which seemed to anger the applicant.

That on January 29, 2014, the deceased and his son were at the river preparing to give water to the cattle when the applicant suddenly appeared out of the bush and slashed the deceased on the head with a panga. An alarm was raised by the applicant fled the scene of the crime. The deceased was rushed to Kijabe hospital by members of the public where he was admitted. He later succumbed to his injuries on April 3, 2014. The applicant was traced and arrested on April 7, 2014 at Narumoro and arraigned before court.

7. In sentencing the applicant the trial court stated as follows:-

“The accused has been treated as a first offender. I have noted the circumstances of the offence. This was murder most foul as the accused waylaid the deceased and murdered him to settle scores. Only one sentence is provided for offence”

8. The accused is sentenced to suffer death in the manner authorized by law. Right of appeal 14 days.
9. The law on re-sentencing, 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) (Muruatetu 2) gave guidelines to assist the courts in re-sentencing and pronounced itself thus: -

“18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below us 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."

The content of pre-sentence I note in particular the comments of the victim's family, which is captured as follows

"The victim's family members were interviewed. They expressed a lot of bitterness and said that should the applicant ever step in Narok they will kill him and deal with the consequences. They are strongly opposed to a review of the applicant's sentence".

10. However, the recommendation of the probation officer's for review of sentence does not seem to take into account the sentiments of the victim's family. The loss of a family member is a permanent injury as life cannot be regained.

Therefore the pain and bitterness of those who have suffered loss should never be taken lightly. The old adage states that "the wearer of the shoes know how it pinches"

11. In my considered opinion and taking into account the sentiments of the trial court before the sentence, the circumstances under which the offence was committed and the content of the pre-sentence report I decline to allow release of the applicant on a non-custodial sentence.

12. However, taking into account his age and alleged medical condition (though not supported by documents). I think he can benefit from an imprisonment for a given term. In setting the same, I note that he was in custody from April 11, 2014 to September 28, 2016 when he was sentenced. I therefore consider that period pursuant to the provision of section 333(2) of *Criminal Procedure Code*. I also note that, to date, he has served a total of 6 years. In the given circumstances I sentence him to serve a custodial sentence of 40 years which shall be reduced by the six (6) years already served. Thus he shall serve a total of 34 years from the date of this order. Upon release, he should relocate from the area of crime.

It is so ordered.

Right of appeal 14 days explained

**DATED, DELIVERED AND SIGNED ON THIS DAY OF 19<sup>TH</sup> DECEMBER 2022.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:-

Ms Ogutu - Court assistant

Applicant in person

Mr. Michuki for the Respondent

