



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 101 OF 2019

STEPHEN MUHORO WAWERU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The applicant herein seeks review of his sentence. He was charged with another person in Criminal Case No. 1148 of 2001 with Robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and Rape contrary to **Section 140** of the **Penal Code**. In the lower court's judgment read on 13th November, 2001, the applicant and his co-accused were both convicted, and on 27th November, 2001 they were both sentenced to death.

2. He and his co-accused appealed in the High Court in HCCRA No. 498 of 2001; and in the Court of Appeal in Nakuru evidenced by the Court's decision reported as **Peter Kimani Karima & Another v Republic [2012] eKLR**. All appeals failed. His co-accused is not party to this application.

3. In his supporting affidavit, the applicant invokes the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. In his mitigation submissions, he seeks a lenient sentence; states that he is remorseful; indicates that he has undergone rehabilitation; and notes that as a human being, he made errors some of irreversible nature which he regrets.

4. In the section under-titled 'Personal Statement' on the crime he states, and I think it is apt to quote him directly, as follows:

“2.0 Your Lordship, after a thorough soul searching and reflection on the facts adduced during trial, the applicant takes full and personal responsibility for the crime as charged. The applicant has undergone punishment, repercussions and felt the effects of the offence over the nineteen (19) years he has been in custody.

2.1 It is his profound regret and apology for having taken part in the commission of the crime in question.

2.2 He is remorseful and greatly repentant for the loss incurred by the victim of the crime, to the society and fellow Kenyans for exhibiting such an unbecoming conduct.

2.3 The applicant condemns any form of crime with the strongest terms possible and do urge the youth to embrace and exercise self-control, morality and contentment in their lives no matter what.

2.4 That the nineteen (10) years he has in custody has served the purpose of sentencing as it has given him an opportunity to transform his entire life.”

5. The DPP has no objection to the application for re-sentencing but did not file any submissions.

6. The court directed that a Probation Officer's Re-sentencing Report be filed and equally, a Report from the Kenya Prisons Service on the Applicant. These were duly filed on 15th November, 2020 and 13th November, 2020 respectively.

7. The brief facts of the case are apt by way of background. They are that the applicant and his co-accused on the night of 9th June, 2001 broke into the house where the victims lived. They ransacked the house took away household goods, watches, shoes and jackets among other

items. They demanded money from the victims. They forced the women victims to strip naked, and then raped one of the victims in turns.

8. The trial court proceeded as follows at the time of mitigation and sentencing:

“Prosecutor : We have not secured records. They may be treated as first offender(s).

Mitigation

1st Accused : I am the sole breadwinner. I suffer from high blood pressure.

2nd Accused : I ask for leniency.

Sentence : Each accused is sentenced to suffer death as per law authorized in the substantive charge.”

9. Clearly, the type of mitigation hearing envisaged by the **Muruatetu case** was not conducted. In those days, mitigation was conducted ritualistically and, where the mandatory sentence was prescribed, it was applied without further ado.

10. In the circumstances the application is suitable for consideration in terms of the principles established under the **Muruatetu case**.

11. The Kenya Prisons Service Report filed on 9th November, 2020 shows that the applicant was 21 years old at the time of conviction, and has been in prison for 20 years. His death sentence was commuted to Life Imprisonment in 2009. He associates well with all members in prison and has maintained a clean disciplinary record, is obedient and hard working.

12. The report further indicates that the applicant suffered mental problems in 2014 but was treated at Mathari Mental Hospital and fully recovered. The report concludes:

“He is ready to join the society and reintegrate well since he has reformed and has achieved a positive attitude towards life. His family has promise to support him if he gets a chance to be back. We propose that he may be considered.”

13. The Probation Officer’s Report has also provided useful information. The Report, under different heads, gives the personal profile of the applicant, the circumstances of the offence, the inmate’s rehabilitation and his view towards the offence.

14. In addition, the Probation Report explores the community’s attitude towards the applicant stating that Nyumba Kumi elders who were visited said the applicant would be safe if released as the offence was committed 20 years ago; further, that the family members of the applicant are ready to receive him and assist him to settle. The complainant’s views were unavailable as they had long relocated.

15. At the time of committing the offence, the applicant was in his early twenties and single. He used to take bhang and alcohol but had since given up those habits. The Probation Officer’s Report concludes and recommends as follows:

“The inmate is remorseful and begs for the court’s leniency. He says he wishes to restart his life on a clean slate.

Recommendation and Conclusion

- ***The inmate is 45 years old and has been in prison for 20 years. He was arrested in his 20’s.***
- ***He is remorseful and begs for the court’s leniency.***
- ***He has undergone positive reformation and change attitude while in prison.***
- ***He has maintained close family ties and his family members are willing to receive him and assist him settle down. He was single, his family hopes that he will be released and get a chance to start a family.***

After the social evaluation, we recommend that he is suitable for release. To assist him in reintegration, he may serve a probation sentence for a period of 2 years. Chances of recidivism are minimal.”

16. I have taken into account all the foregoing matters, and the record of proceedings in the original trial court. I have also taken into account the **Sentencing Policy Guidelines**, and in particular, the objectives of sentencing which, at **Paragraph 4.1 and 4.2**, provide as follows:

“4.1 Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.***
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other***

people from committing similar offences.

3. Rehabilitation: *To enable the offender reform from his criminal disposition and become a law abiding person.*

4. Restorative justice: *To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.*

5. Community protection: *To protect the community by incapacitating the offender.*

6. Denunciation: *To communicate the community's condemnation of the criminal conduct.*

4.2 *These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality."*

17. Taking all the foregoing into consideration, I think the apt sentence to mete on a review, and which will achieve the broadest scope of the sentencing objectives is as follows:

1. The applicant is sentenced to serve a three (3) year probationary sentence with effect from 15th May, 2021.
2. a) The Probation Officer shall design a Probation programme including elements of rehabilitation and such programme shall be in writing.
- b) The applicant shall participate fully in the said Probation programme and a record thereof shall be maintained and availed to court on demand.
- c) If during the probationary period the accused shall not fall afoul of the law he shall be deemed to have completed his sentence.
- d) Should the applicant fall afoul of the law during the probationary period, the probation sentence shall automatically be revoked, he shall be arrested, and brought forthwith before the Court for issuance of a fresh definite time-bound sentence.

Administrative directions

18. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

19. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

20. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 28th Day of April, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Samuel Muhoro Waweru - Applicant present in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu