



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 128 OF 2016

LESIT, J.

KYALO KALANI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for Re-sentencing from the decision of Lesit, J.

delivered on 17th December 2010 in High Court Criminal Case No. 76

of 2009 pursuant to the Supreme Court decision of Francis Karioko

Muruatetu & Another vs Republic [2017] eKLR)

RULING ON RE-SENTENCING

1. The Applicant, Kyalo Kalani, was charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 4th August 2009, at Isinet Masai Reserve in Loitoktok District within Rift Valley Province, the Appellant murdered Stephen Kisyula Kyenze. The Applicant was found guilty as charged and was convicted by this court. He was sentenced to death. His appeal to the Court of Appeal was dismissed. His death sentence was later commuted to life imprisonment.
2. The Applicant has filed an application before this court seeking re-sentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. The Applicant submitted that he had no grudge against the deceased. He stated that the deceased came to his house drunk and beat him up. He urged that he was remorseful for his actions and asked this court to forgive him. He told this court that he is now a reformed person. He submitted that his mother is alone with no one to take care of her. He averred that he also suffers from high blood pressure. He urged this court to consider a non-custodial sentence.
3. Ms. Kimani for the State opposed the application. She submitted that the mitigating circumstances were very minor compared to the aggravating circumstances in the present case. She stated that the Applicant used excessive force which caused trauma. She averred that this court as well as the Court of Appeal dismissed his plea of self defence. She was of the view that the Applicant was not remorseful since he still blames the deceased for what happened. She pointed out that a life was lost due to the Applicant's actions. She further stated that the Applicant can access treatment for his illness while in custody. She opined that the sentence was commensurate to the offence and urged this court to uphold the same.
4. The Applicant bases his application on the Supreme Court decision in **Francis Karioko Muruatetu** (*supra*), in which the Supreme Court outlawed mandatory death penalty for murder as unconstitutional, and struck down Section 204 of the Penal Code to the extent that it prescribed a mandatory death sentence upon conviction for murder. In the premises the Applicant is deserving of a consideration of the sentence.
5. The Supreme Court in the **Francis Karioko Muruatetu** decision further gave the following guidelines with regard to mitigating factors applicable in a re-hearing sentence for the conviction of a murder charge thus:

“[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (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) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

[72]We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

6. Having considered all the above, I find that indeed this court has jurisdiction to entertain the application based on the Supreme Court decision in **Muruatetu** (*supra*). The Applicant has given his mitigating factors which I will consider together with the circumstances of the case and the victim’s statement.

7. This court called for a Re-sentencing Probation Report which has been filed. In that report, the family of the victim stated that reconciliation talks between the clan of the deceased and the Applicant’s clan had been held. It was agreed that the Applicant’s family was to cater for the burial costs and offer 12 cows as restitution as per the Akamba customs. However, the family of the deceased stated that the agreement was yet to be fulfilled. The deceased was survived by his son who was very much affected by his death and wants the Applicant’s family to honour the agreement. The Applicant’s community was not averse to reintegration of the Applicant back to the community.

8. This court has taken into account the submissions by the Applicant as well as the State. It has also taken into account the Applicant’s age and the fact that he suffers from high blood pressure. He was also a first offender. Though the Applicant states that he is remorseful for his actions, he still insists that he acted in self defence and on provocation of the deceased.

9. According to the facts of the case, the Applicant and the deceased had a confrontation on the material night, which escalated to an extent where the Applicant hit the deceased several times with a blunt object on his head. He thereafter fled the scene. The head injuries suffered by the deceased proved fatal. The aggravating circumstances in this case is the fact the Applicant hit the deceased several times on the head.

10. The Applicant has spent ten years in custody since his conviction and sentence by this court. Having considered the circumstances of this application, the Applicant’s mitigation notwithstanding, this court is of the opinion that the period that the Applicant has spent in prison is not sufficient in light of the gravity of the offence that he had committed. Further, the Applicant is yet to take full responsibility of his actions which led to the death of the deceased. He still insists he was acting in self defence, even though this defence was rejected by this court and the Court of Appeal.

11. In the premises therefore, this court having taken into account all these circumstances, sets aside the life imprisonment sentence that was imposed upon the Applicant. The same is substituted by an order of this court sentencing the Applicant to serve twenty (20) years imprisonment to be calculated from the date of sentence by this court. For avoidance of doubt that date is 17th December, 2010.

12. Those are my orders.

DATED AT NAIROBI THIS 20TH DAY OF APRIL, 2021.

LESIT, J.

JUDGE

DELIVERED THROUGH TEAMS THIS 20th DAY OF APRIL, 2021.

LESIT, J.

JUDGE