



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 167 OF 2019

JAMES LOVE MWANG'ONG'O.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....REPUBLIC

RULING

The applicant herein, JAMES LOVE MWANG'ONG'O, has filed this application on 29.3.2019 seeking to be heard on resentencing. In his application, he has declared that this application is brought in line with the directions of the Supreme court in **Petition No. 15 of 2015, of Francis Karioko Muruatetu and others Versus Republic**. The application is based on the affidavit of the applicant sworn on 1.3.2019.

The applicant submitted based on the affidavit in support of the application that he was sentenced to death for the offence of murder on 8.3.2007. His appeal was later dismissed by the Court of Appeal on 3.8.2009. But that his death sentence was later commuted to life imprisonment. That his original trial was HCCR No. 47 of 2005 which the appeal case was Criminal Appeal Number 236 of 2009.

He sought to mitigate which he accordingly did. That he committed the offence when at a tender age and was not reflective. He was then alcoholic, but now at 43 years did is mature and he has learnt how to manage his emotions. He pleaded with the court to give him a second chance in life. While expressing remorse, he stated that he is a changed person, he stressed on having undergone several programmes on rehabilitation and that he is ready to join the society again. He produced several testimonials in support of his assertion that he had reformed.

Ms. Kibathi for the state opposed the application. Counsel stressed on the aggravated nature of the injuries the deceased suffered. That the same were heinous and thus the sentence of death was sufficient and lawful. However, that the life sentence he has been commuted to is sufficient given the circumstances of the case.

On the matter of certificate, it was submitted that the same are not proof of reform.

I have considered the submissions of both the applicant and the state. From the record, the applicant first faced a charge of murder i.e HCCR 47/2005. He was sentenced to death on 8.3.2007. His appeal to the Court of Appeal was dismissed vide Criminal Appeal Number 236 of 2009 on 8.10.2010, and the death sentence was accordingly upheld. He has however, confirmed that in the year 2009, his death sentence was commuted to life imprisonment.

This matter has come back to this court pursuant to the directions given by the Supreme Court in the **Muruatetu** case (cited above). In the said case, the Supreme Court held that mandatory death sentence is unconstitutional and that even wherein the law provides for death sentence, the accused is entitled to make his mitigation before the court, using its discretion may apportion the appropriate sentence.

By way of this application, the applicant has now had the opportunity to present his mitigation which the court has noted. He has expressed his remorse and pleaded to be given a 2nd chance. He has also exhibited the various short course testimonies and certificate he has undergone and achieved while in prison. In the said Muruatetu case, at Paragraph 71, the Supreme Court gave guidelines on the factors to be considered with regard to mitigation during sentence re-hearing. The court listed:

- ***Age of the offender***
- ***Whether he is a first offender***
- ***Whether he pleaded guilty***
- ***His character and record.***

- *Whether it was gender based violence.*
- *Remorsefulness of the offender.*
- *Possibility of reform*
- *Any other factor that the court considers relevant.*

Obviously, the list above is not conclusive, giving the re-sentencing court to latitude to consider other relevant factors. In this case, I have considered the gruesome and cruel acts of violence that the deceased went through. She was a young lady of only about 25 years of age and just starting her career as an air hostess. The offence was unprovoked. The applicant made out a well calculated execution plan. The family of the deceased must have undergone tremendous pain and loss. These are all aggravating factors that I consider relevant in this matter.

I am convinced that the circumstances of this case weigh against the applicant's plea for a non-custodial sentence on the other hand, I find that it is fair, just and appropriate to sentence the applicant to a definite prison terms. I accordingly order that the applicant do serve 50 years imprisonment. This period to run from the date of his arrest on 28.2.2005.

D. O. OGEMBO

JUDGE

24.5.2021.

Court:

Ruling read out in court (online) in the presence applicant (at Kamiti) and Mr. Naulikha for the state.

D. O. OGEMBO

JUDGE

24.5.2021.

'O'

FROM: HIGH COURT APPELLATE SIDE

TO: GK. KAMITI

INFO: PHQ.

24TH MAY, 2021

HCCR MISC. CRIMINAL APPLICATION NO. 167 OF 2019

HIGH COURT CRIMINAL MISC. APPL. NO. 167 OF 2019 ORIGINATING FROM THE COURT OF APPEAL NUMBER 236 OF 2009 COURT AT NAIROBI. APPLICANT **JAMES LOVE MWANG'ONG'O**

APPEAL AGAINST SENTENCE IS ALLOWED BOTH ON CONVICTION AND SENTENCE. THE APPELLANT BE ACQUITTED OF THE 2 COUNTS (II AND III) AND BE RELEASED FORTHWITH UNLESS LAWFULLY HELD. CONFIRM ACTION

DEPUTY REGISTRAR