



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 185 OF 2018

ALEX DIMBA ADHOLA.....APPLICANT

VERSUS

DPPRESPONDENT

R U L I N G

1. The applicant brings this application for resentencing following holding of the Supreme Court in **Francis Karioko Muruatetu vs Republic [2017] eKLR**, in which the Supreme Court of Kenya declared the mandatory nature of the death sentence unconstitutional.
 2. The applicant was charged with **Murder Contrary Section 203 as read with 205 of the Penal Code in High Court Criminal Case Number 37 of 2008**. It was alleged that on the night of 21st and 22nd February 2008 at Mount Sinai Lodge in Nakuru Town, Nakuru District, Rift Valley Province he murdered Miriam Njoki Thige.
 3. The facts of the case were that the applicant and the deceased were both students at Egerton University at the material time and had an intimate relationship. On the material day, which was the opening day for that semester the applicant and the deceased had agreed to meet up. The applicant went to the hotel earlier at 3.45 p.m., booked the Number 22 room and left. He later came back with the deceased, and they went into the room.
 4. The following day at 8.00 a.m., he left the room and went and paid for it. However he did not surrender the keys saying that he was going for tea and would return, and that he had left his luggage there.
 5. He never came back.
 6. Five days later one of the hotel cleaners noticed a foul smell coming from Room Number 22. The hotel owner was called, and he notified the police, who came broke into the room, only to find the deceased lying in the bathroom, dead, naked, with a wire round her neck.
 7. The post mortem showed that she had been strangled.
 8. When investigations commenced as to who the killer was, it turned out that the applicant had used his former roommate's national identity card number and name to register at the reception.
- However investigations led to him, and eventually his father handed him over to the police.
9. In his defence the applicant admitted that he had a relationship with the deceased. He however denied causing the death of the deceased, denied, contrary to availed evidence, having had any contact with her just before her death saying that he had not spoken to her for over one and a half months before her death.
 10. The honourable judge, after a full trial observed;

“In the instance the chain of events, the conduct of the accused (his leaving the hotel on pretext that he'd come back later), the concealment of his identity, using the identity card of a fellow student, the companion never leaving the room, all these strands are not broken or interfered with by any other person or event. His defence is intended to hoodwink the court. I reject it as being unbelievable, deliberately calculated to make it appear as though he was not within Nakuru County on 21st and 22nd February 2008. PW1 and PW2 positively identified him and there can be no case of mistaken identity. I am convinced that accused is the one who lured the deceased to her death, and in fact murdered her. The circumstantial evidence point inculpably the guilt of the accused, and to the exclusion of any other person, and I make a finding of accused being guilty as charged.”

11. In his application the applicant filed written submissions and also made oral submissions and put forward a very powerful mitigation investigation. He expressed his profuse remorse with regard to the offence, admitting that it must have caused a lot of pain and loss, seeking the forgiveness of the family of the deceased, and urging the court to consider that he was a young at the material time, a first offender who was seeking a second chance to get back to society and make his contribution before he became too old in prison.

12. That he was now a reformed person. That he was rehabilitated, and while in custody he had studied law and obtained an LLB Degree from University of London and was now a Law graduate, and an assistant tutor. Using his knowledge and skill he was a legal services provider for his fellow inmates. He also held the position of the Principal of the Naivasha Inmates Education Centre and a trustee in prison.

13. Had gone also gone through a training on mindfulness.

14. He pointed out that he had already spent twelve (12) years in custody, had developed ulcers, his wife and family were ready and willing to receive him at home.

15. He relied on the **Sentencing Policy Guidelines (2016)**. **DPP Guateng vs Oscar Pistorius (96/2015) [2015] ZASCA 204 (3rd December 2015)**, **Mulamba Ali Mobanda vs Republic, Criminal Appeal Number 12 of 2013** where the appellant was resentenced to nine (9) years imprisonment, **Mark Nakitare Simiyu vs Republic Criminal Appeal Number 32 of 2011** where the applicant was resentenced to 15 years imprisonment **Republic vs John Ngángá Gacheru [2018] eKLR** (sentenced to 15 years), **Lawrence Nkongwe Mwiandi [2018] Miscellaneous Application 72 of 2018**, where the applicant was sentenced to the period already served, **Section 333 (2) of the Criminal Procedure Code** and **Ahmed Nkongwe Abdulfathi Mohamed & Another vs Republic Criminal Appeal Number 135 of 2016** on the position that any sentence is to run from date of arrest provided that applicant has all along been in custody.

16. The applicant annexed to his affidavit all his testimonials including a recommendation from the Director, Education Centre Naivasha Maximum Security Prison.

17. In his oral submissions he urged the court not to give him a long sentence as this would be counter-productive, as upon released he would end up as liability to the society, a recipient of *Pesa Kwa Wazee*. He urged that a release now while he was young would give him the opportunity to fend for himself and serve the community. He submitted for instance that he was responsible for seventy per cent (70%) of the appeals and applications filed by his fellow inmates. That if allowed back into society he would be a new Alex Dimba Adhola.

18. He urged the court to find that the mitigating factors in his case far outweighed the aggravating factors.

19. He concluded by citing *Luke 11: 9-13*, saying that he was here before this court asking for a fish and an egg.

20. Ms Murunga for the state submitted that though the applicant was entitled to this application, the case of **Murutetu** had only declared the mandatory nature of the death sentence unconstitutional. It was the position of the state that the applicant deserved the sentence of death.

21. She argued that applicant now purported to admit to committing the offence yet when given the opportunity earlier he had denied the offence and gone through a full trial. That the facts of the case demonstrated that the aggravating circumstances far outweighed the mitigating circumstances. That the applicant had taken the life of a young university student with whom he had an intimate relationship for five (5) years. He had invited her for a date in circumstances which appeared calculated, he killed her, locked her in room, left her there, while lying that he had left his luggage in the room and would return. He had lied about his name, and identity when he booked the room, a clear indication that he had planned to kill the deceased. This demonstrated that he was also a person of bad character. She submitted that there was nothing to show that he had tried to reconcile with the family of the deceased. That the cases he had relied on with regard to sentences were distinguishable as the circumstances in those cases were not similar to his case.

22. In a rejoinder the applicant submitted that he had offered to plea bargain but the state had rejected the same. That the state was looking at this matter as if it was fresh without considering that time had lapsed and he had changed. That it was only fair for the state to consider that two lives were lost in this matter, his and that of the deceased.

23. Further that he wanted the court to take into consideration the fact that he committed the offence while under the influence of alcohol, and was remorseful.

ANALYSIS AND DETERMINATION

24. I have carefully considered the applicant's submissions and those of the prosecution and all the authorities cited..

25. The mandate of this court is resentencing is to;

consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed...

26. In a sentence rehearing for the conviction of a murder charge the court is to consider the principles of sentencing as set out in the **Sentencing Policy Guidelines 2016** vis a vis factors surrounding the offence and the offender such as;

i. *Age of the offender.*

ii. *Being a first offender.*

iii. Whether the offender pleaded guilty.

iv. Character and record of the offender.

v. Commission of the offence in response to gender based violence.

vi. Remorsefulness of the offender.

vii. The possibility of reforms and social reintegration of the offender.

viii. Any other factor that the court considers relevant.

27. Against this 'checklist', the question would be, how does the applicant perform?

28. At the time of the offence he was twenty six (26) years old. His victim was a young female student aged twenty four (24) years old, who was also his lover, a clearly gender based violence offence. The applicant says that at that time he was newly married, yet he had been carrying on with the deceased for five (5) years. The manner of killing the planning that went into it rings the question, what kind of person would kill his lover, a woman he had been intimate with for five (5) years, without any provocations and walks away as if he has done nothing?

29. The prosecution is right. The applicant demonstrated malice aforethought and a calculating mind to kill in the manner in which the offence was committed. He booked the room under a false name using the identity card of a person he knew was innocent. This paints a picture of a person who planned the death of the victim and planned to get away by creating a fall guy.

30. It is true, from the record, that, the applicant wanted to plead guilty but not to Murder, but the lesser offence of Manslaughter, which the state rejected. Nevertheless throughout the trial he maintained the stand that he knew nothing about the death of the deceased. Even in his defence he took the same position and did not take the opportunity to at least explain what had happened. Yet now he now claims that he was under the influence of alcohol, and his judgment may have been impaired, something he never raised during his trial.

31. In any event when he booked the room, using a stolen identity card, when he left the deceased dead in the bathroom, when he lied to the person at the reception that he was just going for tea, he was not under the influence of alcohol.

32. While he alleges remorse there is no evidence of any effort having been made to reach out to the family of the victim.

33. The possibility of reform, rehabilitation is there. The academic credentials, the sterling discipline as a prisoner, and the community service to his fellow inmates. Even as he admits killing the deceased, it appears that it was unprovoked planned killing and the alcohol explanation is an afterthought.

34. With this in the background I find it necessary to request for a Re-sentencing Report from the Probation and After Care Services, Nakuru.

35. The report be availed within 30 days hereof

36. The Deputy Registrar to serve this order on the Probation and After Care Services Officer Nakuru County for compliance.

DATED, SIGNED AND DELIVERED VIA ZOOM THIS 30TH JUNE 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

Applicant present

Ms. Murunga for state