



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 196 OF 2018

BRIAN KIRWA BOWEN.....APPLICANT

VERSUS

DPP.....RESPONDENT

R U L I N G

1. The Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** declared the mandatory nature of the death sentence unconstitutional. It opened up the gates for persons serving on death row to re-open their cases for re-sentence hearing.
2. The re-sentencing courts mandate was set out as to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioner/applicant.
3. Keeping in mind the objectives of sentencing as set out in the **Sentencing Policy Guidelines 2016 at paragraph 4.1**

“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.”*

The court is expected to take into consideration the following circumstances;

- Age of the offender
- Being a first offender
- Whether offender pleaded guilty
- Character and record of the offender
- Commission of the offence in response to gender based violence
- Remorsefulness of the offender
- Possibility of reform and re-adaptation of the offender
- Any other relevant factor

4. The applicant herein was charged with **Murder Contrary to Section 203 as read with 204 of the Penal Code**. It was alleged that on 1st April 2021 at Sawich Village in Koibatek District within Baringo County murdered Joseph Kipkosgei Bowen.

5. On the fateful night the applicant, the deceased who was his brother were in their mother's kitchen, when for no apparent reason the applicant picked a panga and stick and cut the deceased. His mother ran out screaming for help while the applicant locked the door and set the house on fire. He was in there, when the fire became too hot, he ran out, chasing people outside, his brother was burnt to inside the house. The post mortem could not state with certainty whether the death was caused by the burns and panga cuts. The applicants position was that the deceased hit him first with a stick in the eye, and due to the pain, he got so angry, took a panga that was in house and cut the deceased, he said he was intoxicated.

6. The applicant filed mitigation submissions to the effect that he was a first offender, had acted out of provocation, was remorseful and the family had forgiven him. That having spent nine (9) years in custody he had learnt his lesson.

7. He relied on;

Francis Opondo vs Republic [2017] eKLR page 90 – 91 paragraph 12, it was held by the High Court that:

“.....The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004 as follows: In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided etc. (Makanga v R. Criminal Appeal No. 972 of 1983 (unreported). The court may also consider the value of the subject matter of the charge (Mathai vs R [1983] KLR 442) and whether there has been restitution of the property of the accused (Hezekiah Mwaura Kibe vs R [1976] KLR 118). The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.”

Republic vs John Nganga Gacheru & Another [2018], Lawrence Nkonge Mwiandi vs Republic [2018] Miscellaneous Criminal Application Number 72 of 2018, Mark Nakitare Simiyu vs Republic Criminal Appeal No. 32 of 2011, Douglas Muthaura Ntoribi vs Republic [2018] eKLR, Maurice Amuliese Mutambi vs Republic [2020] eKLR and Section 333(2) of the Criminal Procedure Code.

8. In his oral submissions Brian pleaded for forgiveness and regretted the loss of his brother, he also reiterated that he lost an eye out of the same fight that he and his brother fought out of drunkenness.

9. Ms Murunga for the state submitted that the circumstances of the offence were not amenable to this court's mercy towards the applicant. That the manner in which he caused his brother's death he deserved the sentence of death.

10. In his rejoinder the applicant submitted that the circumstances of the offence showed that he had not planned to kill his brother, that it was the deceased who found him in the room that time, his mother was traumatized but she was his mother and the mother of the deceased too.

11. That the anger of one day was not the anger of every day. That his brother took out his eye, that he ought not to have been angry but he was angry.

ANALYSIS

12. I have carefully considered the appellant's mitigation and the authorities cited together with the pre-sentence report dated 30th June 2020. The only issue is what sentence is appropriate in this case.

13. The Probation Officer has indicated that the family of the applicant is ready and willing to receive him back home, and assist in his rehabilitation. I note with concern that the report does not contain any specific interview with the mother of the applicant who is the immediate secondary victim after the deceased.

14. It is also indicated that the family recorded minutes of the meeting where they were in agreement that that applicant could go home, that document has not been availed

15. If indeed the family did have a meeting and made the minutes alleged by the applicant it would be necessary for the same to be seen by the court before the court's metes its sentence as they would speak to rehabilitation and reintegration and whether a non-custodial sentence would be suitable or not.

16. In the same vein it is also imperative that the Probation officer avails the **Victim Impact Statement**. This is because Brian killed his brother then he set the house on fire. It is his own mother who testified on how the whole incident happened because she witnessed it. The probation officer is referred to the **Victim Protection Act No. 17 of 2014 Section 2** which defines victim and the statement:

"victim" means any natural person who suffers injury, loss or damage as a consequence of an offence; "victim impact statement" means a statement by the victim, or where incapacitated, the victim's representative, on the psychological, emotional, physical,

economic or social impact of the offence committed against the victim and includes any recording, summary, transcript or copy thereof;

17. And **Section 12** which provides for the stamen.

Victim impact statements (1) A victim of a criminal offence may make a victim impact statement to the court sentencing the person convicted of the offence, in accordance with section 329C of the Criminal Procedure Code (Cap. 75) and that statement may be considered by the court in determining the sentence of the offender.

18. And **section 329(C) of the Criminal Procedure Code**

When victim impact statements may be received and considered

(1) If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender.

(2) If the primary victim has died as a direct result of the offence, the court shall receive a victim impact statement given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate.

19. It is my considered view that the circumstances of this case and the manner in which the offence was committed necessitate the consideration of a victim impact statement. Taking that into consideration I direct therefor that the Probation Officer do avail to court within 30 days here;

i. The Victim Impact Statement

ii. The family meeting minutes

20. The Deputy Registrar to serve this order on Probation and After Care Service Officer Nakuru County for compliance.

21. Orders accordingly

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

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

Ms. Murunga For state

Applicant: Present