



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 142 OF 2018 CONSOLIDATED WITH MISC. CRIMINAL APPLICATION. NO 70 OF 2019

FATHER GUYO WAQO MALLEY.....1ST APPLICANT
MOHAMMED MOLU BAGAJO.....2ND APPLICANT
ADAN IBRAHIM MOHAMMED3RD APPLICANT
MAH.....4TH APPLICANT
ROBA BALLA BARICHI5TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. All the applicants were charged with of the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars were that the applicants jointly murdered Bishop Luigi Locati on the 14th day of July 2005 at about 7.30 pm at Isiolo catholic diocese in Isiolo district within Eastern Province.

2. They were convicted and sentenced to suffer death on the 6th November 2014. The death sentence was later on commuted to life sentence for each of the applicants by his Excellency the President of the Republic of Kenya.

3. The applicants through a notice of motion dated 8th April 2018 and a chamber summons dated 4th January 2019, sought for resentencing in conformity with the decision by the Supreme Court in petition No. 15 and 16 of 2015 consolidated- **Francis Karioko Muruatetu and another V Republic [2017] eKLR**.

4. They also sought to have the court give breath to life sections 216 and 329 of the Criminal Procedure Code in capital cases. The said sections provide as follows:

Section 216

“The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.”

Section 329

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.”

5. The applicants also urged the court to consider the period they had been in incarceration and allow their plea.

6. I will give a summary of the mitigation and submissions by each of the applicants:

1st applicant – Father Guyo Waqo Malley;

7. -Was a catholic priest serving in Isiolo before this incident.

- He is aged 64 years.
- Frustration by the deceased pushed him into mental depression.
- He does not deny committing the offence.
- He is very remorseful and says he has been rehabilitated. He has continued to teach others in prison.
- Has had sufficient time for rehabilitation and wishes to be given a second chance.
- His stay in prison has taught him a lot about the realities of life.
- Annexed to his submissions are recommendations from Patricia Makali (SP) in charge of the Kamiti Prisons Academy; A plea for reconciliation with the family of the deceased dated 19th December 2019 addressed to this Grace Hurbertus Matheus Maria Van Megen Apostolic Nunzio of Kenya – Nairobi; A recommendation from Mr. Charles G. Mutembei officer in charge Kamiti Maximum Prison and finally a letter from Father Bert Van Megen of the Apostolic Nunciature in Kenya dated 19th January 2020. He did this letter in response to a letter by the 1st applicant.

8. Mr. Kithi for the 1st applicant submitted that the applicant besides being remorseful has gone through training in philosophy and medicine and has a productive life to live. He will offer voluntary services to the public. He urged the court to consider decongesting the prison especially during this period of Covid – 19.

2nd applicant - Mohammed Moha

9. -He is remorseful over what happened.

- Prayed for leniency.
- Married with two children and has several siblings.
- In prison he enrolled in several courses and spiritual programmes.
- He was aged 31 years at the time of arrest on 14th July 2005 and was a first offender.
- Urges the court to consider the period already served to be sufficient punishment.
- He annexed a KCSE certificate (Mean grade score D-) achieved in the year 2018; Certificate of completion of Islamic education course .13th October 2016; Recommendation dated 12th September 2019 from Mr. Charles Mutembei Officer in charge Kamiti Maximum Prison and Kenya secondary school leaving certificate from Kamiti inmate's Academy.

10. He does not deny committing the offence. M/s Odembo for the 2nd applicant urged the court to reduce sentence and give him a non-custodial sentence. She submitted that the applicant's wife had left after his arrest and he had also contracted asthma and suffered depression while in prison. She added that he had reformed.

3rd Applicant – Adaw Ibrahim Mohamed

11. He is a 1st offender and is remorseful

- Has offered religious teaching at the prison mosque.
- Has been rehabilitated. He annexed a certificate of participation in a training program on 18th April 2019.
- Requests for a lenient sentence that would enable him be reintegrated back to society.
- He urges the court to consider the period he has been in prison to date.
- He is aged 57 years and is married with six (6) children.
- He did not deny committing the offence.

4th Applicant – MAH

12. Though Dr. Khaminwa had informed the court that the 4th applicant had filed submissions I did not find any in the file. In his submissions counsel stated that the 4th applicant was 17 years at the time of commission of the offence and was in remand for 14 years

13. He further submitted that the 4th applicant was a 1st offender and has reformed, having learnt a lot in prison. He added that the applicant has done some national examination. Counsel contends that the sentencing policy is for reformation of a prisoner. He therefore urged the court to exercise its discretion and reduce the applicant's sentence.

5th applicant – Roba Balla Barichi

14. He is a 1st offender and was arrested while aged 31 years and is now 46 years of age.

- The time in prison has enabled him to know himself better and is now a committed Muslim.
- Requests the court to consider the period he has spent in prison while resentencing him.
- He had just gotten married at the time of his arrest and his wife remarried. He therefore has no family of his own.
- He has undertaken rehabilitation programs while in prison. He annexed a recommendation letter from Mr. Charles Mutembei officer in charge Kamiti Maximum Prison dated 12th September 2019; Certificate in Islamic education dated 13th October 2016; KCSE certificate (Mean grade D+) for the year 2019 from Kamiti G.K Prison, Academy;
- He sits in inmates disputes resolution committee and is a member of “crime si poa” committee.
- He has suffered depression and now has asthma (Report by a Clinical officer Marwa Paul of Kamiti Maximum prison dated 10th April 2018).
- He is remorseful for what he did and is ready for reintegration unto the society.

15. M/s Odembo his counsel submitted that the said applicant is totally reformed and may be considered for a non- custodial sentence.

16. Mr. Momanyi for the State though not opposed to the resentencing pointed out that no victim assessment report and pre-sentencing report had been supplied. He stressed that a life had been lost as a result of the applicants’ actions. Counsel submitted that the 1st applicant was the planner and financier of this act and the case was a very clear one. He urged the court to go by the guidelines in resentencing set out by the Muruatetu case. That the court should give a sentence that will teach the applicants a lesson. He suggested that the 1st, 2nd, 3rd and 5th applicants should get 40 years imprisonment each.

17. As for the 4th applicant counsel submitted that he was a minor at the time of commission of the offence. That in applying section 191 of the Children’s Act and the Court of Appeal case of **DKC Vs Republic [2014] eKLR** the court may release him.

18. In a rejoinder Mr. Kithi for the 1st applicant contended that the suggested 40 years sentence is unconstitutional in respect to the Muruatetu case. He asked the court to consider a non-custodial sentence as so much had changed.

19. M/s Odembo for the 2nd and 5th applicants in rejoinder urged the court to consider the suggested 40 years sentence to be unfair. She asked the court to consider the age of the applicants and give a non-custodial sentence. The 3rd applicant had nothing to add to his submissions.

20. Dr. Khaminwa for the 4th applicant submitted that as a nation we had moved so much away from the motion of deterrent sentences and the concentration is now on reformation of prisoners. He urged the court to consider that, in respect of the 4th applicant.

21. At the close of the submissions on 3rd December 2020 the court called for probation officers’ reports in respect to all the applicants. The reports were finally filed on 26th April 2021.

22. The report on the 1st applicant was by Mr. Andrew Kanyutu M. He interviewed a number of persons. There are those who supported the applicant’s re- sentencing but others did not. The Christians, Muslim community and the administration led by Isiolo county commissioner and Governor were the ones opposed to the re-sentence of the 1st applicant. The reason they gave is that his return would cause a lot of tension and insecurity in the county. Secondly that the 1st applicant reacted very badly when the bishop and priests visited him in prison so he was not ready for reconciliation.

23. He acknowledged that the said applicant could be considered for resentencing owing to his being a 1st offender, acknowledgement of the offence, expression of remorse, efforts of reaching out to the victim and having supportive social and family system.

24. He finally disrecommended a non-custodial sentence due to the negatives stated above.

25. The 2nd applicant’s report was done by Mr. Macharia P.N. He interviewed representatives of the victim, the applicant and his family. He found that the situation on the ground was still volatile and there has to be reconciliation to avail civil unrest. He therefore disrecommended any resentencing of the 2nd applicant.

26. The 3rd applicant’s report was done by M/s Mercy M. Kanyangi. She interviewed several people and also perused a number of prosecution documents. Various communities and a representative of the national government were interviewed. Upon assessment of all the views collected M/s Kanyangi came to the conclusion that the application for resentencing be deferred to a later date to give room for a court coordinated reconciliation process.

27. The 4th applicant’s report was done by Abima M.M. He interviewed both the applicant’s and victim’s family, the victim (church), various communities and the county commissioner. Each of them gave their version of the way the resentencing should be done. He therefore urged the court to defer the resentencing.

28. The 5th applicant’s report was done by P. Alambo. He too interviewed the applicant’s family, various communities and the victim (church). He urged the court to defer the resentencing to give the various parties and bodies time to prepare for the applicant’s release.

29. I have considered the applications, annexures, submissions and the probation officers' reports. The issue for determination is whether the applicants are suitable material for resentencing.

30. The application for resentencing by the applicants is premised on the Supreme Court decision in the famous **Francis Karioko Muruatetu case (supra)**. The applicants were convicted and sentenced to each suffer death for the murder of bishop Luigi Locati. This was on 6th November 2014. At that time in history, the death sentence was a mandatory sentence for anyone convicted of Murder contrary to section 203 as read together with section 204 of the Penal code. We used to say "the courts hands were tied" meaning despite any obvious mitigation raised the court could not pass any other sentence besides the death sentence.

31. This is the injustice that the **Muruatetu** case came to cure. The said case gave an accused person an opportunity to mitigate and the court an equal opportunity to assess and consider the said mitigation and any other circumstances before passing sentence. In other words, the court is now left to exercise its discretion in sentencing in Murder cases and no longer say its hands are tied.

32. Part 1 section 4 of the sentencing policy guidelines provides for the objectives of sentencing to be as follows:

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"

33. In **Francis Kariko Muratetu and another v republic** (supra) the Supreme Court stated:

"[71] 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."

34. In a scenario such as this, the court requires to consider the circumstances prior to the commission of the offence, at the time of trial and subsequent to the conviction. What was the conduct of the applicant during all these stages? Thus a consideration of all this will assist in the resentencing. There is no fixed sentence as learned counsel Mr. Momanyi would want it done by suggesting a forty (40) years sentence.

35. I have deliberately cited the above provisions because of the reports by the probation officers and their conclusion, that because the Catholic church, County Commissioner and Governor are opposed to any release of the applicants then the court should go out of its way to lead an alternative justice reconciliation committee to reconcile the parties.

36. From the reports filed its also clear that the officers consider resentencing as an order releasing convicts from prison and that appears to be the message they gave to the persons they interviewed.

37. The reports from the Catholic church diocese Isiolo, led by bishop Anthony Irem, Christian community led by bishop Stephen Kalunyo Muslim community led by Sheik Ahmed show that they are carrying very heavy hearts from within. They claim to have forgiven the

applicants but they say when they remember the good works of the deceased they do not want to see the applicants. This is not forgiveness.

38. Bishop Luigi died in 2005 and the applicants were known and arrested soon thereafter. It is now a good 16 years since the said death. Does it mean these senior religious leaders have never found it in their hearts to forgive the applicants? Why have they not preached to their followers and asked them to forgive and release the applicants from their hearts? What is our heavenly Father saying when He looks down at them? These leaders starting from the Church, National government, County government should know that they do not require the Court to lead a delegation to Isiolo to reconcile the communities. That is part of their duty.

39. Going by the submissions and the Probation Officers reports the following are the ages of the applicants at the time of arrest.

	Age in 2005	Present Age
1 st applicant	48 years	64 years
2 nd applicant	29 years	45 years
3 rd applicant	41 years	57 years
4 th applicant	17 years	33 years
5 th applicant	30 years	46 years

40. It is clear that the 4th applicant was a minor at the time of commission of the offence. This fact was not brought out during the sentencing by the trial court. Learned State counsel Mr. Momanyi for the prosecution in his submission agreed that the 4th applicant was indeed a minor in 2005 and section 191 of the Children's Act should have been considered.

41. He was not opposed to his release saying he had suffered enough punishment. In the case of **DKC V Republic** (supra) the Court of Appeal stated this:

“Whatever the case, life imprisonment is not provided for under the **Children's Act**, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.”

42. The 4th applicant has been behind bars for 16 years. He was in custody for nine (9) years before he was convicted. The reports from the Kamiti Prison show that he has benefited a lot from his stay in prison. I therefore allow his application and the life sentence is substituted with the period already served. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

43. The rest of the applicants save for the 1st applicant went to prison when they were young and are now aged. The documents from prison show they have been involved in various meaningful activities. They all admit having committed the offence for which they say they are remorseful.

44. It is true and very painful that a precious life was lost at the hands of the applicants. The victim may never easily say he/she wants anything to do with the culprits. However, the sole aim of imprisonment is reformation and social rehabilitation. The issues to consider are whether the convict has

- i) accepted his/her mistakes
- ii) is remorseful
- iii) willing to reform
- iv) ready to reconcile with the victim
- v) ready to live among others and serve humanity together.
- vi) Has been behind bars for a reasonable period.

45. The reports by the probation officers on the applicants' rehabilitation and plans for integration are very good. Even among those interviewed especially the Chiefs the message is that the applicants lived well in the society, worked hard and had no issues with their community members and would be received well in the event of a release.

46. There is no report of any unlawful activities that any of the applicants was involved in during the period before their arrest. They were all first offenders. During the hearing of the case they were never released on bond. The “home” they have known for the last sixteen (16) years is the prisons. It is from this “home” that reports have indicated that the applicants have accepted their wrong doing, are remorseful and have fully embraced their faith.

47. The mastermind of all this was the 1st applicant who is now aged 64 years. He was a priest working with the deceased. From the letters produced during the hearing of the case, there were serious disagreements between the 1st applicant and the deceased which should not have been left to escalate to the level it did.

48. The applicants have asked to be given a second chance in life which the State is not opposed to. The issue is what punishment is suitable for them. Section 333 (2) of the Criminal Procedure Code provides:

“Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

49. I have considered the applicants’ ages, the period they have been in prison from the date of arrest, the pain that was inflicted on the victim and his family, the guilt hanging on the applicants’ heads and the reports on their level of rehabilitation. Having done all that I hereby substitute the life sentence each of the applicants is serving with a sentence of 27 (twenty seven) years to be calculated from the date they were first arraigned in court.

Orders

i) The 4th applicant’s sentence is reduced to the period already served.

ii) The 1st, 2nd, 3rd and 5th Applicants to each serve 27 (twenty seven) years from the date they were first arraigned in court.

Orders accordingly.

DELIVERED ONLINE SIGNED AND DATED THIS 30TH DAY OF JULY, 2021 IN OPEN COURT AT NAIROBI

H. I. ONG’UDI

JUDGE