REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 160 OF 2019

JOSEPH MAYAKA MOGAKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] Before the Court for determination is an application filed on **20 January 2020** by **Joseph Mayaka Mogaka** (the applicant herein). The said application was brought by way of Chamber Summons, and is expressed to have been filed pursuant to **Articles 22(1), 23(1), 25(a), (c), (d), 27, 50, 165(3)** of the **Constitution of Kenya, 2010**, as well as **Section 296(2)** of the **Penal Code** and **Section 169(1)** as read with **Sections 216 and 329** of the **Criminal Procedure Code**. The applicant thereby sought orders that:

> **[a]** the decision in **High Court Criminal Case No. 16 of 1997** at Eldoret be declared null and void as his mitigation within the meaning of **Sections 216 and 329** of the **Criminal Procedure Code** was not considered.
>
> **[b]** the Court be pleased to issue any such further orders, directions and/or reliefs it may deem fit and expedient in the circumstances.

[2] In the grounds set out in support of the application, the applicant averred that his appeal from the decision of the High Court in **Criminal Case No. 16 of 1997** was heard and determined by the Court of Appeal vide **Eldoret Criminal Appeal No. 260 of 2003,** in which the decision of the High Court was upheld. He further averred that, since the mandatory death sentence has since been held to be unconstitutional by the Supreme Court in **Supreme Court Petitions No. 15 and 16 of 2015: Francis Muruatetu & Another vs. Republic**, he is entitled to a sentence re-hearing as a matter of urgency; and that this is his right under **Article 25(c) and 50(2)(e)** of the **Constitution.**

[3] In support of his application, the applicant relied on his own affidavit filed alongside the application on **20 January 2020**. He was explicit therein that he was not contesting his conviction, but was keen on having a re-hearing on sentence only. He cited **Article 27(1)** of the Constitution and asserted that he is entitled to equal protection and benefit of the law as those whose sentences have been re-heard. He added that it is the duty of the Court to protect, promote, preserve and bring into reality the values and principles enshrined in the Constitution.

[4] In addition to the Chamber Summons, the applicant filed another document under the title "APPLICATION", fashioned in the nature of a Petition; for it sets out the particulars of the parties, the facts of the case, the nature of his claim, the applicable law and the constitutional foundation of the application as well as the relief sought. Thus, by way of relief, the applicant prayed that he be granted an opportunity to mitigate in re-sentencing hearing, in the light of the decisions of the Court in **Douglas Ntoribi** (Meru High Court Misc. Criminal App. No. 4 of 2015), **William Okungu Kittiny vs. Republic** [2018] eKLR and **Mulamba Ali Mabanda**, Mombasa Criminal Appeal No. 12 of 2013. He also prayed that the Court be pleased to grant a re-hearing on sentence; and to make such other orders that it deems fit.

[5] The application was initially filed at the Constitutional and Human Rights Division of the High Court at Nairobi, but was on **5 November 2020** transferred to the Criminal Division, Milimani, from where it was thereafter transferred to the High Court at Eldoret on **30 November 2020**. When it ultimately came up for directions, the parties opted to urge the application by way of written submissions; which submissions were duly filed and exchanged.

[6] In his written submissions filed on **2 March 2021,** the applicant reiterated his stance that he is not contesting his conviction. He then proceeded to set out, in detail, the mitigating factors in his favour, such as his age, the fact of his being a first offender, and that he is remorseful for the offence. He also mentioned that he has benefitted from the rehabilitation programmes he has participated in while in custody; in addition to setting out his own personal circumstances. The applicant also made reference to the **Judiciary Criminal Procedure Bench Book 2018, the Judiciary Sentencing Policy Guidelines, 2016,** and the South African case of **Oscar Pistorius** in urging the Court to reconsider his sentence. He also prayed that **Section 333** of the **Criminal Procedure Code** be put into consideration to account for the time spent by him in pre-trial detention.

[7] On his part, **Mr. Mugun**, learned counsel for the State, underscored the point that the Supreme Court in **the Muruatetu case** did not outlaw the death sentence; but confined itself to the mandatory nature of the sentence. He urged the Court to bear in mind the general rule in sentencing; namely, that each case should be looked at within the context of its peculiar circumstances. In his view, the facts of this particular case present particularly aggravating circumstances that make it so heinous that the death penalty is the most befitting sentence. Counsel enumerated the circumstances thus:

> **[a]** The deceased was the applicant's wife;
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> **[b]** The applicant and his brother, who was his co-accused before the High Court, were in the habit of assaulting the deceased prior to her demise; and that these incidences of assault took place in the presence of their children.
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> **[c]** The applicant and his brother committed the offence in a such a brutal way that the deceased's body had multiple fractures and injuries, suggesting that she had been assaulted over and over again using a blunt object;
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> **[d]** In order to cover their crimes, the applicant and his brother buried the deceased's body in a shallow grave hoping that it would decompose with time;
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> **[e]** The deceased's body was left in that shallow grave for about a year.
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> **[f]** Despite the fact that the deceased's children (and some of her relatives) inquired about her numerous times, the applicant refused to relieve their anxiety by disclosing what had happened.

[8] Accordingly, it was the submission of **Mr. Mugun** that the death sentence imposed on the applicant is not only legal, but is also warranted in view of the aggravating circumstances in which this offence was committed. He accordingly urged the Court to dismiss the application.

[9] The brief background to the application is well set out in the Judgment of the Court of Appeal dated **19 October 2007** and the applicants own submissions; namely, that the applicant was arrested on **5 January 1995** and arraigned before the High Court at Eldoret on a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** He was charged jointly with his brother and were found guilty of the offence after trial. The victim was the applicant's wife, **Salome Nyokabi**, whose death occurred on **14 May 1994**. The applicant was accordingly convicted and sentenced to death on **16 August 2002.**

[10] Being aggrieved by his conviction and sentence, the applicant filed an appeal to the Court of Appeal, being **Eldoret Criminal Appeal No. 260 of 2003**. That appeal was found to be without merit and was accordingly dismissed on **19 October 2007**. Since then the applicant has been serving his sentence until **20 January 2020** when he approached the Constitutional and Human Rights Division as stated hereinabove. His approach was premised solely on **the Muruatetu case**. Hence, although his substantive prayer is that the decision in **High Court Criminal Case No. 16 of 1997** at Eldoret be declared null and void as his mitigation within the meaning of **Sections 216 and 329** of the **Criminal Procedure Code** was not considered; that prayer is to be considered, not as a flaw in the sentencing process, but within the context of **Muruatetu** in so far as the mandatory penalty of death made mitigation superfluous at the time.

[11] In **Muruatetu,** the Supreme Court declared unconstitutional the mandatory aspect of the death sentence as prescribed by **Section 204** of the **Penal Code**. That decision was made on **14 December 2017.** For its full tenor and effect, an excerpt of the decision is restated here below:

> **"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.**
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> **[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution**."

[12] The Supreme Court then added at paragraph 69 of its Judgment that:

> **"Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt,** *this decision does not outlaw the death penalty***, which is still applicable as a discretionary maximum punishment."**

[13] In **William Okungu Kittiny vs. Republic** (supra), in which the Court of Appeal had occasion to reflect on the ramifications of the **Muruatetu case**, it was held that:

> **"...The appellant was sentenced to death for robbery with violence under Section 296(2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296(2) and 297(2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the**

findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the Constitution...as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296(2) and 297(2) of the Penal Code on the death sentence fails."

[14] The same stance was taken in the two other cases cited by the appellant, namely: **Mulamba Ali Mabanda** (supra) and **Douglas Ntoribi** (supra). Indeed, the Supreme Court has since issued further guidance in connection with the **Muruatetu decision** vide its Directions dated **6 July 2021.** Hence, at paragraphs 11, and 12 thereof the Supreme Court stated thus:

[11] The ratio decidendi in the decision was summarized as follows;

> **"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**

[12] We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.

[15] It is manifest, therefore, that the death sentence *per se*, is neither unlawful nor unconstitutional. Indeed, authorities abound for the proposition that, in an appropriate case, such a sentence can and ought to be imposed if the justice of the case so dictates. Hence, at Paragraph 52 of its decision in **Muruatetu**, the Supreme Court was explicit that:

> **"We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness." (emphasis supplied)**

[16] Thus, in **Daniel Mwomole Adede vs. Republic** [2019] eKLR in which the Court of Appeal was urged to apply **Francis Karioko Muruatetu and** quash the death sentence in favour of a fixed term sentence for murder, the Court of Appeal held thus:

> **"We now consider the mandatory death sentence meted out on the appellant, we note that the same is provided for in Section 204 of the Penal Code and therefore the learned judge did not err in sentencing him as such. However, the appellant claimed that the same was harsh since he was a first offender. His counsel further urged the Court in his submissions to apply the Francis Karioko Muruatetu & Another –v- Republic, (supra) and reduce the sentence meted out on the appellant…In the instant matter, the circumstances under which the offence was committed was heinous and malicious. The appellant deliberately and with impunity pursued and viciously attacked the deceased with a clear intent to kill her even as she tried to flee to seek refuge. The injuries inflicted on the deceased were not only aimed to kill but were also meant to take away her dignity in the process."**

[17] The Court of Appeal accordingly held that:

> **"We are aware of the Supreme Court decision in Francis Karioko Muruatetu & Another –v- Republic (supra)… Nevertheless, due to the aggravating circumstances surrounding the death of the deceased, we decline to vary or interfere with the death sentence meted upon the appellant. This appeal has no merit. We uphold and affirm the conviction and the death sentence meted on the appellant. This appeal is hereby dismissed in its entirety."**

[18] With the foregoing in mind, I have paid attention to the facts of this case. As indicated by **Mr. Mugun**, the applicant's sentence may have been commuted already from death to life imprisonment by the President of the Republic of Kenya. Nevertheless, in an application of this nature, the focal point is not the sentence as commuted, but what was imposed at the time of the initial sentencing hearing. I therefore agree with the view expressed by **Hon. Majanja, J.** in **John Gitonga alias Kadosi vs. Republic** (supra), that:

> **"...this petition is one for resentencing not clemency. The petitioner has already had the benefit of his death sentence commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under Article 133 of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional."**

[19] Consequently, **Section 329** of the **Criminal Procedure Code** provides that:

> **"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."**

[20] And, in the **Criminal Procedure Bench Book**, the standard practice recommended is set out thus:

"...Sections 216 and 329 of the CPC empower the convicting court to hear evidence before sentencing that it thinks necessary to determine the appropriate sentence or order. Such evidence may, for example, be contained in probation reports, community service reports, or general social enquiry reports from the probation officers. The offender may also present mitigating evidence to the court. The court ought to establish the history, character, and antecedents of the person convicted, as well as all matters relevant to punishment, before imposing a sentence. While requesting such additional information is discretionary ... it is desirable to do so. During the sentence hearing, the court receives submissions from the prosecution, the convicted person, the victim (voluntary), the probation officer and, where relevant, the children's officer."

[21] In the same vein, at **Paragraph 23.9** of the **Judiciary Sentencing Guidelines** it is suggested thus:

"The first step is for the court to establish the ... sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum ... sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."

[22] Further to the foregoing, directions were given by the Supreme Court dated **6 July 2021** thus, (at Paragraph 18 thereof):

[a] The Judiciary Sentencing Policy Guidelines be revised in tandem with the new jurisprudence enunciated in Muruatetu;

[b] All offenders who have been subject to the mandatory death penalty and desire be heard on sentence will be entitled to re-sentencing hearing.

[c] In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.

[d] An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

[e] In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court:

[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] The manner in which the offence was committed on the victim;

[vii] The physical and psychological effect of the offence on the victim's family;

[viii] Remorsefulness of the offender;

[ix] The possibility of reform and social re-adaptation of the offender;

[x] Any other factor that the Court considers relevant.

[23] The foregoing are all matters that must be given appropriate attention at the re-sentencing hearing. Accordingly, I note that the applicant presented detailed submissions in mitigation in which he pointed out that he was 48 years old at the time of his arrest; and that he is now 74 years old. He also stated that he was a first offender after the unfortunate incident. The applicant also mentioned that he has lived to regret the occurrence and is extremely remorseful for his actions. He pointed out that he had reached out to the deceased's family and asked for their forgiveness and that they are prepared for reconciliation. Also significant is the applicant's assertion that his incarceration has afforded him an opportunity for introspection; and that as a result he has transformed into a God-fearing, law-abiding citizen; adding that he has used his time and efforts to minister to fellow inmates. The applicant annexed certain letters and testimonials to his written submissions to prove that he has been of exemplary character and that he serves as a church elder at the prisoner's chapel; among other responsibilities.

[24] In terms of his personal circumstances, the applicant stated that, upon his arrest, their 8 children were placed in the custody and care of his parents who later died. The younger children were thereafter looked after by their elder siblings; and that 3 of them have had to drop out of school due to lack of school fees. He also mentioned that he has developed health complications such as loss of sight and arthritis due to old age. He accordingly prayed that he be given a second chance to re-integrate with the society. Thus, quoting **the Pistorius murder case**, the applicant urged the Court to bear in mind that:

"Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions...a non-custodial sentence would send a wrong message to the community. On the other hand, a long sentence would not be appropriate either, as it would lack the element of mercy..."

[25] The applicant also relied on **Mulamba Ali Mabanda** (supra) to underscore the fact that the period of his incarceration should be taken into account in re-sentencing. In that case, the Court of Appeal took the following approach:

"...we note that the appellant was a first offender, he had a young family he was taking care of, he was said to have reformed... the appellant has already been incarcerated for almost nine years. In our view, he has already paid his debt to the society and learnt his lesson. In the circumstances the appropriate sentence that commends itself to us is one that is reduced to term already served. We therefore order that the appellant be released from prison custody unless he is otherwise lawfully held."

[26] On his part, **Mr. Mugun** enumerated the following aggravating circumstances in urging the Court to dismiss the application:

[a] The deceased was the applicant's wife;

[b] The applicant and his brother, who was his co-accused before the High Court, were in the habit of assaulting the deceased. These incidences of assault took place in the presence of their children.

[c] The applicant and his brother committed the offence in a such a brutal way that the deceased's body had multiple fractures and injuries, suggesting that she had been assaulted over and over again using a blunt object;

[d] In order to cover their crimes, the applicant and his brother buried the deceased's body in a shallow grave hoping that it would decompose with time;

[e] The deceased's body was left in that shallow grave for about a year.

[f] Despite the fact that the deceased's children (and some of her relatives) inquired about her numerous times, the applicant refused to relieve their anxiety by disclosing what had happened.

[27] I have taken all the foregoing into account and weighed both the mitigating and aggravating circumstances of the case. It is noteworthy that, although the applicant mentioned, in his written submissions, that he had attached a letter from the deceased's brother to indicate that he reached out to the deceased's family and that they had forgiven him, no such letter was attached. And although he is remorseful and has apparently had time for introspection, the facts show that the offence was committed with inexcusable brutality and insensitivity. Here is an excerpt of the Judgment of the Court of Appeal (at page 5) as to what transpired after the assault of the deceased by the applicant and his brother, as narrated to the High Court by the deceased's 16-year-old nephew, **Jeremia Maina Kari** (PW5):

"The first appellant, in the hearing of Maina told those "wazees" that the deceased had misbehaved and he was disciplining her. Maina asked where the deceased was and he was told that she was lying on the bed. When Maina tried to touch her on the bed, she was not there. Maina then asked for a spot light and on flashing the same, he saw the deceased under the bed. She had a cut on the leg. One eye was open but she was still breathing. Maina then left and was escorted to the bus stand and he went to his other aunt and to his grandmother to both of whom he reported the incident. That was the last time anybody saw the deceased alive."

[28] The Judgment of the Court of Appeal further shows that, in the opinion of **Dr. Ywaya** who performed postmortem on the body after exhumation, the cause of death was attributable to three fractured ribs as well as a fracture of the right orbital bone that the deceased sustained. He further formed the opinion that the injuries could have been caused by a blunt object. It is also significant that, in order to cover their crimes, the applicant and his brother buried the deceased's body in a shallow grave hoping that it would decompose with time; and that the deceased's body was left in that shallow grave for about a year; such that, despite the fact that the deceased's children inquired from the applicant about her numerous times, he refused to disclose what had happened to the deceased. He instead lied to them that the deceased had gone to Mombasa and would never return. He proceeded to demolish their matrimonial house at Tinderet and left the children homeless.

[29] Thus, what stands out from the evidence presented during the sentence re-hearing, is the brutality with which the applicant and his brother murdered the deceased; the manner of cover-up and the conspiracy of silence that followed the heinous act. Accordingly, I am of the considered view that the sentence imposed on the applicant was warranted. In any event the same has since been commuted by the President of the Republic of Kenya to life imprisonment; and to my mind, no justification has been shown for any further adjustment of the sentence. That being my view, it would be superfluous to pay attention to the requirements of **Section 333** of the **Criminal Procedure Code.**

[30] In the result, I find no merit in the application filed herein on **20 January 2020**. The same is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF NOVEMBER 2021.

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OLGA SEWE

JUDGE