



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO. 2 OF 2020

LESIT, J

MAMUSH HIRBO FAJA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-HEARING ON SENTENCE.

1. The Applicant, **MAMUSH HIRBO FAJA** was tried and convicted by this court and thereafter on the 29th February 2016 sentenced to death as by law prescribed. He subsequently filed an appeal to the Court of Appeal on the 30th May 2016 and the same dismissed in its entirety in a judgment of the Court delivered on 25th October, 2019.

2. The Applicant now moves this court vide a **Notice of Motion** application dated 27th January, 2020. filed on his behalf by Mr. Swaka advocate, seeking orders on the following terms:

i. Moot

ii. Moot

iii. The honourable court be pleased to revise the sentence from a custodial to a non-custodial.

iv. The court be pleased to commute the accused (sic) person's sentence to the period already served.

v. The court grants any other orders it may deem expedient in this matter.

vi. Costs be in the cause.

3. The application is based on seven grounds on the face of the application. In summary,

a. The Applicant explains that he was charged in HCCR No. 48 of 2013, tried by this court and sentenced to death.

b. That he is at the verge of a nervous breakdown because he faces life imprisonment.

c. He is a husband, father and sole breadwinner of his family and that his family has fallen apart due to his incarceration.

d. His children are unable to continue with education and may loose track of life.

e. He has suffered enough, is completely remorseful and pledges to conform with the law and become a law abiding and productive member of the society.

f. No prejudice will be suffered by the Respondent if the orders sought are granted.

g. It is in the public interest that the application be allowed as the sentence is excessive.

4. The application is supported by an affidavit sworn by the Applicant in which he repeats the grounds cited on the face of the Motion, so I need not repeat them here.

5. The Application was argued by Mr. Swaka advocate on behalf of the Applicant, while Ms. Onunga, learned Prosecution Counsel represented the State.

6. Mr. Swaka, in his oral submissions urged that the Applicant had come to court under the Muruatetu case on the issue of mitigation. Counsel urged that the Applicant was extremely remorseful for his conduct which led to the offence and eventually to this charge. Mr. Swaka urged that the victim in this case was the Applicant's wife, and that the Applicant will carry the weight of his actions upon his conscience forever, which is an eternal punishment, taking away his peace.

7. Mr Swaka urged that the Applicant regrets that he lost his self-control and carried out the heinous crime which has caused his child to remain without parents thus taking a toll on them.

8. Mr. Swaka asked the court to consider that the Applicant has been in prison for 7 years. He urged that this period has been a time of self-reflection and personal post mortem, and that he has come to a conclusion that crime, especially murder does not pay.

9. Mr. Swaka urged that Applicant has undergone basic education at Kamiti Academy, having been illiterate in the past. Counsel urged that that education will help him in life.

10. MS Onunga learned Counsel for the State urged the court to consider that the Applicant had appealed this court's decision, and his appeal dismissed and sentence of death upheld. Counsel urged that since the Applicant had come for re-sentencing, the court should be guided by circumstances of the case including the mitigating factors and the following factors:

a) Whether the Applicant is remorseful

b) Age of the Applicant

c) His character

d) Whether he is a first offender.

11. Ms. Onunga urged that the Applicant had not demonstrated his remorse to the court but had merely made an unsubstantiated statement to court to that effect. Counsel was intrigued that Mr. Swaka had befittingly described the Applicant's crime as heinous. She urged the court to consider that the cause of death was multiple stab wounds to the chest and the abdomen. Counsel also urged the court to consider that the Applicant's conduct had affected many people including the only child of the deceased and the Applicant.

12. Regarding his character, Ms Onunga urged that Prison authorities usually gave a statement concerning an in-mates conduct in prison, and that none was given in this case to confirm his character in prison.

13. Ms. Onunga urged the court to consider the aggravating circumstances before reviewing sentence, and to consider the Court of Appeal decision in this matter and what they considered.

14. This court called for and received a re-sentencing report from the Probation Officer, Mr. Kanyotu, filed on the 21st February, 2020. In his report, Mr. Kanyotu summarized the objective of the report as being '*a social inquiry to determine the Petitioner's suitability to non-custodial re-sentencing, by considering his conduct in prison, and ensuring the Petitioner and public interest*'.

15. The Probation Officer interviewed the Applicant who expressed remorse for his actions, an attempt to reach out to the family of the deceased and his good conduct while in prison. The family of the Applicant spoke positively of the Applicant, expressed their willingness to help re-integrate him back to society if he is released from prison, and the fact they kept contact with him during the period he has been in prison.

16. The family of the deceased was interviewed. They expressed concerns about their security citing the fact they were under Witness Protection during the pendency of the trial and had severally received threats to their lives. They said that they were still apprehensive of their security if the Applicant were released from prison. They alluded to attempts by their family to get support from the family of the Applicant for the up-bringing of the deceased surviving children but stated that no support as had been pledged has ever been received.

17. When this case came up for ruling on re-sentence, Mr. Kanyotu for Probation Stood up in court with a supplementary report. He explained that after he filed the initial report in court, he was approached by members of the families of the deceased and the Applicant who made a representation to him which he felt he should bring to court's attention. The alleged report is actually not a report. I would best describe it as a note. It seems to summarize information given to the Officer by third parties of an apology given by family members of one party to the family members of the other party, the latter which accepted it; it contains a statement of agreed future conduct between the two parties regarding the children of the deceased; and, ends by requesting 'the court to give a positive consideration in re-sentencing'.

18. The court has considered guiding judgment of **Francis Kariko Muruatetu and another Versus Republic and others Petition No 15 & 16 of 2015**, where the Supreme Court sets out the guidelines in re-hearing of sentence where mitigation was not considered at the trial. The guidelines are as follows:

“As a consequence of this decision, paragraph 6.4-6.7 of the guideline are no longer available. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in rehearing 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 offense 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.**

The guidelines are advisory and not mandatory. They do not take away judicial discretion.”

19. As I started by saying, the Applicant filed an appeal to the Court of Appeal which was heard and determined before coming back to this court with this application.

20. The Supreme Court, in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** cited by Mr. Swaka and Ms. Onunga herein, held:

“[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

[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.

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

- a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”**

21. The Prosecution Counsel drew this court’s attention to the decision of the Court of Appeal on this matter, as regards sentence. I did consider the relevant portion of that judgment. The learned justices of appeal had the following to say:

“On sentence, we have noted from the record the mitigation made before the trial court, and the ultimate sentence imposed on the appellant involved a thorough consideration of the circumstances of the murder and mitigating factors. Like the trial court, we think the sentence of death as prescribed by law was appropriate given the circumstances. We are satisfied that the trial court properly exercised its discretion, and therefore uphold the sentence of death that was imposed by the trial court.”

22. I noted that the decision of the Court of Appeal was delivered on the 25th October, 2019. That of the Supreme Court of **Francis Muruatetu**, supra, was delivered on 14th December, 2017. That would mean that by the time the Court of Appeal heard this appeal, they were aware and were guided by the Supreme Court case.

23. The statement of the Court of Appeal that **“we have noted from the record the mitigation made before the trial court, and the ultimate sentence imposed on the appellant involved a thorough consideration of the circumstances of the murder and mitigating factors. Like the trial court, we think the sentence of death as prescribed by law was appropriate given the circumstances”** appears to say that the Court of Appeal addressed itself to the sentence imposed by this court, the mitigation made before the high court and the circumstances of the case affecting sentence. All these observations and considerations were made by the Court of Appeal in its appellate jurisdiction. The Court made it clear that it addressed itself to the mitigation made before the trial court, as well as the circumstances of the case in regard to the sentence imposed by the trial court. It then declared that given those factors, in its view as an appellate court, it considered that the sentence given by the high court was appropriate in the circumstances, and upheld it.

24. Since that declaration was made long after the Muruatetu case decision, and considering the reference to mitigating factors and circumstances of the case, I am convinced that the declaration made regarding the sentence was in light of the Supreme Court decision. The effect of the conclusion I have arrived at in this case is that the Applicant lacked locus to return back to this court to challenge the sentence, or to apply for re-hearing of sentence, having gone through the Court of Appeal, a court of a higher jurisdiction than this one, and which has supervisory power over this court. Besides, that court clearly stated that it also considered the mitigation by the Applicant, and the circumstances of the case, and made a declaration that the sentence was appropriate. I have no jurisdiction to re-consider the sentence, or even to vary the same as invited by the Applicant.

25. Having come to the conclusion I have in this matter I find the application incompetent and accordingly strike it out in its entirety.

DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2020.

LESIT, J.

JUDGE