



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL PETITION NO. 62 of 2018

NATHAN MWITO M' ITABALI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

Re-sentencing

1. The applicant herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 6th September 2005 at Kabuiti Village, Ngunyunyu Location in Meru North District within the Eastern Province he murdered **Christine Mukiria Mwito**.
2. The trial Magistrate found the principal charge proved and sentenced the Applicants to death in H.C.CR.C. No. 74 of 2005 before Lessit J. They lodged an appeal at the Court of Appeal, Nyeri, Criminal Appeal No. 79 of 2013 (R.N. Nambuye, P.O. Kiage, F. Sichale, JJA) but was dismissed.
3. Following the decision by the Supreme Court in Francis **Karioko Muruatetu & Another –vs- Republic [2017] eKLR** the applicant has applied for re-sentencing. The applicant submitted that; (1) he has been rehabilitated during the 14 years he has been in custody; (2) he is remorseful; and (3) He has an advanced age of 67 years. He provided Certificates of rehabilitation and courses in biblical studies.
4. A recommendation from **David W. Ndumu**, the in charge Meru main Prison also presented positive views about the applicant. It stated that the applicant had embraced the correctional core values of reformation and rehabilitation, hence considered a person who can integrate well with the outside world.

ANALYSIS AND SENTENCING

5. I will consider the circumstances of this case as well as the relevant factors in sentencing that were stated by the Supreme Court in the Muruatetu case in the following paragraphs:

“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. 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.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

6. The charges that were levelled against the petitioner herein present a heinous act to say the least. The circumstances of the commission of the offence were grave as the petitioner took the deceased, who was his daughter, then 4 years to his sister’s farm and ruthlessly slit her neck, and buried her in a shallow grave. When her wife, Pw1 asked him of the whereabouts of the daughter, he also attacked her, occasioned her serious bodily injuries and left her for dead. He would later on confess to his brother P w 5 at his residence which was 60 km away from the scene of the crime.

7. Although in his testimony, he stood on the stool the whole night whist in his brother’s residence, mental examination carried out established he was of good mental capacity at the time hence fit to stand trial. Of great relevance is that, both the trial court and the appellate court made considerable mention of the commission of the offence and the actions of the petitioner after the offence.

8. I have taken into account the mitigating and aggravating factors. I have considered the principles set out in the **Muruatetu case** as well as the **Kenya Judicial Principles of Sentencing**. I have also considered that a life lost at the hands of the petitioner for no reason and the circumstance attendant thereto. The offence was committed in a gruesome manner and the conduct of the applicant after the commission of the offence was quite unapologetic. However, he has shown willingness to change and become a productive member of society. On that basis, I am inclined to and hereby set aside the death penalty. In accordance with section 204 of the Penal Code, I sentence him to a jail term of 25 years with effect from 10th November 2005 when he was first arraigned in court. It is so ordered. Right of appeal 14 days.

Dated, signed and delivered in open court this 9th day of March 2020.

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F. GIKONYO

JUDGE

IN PRESENCE OF

M/s Nandwa for DPP

Applicant in person - present

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F. GIKONYO

JUDGE