REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 160 OF 2018

JOHN MACHARIA GACHANJA ..... APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The Applicant, John Macharia Gachanja, was convicted of the offence of death on 17/12/2004. He was sentenced to death as the law mandatorily provided at the time. His appeal to the Court of Appeal on both conviction and sentence was dismissed.

2. The Applicant has now approached this Court for resentencing pursuant to the decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

3. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

> *As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*
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> *I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

4. It is for this reason that I seized jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

5. The circumstances in which the Applicant committed the murder are truly tragic and heart-wrenching. The Applicant was married to one Phyllis Wanjogu Kanyi. The Deceased in the case was the child of Phyllis who was born before her marriage to the Applicant. Upon marriage, the Applicant accepted the Deceased, then barely four years old, as his own child.

6. However, the Applicant changed his mind and attitude shortly after the marriage. He started resenting the child which resulted in him mistreating her. This caused conflict in the marriage with the result that Phyllis left the marriage and returned to live with her parents.

7. It was from Phyllis' aunt that the Applicant went and picked up the Deceased. That was the last time she was seen alive. She was found shortly thereafter dead with a cut wound on the chest running to the left which was curved downwards. The body also had a stab wound on the left chest wall; and a cut stomach resulting in the intestines spilling out. The Pathologist who conducted the post-mortem examination concluded that the cause of death was internal hemorrhage secondary to stab wounds.

8. The Applicant now says that he is a first offender and that the death penalty is excessively harsh for his offence. He also submits that he has fully reformed while in Prison; and that he has never committed any offence against Prison discipline. Further, he submits that he was very youthful when he committed the offence since he was in his early twenties.

9. The also Applicant submits that he is remorseful; and that he has reconciled with Phyllis the mother of the child. He says he deeply regrets his actions; and says that he got angry and let the anger control him to the point of committing the evil action. He says that he has now learnt to control his anger; and that he hopes to get a second change to live as a law abiding citizen.

10. Mr. Chigiti, the Prosecutor, pointed out that there were seriously aggravating circumstances in the case which the Court should take into account. He pointed out that the Applicant killed a child who used to call him "father." He also pointed out that the mother of the child told the Trial Court that the Applicant used to molest the child and that that is why she had left. Mr. Chigiti also asked the Court to consider the inhuman way in which the Applicant committed the murder of the child. Finally, Mr. Chigiti asked the Court to consider that Applicant went into hiding after committing the murder.

11. I have carefully considered all the factors in his case on an individualized basis as I am required to do. I have considered the following four mitigating factors.

12. *First*, the Applicant is a first offender.

13. *Second*, the Applicant expressed remorse. I formed the opinion that he was sincere in his remorse. The fact that he has reconciled with the mother of the Deceased is a powerful indicator of his remorse.

14. *Third*, I have considered the relative youth of the Applicant as a mitigating factor.

15. *Fourth*, I have also considered the fact that the Applicant has reformed and has demonstrated that through the recommendations from the Prison authorities and the various certificates he has earned while in Prison. The fact that his family is willing to support him start life afresh is also a positive factor.

16. However, as Mr. Chigiti pointed out, there are serious aggravating circumstances in this case. *First*, the Applicant murdered a child who was in a special relationship with him being her presumptive adopted father. Rather than extend care and protection, he used the opportunity to snuff life out of her.

17. *Second*, the manner of killing was particularly heinous, depraved and gruesome. The Applicant stabbed the little, innocent child a few times, ripped off her intestines and then left her by the bushes for the dead.

18. *Third*, the post-offence conduct of the Applicant is an aggravating factor. The Applicant ran away immediately after committing the crime.

19. While these are serious aggravating circumstances, I was not persuaded that they constitute the kind of circumstances that should attract the death penalty, as Mr. Chigiti urged. The death penalty should be reserved for the most heinous of homicides. In the circumstances of this case, I do not think the level of moral culpability calls for the death penalty. I will, therefore, set aside the death penalty imposed on the Applicant.

20. I have come to the conclusion that a long custodial sentence is merited as the only suitable way of expressing society's condemnation of the Applicant's conduct or deter similar conduct in the future. Having considered all the mitigating circumstances and aggravating circumstances, and considering the time the Applicant was in custody during the pendency of the trial as I am required to do under section 333 of the Penal Code, I am of the view that a custodial sentence of thirty (30) years is the appropriate sentence. The Prison sentence will, therefore, be computed beginning on 17/12/2004.

21. Orders accordingly.

Dated and delivered at Nakuru this 23rd day of April, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.