REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS APPLICATION NO. 24 OF 2018

JAMES KARUGA KAMAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The applicant was charged and convicted by this Honourable Court of the offence of Murder contrary to section 203 as read with section 204 of the Penal Code cap. 63, Laws of Kenya. On 28 July,2006, he was sentenced to death which, according to section 204 of the Penal Code, was the only penalty for such an offence.

His appeal to the Court of Appeal was dismissed on 18 May 2007.

By a Miscellaneous Application dated 28 September 2018, he now seeks to be sentenced afresh in the wake of the Supreme Court decision in **Petition No. 15 of 2015, Francis Karioko Muruatetu & Another versus Republic (2017) eKLR** where it has since been held that Section 204 of the Penal Code is inconsistent with the Constitution to the extent that it makes death a mandatory sentence for the offence of murder and, by the same token, deprives the trial court of the discretion to mete out what would be an appropriate sentence depending on the circumstances of each particular case.

Inspite of this decision, death as a punishment for the offence of murder, is still a legal sentence, except that it is now not a mandatory sentence.

It is against this background that the applicant seeks to be heard on sentence because, as it is now obvious, the legal basis upon which he was sentenced has since been invalidated.

In support of his application, he has cited several decisions of this honourable court where the Muruatetu decision has been cited successfully by applicants who have, from time to time, sought to have their sentences reviewed. These decisions include Sebastian **Okwero Mrefu Versus Republic (2014) eKLR; High Court Criminal Appeal No. 150 of 2016 Samson Njuguna Njoroge versus Republic; William Okungu Kittiny versus Republic (2018) eKLR;and High court petition no. 610 of 2010, Joseph Kaberia & Others versus Republic.**

The applicant contended that though he mitigated upon conviction, his mitigation was not taken into account because, as noted, death penalty was a mandatory sentence then. He thus urges this court to consider the mitigation offered at the trial and possibly mete out a more lenient sentence. Even then, he has admitted, that his sentence was commuted to life imprisonment by the President of the Republic of Kenya on 3 August 2009.

When his application came up for hearing, all he said is that he wants the court to "assist him on the question of sentence".

Ms. Ndung'u, the learned counsel for the state, opposed the application urging that the death penalty has not been declared unconstitutional; it is only that it is not a mandatory sentence. In these circumstances, so counsel urged, it was the appropriate sentence particularly because of its deterrent effect. In short, counsel urged that the sentence ought to be sustained.

The Muruatetu decision impugned Section 204 of the Penal Code primarily because, first, it relegates mitigation of a person convicted of murder to an exercise in futility because, regardless of how sincere the mitigation might be, the trial court has no other option but to pass a sentence of death.

Yet, according to sections 216 and 329 of the Criminal Procedure Code, cap. 75, mitigation is part and parcel of the trial process; on its part,

section 216 is particular "*that 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 to be passed or made."* Section 329 is more less in similar terms, 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."*

In many ways, section 204 of the Penal Code emasculated these provisions of the law of their efficacy.

The second reason why section 204 was rendered invalid is closely related to the first one and it is this: by disregarding mitigation and the provisions of the law upon which it is based and, being mandatory in its effect, section 204 curtailed the discretion of a trial court to mete out what would be an ideal sentence, upon conviction of an accused, after taking into account, not only the mitigating factors but also the accused's own mitigation.

While reiterating the importance of mitigation and discretion of the trial court, the Supreme Court noted that it is of vital importance in sentencing for the trial court 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. In its own words, the Court stated as follows:

> "[***46] . 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.***
>
> ***[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."***

The third reason for the invalidation of section 204 was that it was discriminatory in nature and therefore contrary to article 27 of the constitution; that article says that every person is equal before the law and has the right to equal protection and equal benefit of the law. Of itself, equality includes the full and equal enjoyment of all rights and fundamental freedoms.

It was the Supreme court's opinion that persons sentenced under section 204 are not accorded equal treatment as those convicted of offences other than murder; while these latter category of offenders have the chance to mitigate before sentencing, those convicted of murder have been deprived of this opportunity, so held the Supreme Court.

Turning back to the appellant's application, it is true that all that vitiated the accuseds' trial in the Muruatetu case is what vitiated the applicant's trial with particular regard to sentencing; he was sentenced to death on the basis of what is now an unconstitutional provision of the law; though he mitigated, his mitigation was not considered as it was of no use in light of the existing law; and, he was discriminated against in the sense that though mitigation of offenders of offences other than murder would be duly considered, his own was disregarded only because he faced the offence of murder.

For all these reasons, the applicant was always entitled for a rehearing on sentence.

But, as I understand the Muruatetu decision which, basically, is the legal foundation of the applicant's application or petition, it is one thing to be heard; it is another thing altogether, for the trial court to review the sentence already imposed.

With all its constitutional frailties, a sentence of death imposed upon the authority of section 204 of the Penal Code, obviously prior to the Muruatetu decision, may still be sustained not necessarily because it is a lawful sentence, but because, even if the accused's mitigation was to be taken into account and, considering the evidence and, in particular, the circumstances under which the victim was murdered, amongst other considerations, no sentence would be more appropriate than a death sentence.

The whole point, as has been noted, is not whether the death sentence ought not to have been passed; the bone of contention was always that that in passing the death sentence, the court could not consider the accused's mitigation because it was deprived of the discretion to pass any other sentence notwithstanding the accused's mitigation.

For avoidance of doubt, the Supreme Court was clear that death sentence is still a lawful sentence; at paragraph 69 of its judgment, the court stated thus;

> ***"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."***

Let us consider the applicant's situation in this light.

The trial record shows that the applicant mitigated; to be precise, Mr. Wachira, his learned counsel, mitigated on his behalf and stated as follows:

> ***"I am aware the sentence is only one. But for record purposes the accused is aged 45 years. Has a family of 12 children. In view of the law I will stop there."***

Following the law as it then stood, the learned judge held that only one mandatory sentence was allowed which was death sentence. As far as the applicant's mitigation is concerned, he noted as follows:

> ***"The accused person has been found guilty and convicted. He is being treated as a first offender and I am taking into account what counsel defending him has told the court on the accused's behalf in mitigation."***

At the hearing of his application, the applicant, now acting in person, did not mitigate any further; all he said was this:

> ***"I want the court to assist me on the question of sentence."***

So, the only mitigation on record is what I would call the cautious or rather restrained mitigation offered by the accused's counsel at the tail end of his trial.

What about the circumstances of the murder of his victim?

The evidence on record shows that the victim was of Caucasian origin. On the fateful day, she was on a fishing expedition, literally speaking, together with her immediate family members who included her husband, their two children and a friend. They were fishing at different sections of river Kanyenyaini in Murang'a.

The applicant accosted the deceased at her end, where she was fishing alone. He strangled her but just before she died, threw her into the river where she finally drowned. According to the pathologist, she died of a combination of strangulation and drowning. Moments after her murder, the applicant was later found half-naked not far from where the body of the deceased was recovered. The deceased's watch was also found where the accused was found seated.

A few hours earlier, the applicant had been seen stalking the deceased on her way to the section of the river where, apparently, she was going to fish from.

Upon arraignment, the applicant denied the charge, and the state had to call eleven witnesses in a trial which stretched from September 2005 to July, 2006.

It is worth noting that the victim was of female gender and therefore there is the element gender-based violence in her murder.

It is not clear why the accused murdered deceased but considering the state in which he was found, there may have been an attempted sexual assault on the deceased or, considering that the applicant was found in possession of a one of the deceased's personal items, it may have been case of violent robbery the result of which was the deceased's death. It may as well have been a combination of both.

There is no suggestion on the part of the applicant that he is remorseful for his beastly act or that if he is given a more lenient sentence, he is ready to mend his ways.

When all these factors are put into consideration, I am persuaded that the deceased did not and, for present purposes, does not deserve any other sentence besides that of death. There was no justification whatsoever for his brutal murder of the deceased. A death sentence would not only be retributive, but it is also deterrent, acting to discourage those who may tend towards the applicant's behaviour. At any rate, it is a sentence I believe is proportionate to the crime committed and within the sentencing policy guidelines.

The applicant should be content and count his blessings that the initial sentence, though based on a provision of law that has since been declared unconstitutional, has been commuted to a life sentence. That is the best bargain he could possibly get. In any event, the Supreme Court held in the Muruatetu decision 'life sentence' need not necessarily mean the natural life of a prisoner. The court suggested that it could mean a certain minimum or maximum number of years set by a judicial officer though in the same breath, it recommended that the Attorney General and Parliament commence an enquiry and develop legislation to define what constitutes 'life sentence'.

For the foregoing reasons, the applicant's application is dismissed.

I note he filed a similar application in Nairobi High Court Miscellaneous Application No. 532 of 2018 which was then transferred to the Chief Magistrate's Court at Nyeri and registered as Petition No. 58 of 2019. The last order in that file was made on 21 May 2020 referring the petition to this court. Apparently, it had not been entered in this court's registry at the time of writing this judgment. Whatever the case, this judgment shall be filed in that application as well. It is so ordered.

Signed, dated and delivered this 28th day of May 2020

Ngaah Jairus

JUDGE