



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO 282 OF 2018

JAMES IMBOYERE OBWOWOM.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

1. The applicant was charged with two counts of murder contrary to Section 203 as read with section 204 of the Penal Code in Nairobi High Court Criminal Case No 35 of 1992 for which he was tried convicted and sentenced to death. He then filed an appeal to The Court of Appeal Being Criminal Appeal No. 65 of 1993 which appeal was dismissed on 12th April 2002 almost eighteen years from the date of this ruling.

2. The Court of Appeal then being the highest court in the land, the applicant's fate seemed to had been sealed. In the meantime, his death sentence was in the year 2003 commuted to life imprisonment through a Presidential decree and that was the position as regards the applicant until MURUATETU came!

3. On June 19th 2018 the applicant approached this court by way of Chamber Summons in which he sought re-sentencing on the strength of the Supreme Court decision on the mandatory nature of death sentence as it then existed in statute. He set out his claim in his supporting affidavit, wherein it was stated that he was relying on the cases of **KABERIA & 11 OTHERS v REPUBLIC** and **FRANCIS K MURUATETU & ANOTHER v REPUBLIC** in seeking resentencing.

4. When the application came up for hearing, the applicant who was unrepresented filed written submissions which he relied on together with re-sentencing report prepared by the Probation department and filed in court. Mr. Momanyi for the DPP did not oppose the application but submitted that the applicant should be sentenced to imprisonment for a period of 50 years taking into account the fact that it was a double murder and the sentence should therefore act as deterrence to would be offenders. He contended that the re-sentencing report had not captured the victim's impact report.

5. The applicant's written submission can be summarized as follows; his application was pursuant to the Supreme Court decision in MURUATETU case on the mandatory nature of death sentence and the principles set therein as regards guidelines to be applied by the courts, which includes but not limited to:-

- (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.*

6. He submitted that the court should consider his mitigating factors, the aggravating factors if any and provide the appropriate sentence. He stated that he was remorseful for his action and sought forgiveness having learned from his mistake during the period in custody. He contended that at the time of the commission of the offense he was a young man aged 20 years who was under the influence of alcohol and hard drugs. It was his further submissions that after 29 years in custody, he had been rehabilitated and reformed, having undergone Christian counselling and mentorship programs and had acquired skills including soap and detergent making which he intends to make use of outside prisons.

7. In mitigation he stated that he was a young man who did not have any previous conviction and was a business man in Nairobi at the time of the commission of the offense and should be treated as a first offender. He was un married at the time of his conviction and was now aged 49 years who should be given a second chance to start a family of his own.

8. On sentencing he stated that resentencing was different from the normal sentencing, since the court was dealing with prisoners who had spent some time in prison and therefore among other things, reforms and rehabilitation of the prisoner should form the main basis of determination of sentence. He relied on the High Court of South Africa in the judgement of OSCAR PISTORIUS on the applicable principles and **MISC CRIM. No 45 Of 2018** Nakuru where the Judge had this to say;

22. Re-phrasing the Sentencing Guidelines, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years' imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

- i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.**
- ii. Was the offender armed with a gun?**
- iii. Was the gun an assault weapon such as AK47?**
- iv. Did the offender use excessive, flagrant or gratuitous force?**
- v. Was the offender part of an organized gang?**
- vi. Were there multiple victims?**
- vii. Did the offender repeatedly assault or attack the same victim?**

b. Circumstances Surrounding the Offender: The factors here include the following:

- i. The criminal history of the offender: being a first offender is a mitigating factor;**
- ii. The remorse of the Applicant as expressed at the time of conviction;**
- iii. The remorse of the Applicant presently;**
- iv. Demonstrable evidence that the Applicant has reformed while in prison;**
- v. Demonstrable capacity for rehabilitation;**
- vi. Potential for re-integration with the community;**
- vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.**

c. Circumstances Surrounding the Victim: The factors to be considered here include:

- i. The impact of the offence on the victims (if known or knowable);**
- ii. Whether the victim got injured, and if so the extent of the injury;**
- iii. Whether there were serious psychological effects on the victim;**
- iv. The views of the victim(s) regarding the appropriate sentence;**
- v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;**

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime.”

9. Reliance was also placed on the Court of Appeal at Malindi decision in the case of **MULAMBA ALI MABANDA CRIMINAL APPEAL NO 22 OF 2013** where the court had this to say:-

*“21. However, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellant. In its recent decision in **Francis Karioko Muruatetu and another vs Republic**, (2017) eKLR the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts’ discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interfere with the sentence herein in the interest of justice. We observe that the appellant had fully mitigated before the trial court and relying on that mitigation address, we are able to impose the sentence which in our view is appropriate to the offence committed by the appellant, and the circumstances surrounding the same.*

22. From the said mitigation, 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 items robbed from the complainants were of modest value; the complainants were not injured; the appellant has already been incarcerated for almost nine years. In our view, he has already paid his debt to society and learnt his lesson. In the circumstances the appropriate sentence that commends itself to us is one that is reduced to the term already served. We therefore order that the appellant be released from prison custody unless he is otherwise lawfully held.”

10. On appropriate sentence reliance was placed upon the following cases:-

A) **RASESH SHAH MISC APPLICATION NO 337 OF 2013** where the High Court at Nairobi re-sentenced the applicant who had been charged with multiple death to 20 years imprisonment

B) **WILLIAM OKUNGU KITTINY VS. R [2018] eKLR** where the court extended Muruatetu to Robbery with violence

C) **SABASTIAN OKWERO MREFU V. R [2014] eKLR** where death sentence was substituted with the period already served of 8years

11. The court was urged to consider the pre conviction period under the provisions of section 333 of the Criminal Procedure Code as stated in the case of **TITUS NGAMAU MUSILA alias Katitu CRIMINAL CASE NO 78 of 2014**.

DETERMINATION

12. Whereas the Supreme Court in the MURUATETU case had suggested that all other cases await guidelines issued by the Attorney General, the Court of Appeal in the case of **WILLIAM OKUNGU KITTINY, (supra)** held otherwise and therefore this matter is rightly before the court for determination. Arising from the Court of Appeal decision, several High Court decisions have set out what to be considered at the re-sentencing hearing with Justice Odunga in the case of **REPUBLIC v MEMA MAKALI [2019] eKLR** setting out the following considerations;

“In my view fairness to the accused in sentence rehearing is considered appropriate, would require a consideration of the circumstances prior to the commission of the Offense, at the time of the trial and subsequent to conviction. The conduct of the Accused during this stage may therefore be a factor “

13. I associate myself with the observation of the Judge above but emphasis that my understanding of the reading of the MURUATETU decision is that the court must put the applicant at the position he was at during sentencing and for the court to pass out what it considers as an appropriate sentence which would have been passed, taking into account the applicants mitigation, the circumstances of the case and the Supreme Court guidelines thereon.

14. In this case a resentencing report was filed wherein it was stated that the same had no previous convictions, the offense was committed jointly with others not before the court. The Applicant dropped out of school in class six and was working as a mason. He was accused of robbing and killing Julie Victoria and her daughter Natasha Rzewski at their home where he had been employed for a period of nine months. Though not mentioned in the report, from the proceedings the applicant also raped the deceased (Julia). It was stated that the applicant plans to relocate to his rural home. Whereas the family members confirmed that the applicant was a truant child beyond parental control which made him leave school at an early age, they showed readiness to support his integration into the community.

15. On conclusion and recommendation it was stated that the applicant had shown remarkable behavioral and character change following prison rehabilitation. He was now a trustee in charge of other inmates and the prison authorities talked positively about his character. His risk level of recidivism had reduced significantly and non-custodial sentence was recommended.

16. Having set up the legal principles on resentencing and having taken into account the submissions by the applicant and the State and guided by relevant authorities, I have noted that the applicant betrayed the trust of his employer and that this murder was committed in the process of robbery with violence and having taken the mitigating factors am of the considered view that this was a case that fits “the rear of the rears kind” and therefore a deterrence sentence was called for. I would therefore have sentenced the applicant to serve an imprisonment

term of forty (40) years from the date when he first appeared in court taking into account the provision of Section 333 of the Criminal Procedure Code that is to say 28/8/1991. He is also entitled to remission on the period served.

17. In the final analysis I make the following orders;

A. Death sentence meted on the applicant is set aside and substituted with an imprisonment term of forty (40) years from the date when he took plea.

B. The applicant is entitled to remission on the period served.

And it is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY 2020 through Google Teams.

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J. WAKIAGA

JUDGE

In the presence of:-

Ms. Onunga for the State

Applicant in person

Court assistant: Karwitha