



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CRIMINAL APPLICATION NO. 164 OF 2019**

**LESITT, J**

**STEPHEN MUNGAI MACHARIA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal for Re-sentencing from the original conviction and sentence by Hon. Mr. Justice Mango dated 16<sup>th</sup> November, 1993 in High Court Criminal Case No. 76 of 1988)

**RULING ON RE-SENTENCING**

1. The Applicant, **STEPHEN MUNGAI MACHARIA** has approached this court vide a Chamber Summons application dated 29<sup>th</sup> March 2019. On the face of the Chamber Summons the Applicant cites the cases of **FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC Supreme Court Petition No. 15 of 2015**

2. On the face of the application the applicant seeks for orders as follows:

**1. Moot**

**2. That this honourable court be pleased to re-sentence to conform with the Supreme Court directives in Petition No. 15 of 2015.**

**3. That the application in respect of review of the sentence in Nairobi High Court Criminal Case No. 76 of 1988 if heard has high chances of success.**

**4. That the application is based upon annexed affidavit of Stephen Mungai Macharia and other grounds to be adduced at the hearing thereof.**

3. The supporting affidavit has six paragraphs. In brief the deponent avers that he was charged in HCCCR. No. 16 of 1988, tried and convicted of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and sentenced to suffer death. He avers that his appeal to the Court of Appeal was dismissed.

4. The Applicant deposes that since the successful **Petition No. 15 of 2015** from Supreme Court which declared the mandatory death sentence unconstitutional, he seeks judicial review on the sentence alone in **High Court Criminal Case No. 16 of 1988** against him.

5. The Applicant has filed what he terms as an APPLICATION which bears subtitles, the Parties Facts, Claim and Relief sought in which he restates the averments in his affidavit. Even though this document is superfluous and defective for want of form, under **Article 159(2)** of the **Constitution**, I have considered it.

6. The only additional information on it is the statement on the Relief sought. In it the Applicant states that in the interest of justice this court should exercise its inherent powers to substantially do justice to the Applicant taking into account the period spent in custody and consider awarding remission to the new sentence this court will impose.

7. In his oral submissions, the Applicant urged that he filed this application seeking Re-sentencing. He submitted that he was tried for robbery with violence in 1987. He submitted that he admits he committed the offence for which he was convicted and urged the court to

give him a second chance.

8. The Applicant stated that he has been in prison for 32 years and was remorseful for his actions. He urged the court to consider the length of time he has been in prison. He urged that he was 21 years old, was a young and foolish man when he was convicted. He said he is now a reformed man.

9. The Applicant urged that since his incarceration he had trained in Dress Making and Tailoring and had attained Grade 1 Certificate in both skills. He urged court to consider a different sentence and that if court was obliged to make it a term sentence to order it to run from date of his initial sentence.

10. The application was opposed. Ms Kibathi, Learned Prosecution Counsel urged the court to uphold the sentence meted out by the trial court (High Court) and confirmed by the Court of Appeal. Counsel urged that on 29<sup>th</sup> October 1986 the Applicant murdered a girl of 14 years of age cutting short her future.

11. Counsel urged that the circumstances of the offence were brutal as the Applicant defiled the deceased and then strangled her to death. Counsel urged that the Applicant left the scene, a coffee plantation and was not found until August 1987 almost a year later. Counsel urged that if the court was minded to alter the sentence to commute it to life imprisonment.

12. The correct date of the offence was 30<sup>th</sup> November 1986 and the place of crime was Marurui Coffee Estate in Nairobi. The deceased was Magdalene Njoki, a girl of either 12 or 14 years old, daughter to Hanna Njeri Njora.

13. The court called for a Pre-Sentencing Report from the Probation. Mr. Kanyutu, Probation Officer submitted a one-sided report. The family of the deceased were never found, he explained in the Report.

14. It has been 32 years or so since the incident. It is understandable that the family may be difficult to find as their known residence was Nairobi, which may not have been their home area.

15. I have considered the application. This is a heart rending case given the loss of the deceased at a very young age and in such bad circumstances of being first violated before being murdered.

16. That said, I note that the Applicant has been in Prison serving sentence for the last 32 years. That by any standard is a long time indeed. The celebrated case of **Francis Karioko Muruatetu & Anor Vs. Republic Supreme Court Case No. 14 and 15 of 2015** (consolidated) has given courts the power to Re-Sentence persons who were handed mandatory sentences of death for murder charges as prescribed under **section 204** of the **Penal Code**. I will exercise my discretion relying on this case.

17. I have considered that the Applicant has been serving sentence in this case for the last 32 years. I have considered he is remorseful on two fronts. One, he confessed this crime and his conviction was based on that confession alone. Secondly he acknowledges even to-date that he committed the offence and says he regrets his actions.

18. I have noted from his submission that he is rehabilitated within prison and has learnt skills which will help him to be self-reliant and independent. There are high hopes that he will easily be re-intergrated into the society.

19. For the time being I think the Applicant will require help to safely re-intergrate into society. In those circumstances his family and the Government through Probation should assist him. In the result I will allow the application for re-sentencing to conform with the case of **Muruatetu & Anor Vs. Republic**, supra, and make the following orders.

20. It is ordered that:

**a. The sentence of death be and is hereby set aside.**

**b. The Applicant's sentence is reduced to the period served.**

**c. The Applicant is set at liberty forthwith unless he is otherwise lawfully held.**

**d. He will be under supervision of the Probation with help of his family members for 12 months from today.**

**DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 2020.**

**LESIT, J.**

**JUDGE**