REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 67 OF 2018

GODFREY MUCHIRI NJUGUNA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING UPON AN APPLICATION FOR RE-SENTENCING

1. The Applicant, Godfrey Muchiri Njuguna, was convicted of the offence of murder on 24/10/2003. 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 in a judgment dated 30/09/2005.

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 contained in both the High Court and Court of Appeal judgments. The Deceased was the Applicant's step-mother. There existed long-standing feud between the two polygamous units. On the day the murder happened, the Applicant and the Deceased had apparently spent the day relating well until around 5:00pm when the Applicant, for no apparent reason, attacked the Deceased with a panga and an axe killing her instant. He hit her with the blunt side of the axe and she fell. He then continued hitting her while she was down.

6. In a version of the events proffered by the Applicant which was accepted by the three assessors, the Applicant said that he had been drinking changaa together with the Deceased and that they were walking home drunk when the Deceased reminded her of the death of the Applicant's mother and about the quarrel about where she would be buried. The Applicant said that he snapped and become irredeemably provoked, losing his senses temporarily. However, the Learned Judge rejected the defence of provocation, a decision affirmed by the Court of Appeal.

7. During the hearing of this Application, the Applicant repeated his version of events in a bid to persuade the Court that he did not plan the murder. He said that he was walking home with the panga and axe since he was from the shamba and then passed by a changaa den with his step-mother. He conceded that he attacked her but said that he had not planned to. He said that he was very remorseful for what had happened and asked for forgiveness from the Court and the family.

8. The Applicant told the Court that he is now fully reformed and that he has spent the last 19 years in custody reflecting on his actions. He produced a Recommendation Letter from Prison authorities showing that he has been

of good discipline while in Prison. He also produced three Upholsterer Certificates showing that he has now been certified by the National Industrial Training Authority in Grades I, II and III.

9. The Applicant asked the Court to set aside the death sentence imposed and be pleased to find that the time served is sufficient. He requested that any remaining sentence be non-custodial.

10. The Prosecuting Counsel asked the Court to consider that the attack was unprovoked and was vicious. It was also against a helpless and elderly lady. Counsel asked the Court to consider that the Applicant was armed and used a panga and an axe to hit the victim on the head several times.

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.

14. *Third*, the Applicant has now reformed and is fully rehabilitated. The Recommendation Letter by the Prison authorities and the NITA certificates tell this story convincingly.

15. *Fourth,* I have also considered the fact the Applicant's family is willing to support him start life afresh is also a positive factor. In a Social Inquiry Report filed in Court, the family of the Applicant indicated strong support for him and a demonstrated willingness to help him start life afresh.

16. However, as Ms. Rotich, the Prosecuting Counsel, pointed out, there are some aggravating circumstances in this case. *First*, the Applicant

murdered a helpless elderly lady (who was his step-mother). *Second*, the Applicant killed using an offensive weapon; and continued hitting the Deceased even after she had already fallen on the ground.

17. While this was adjudged pre-meditated murder as by law defined, I was not persuaded that they constitute the kind of circumstances that should attract the death penalty. 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.

18. The Applicant has been in custody for the last nineteen (19) years. He has demonstrably reformed. The Prison Authorities were unreserved in their recommendations for him. He now has three NITA certificates of vocational training meaning that he stands a good chance of pursuing productive economic activity if released from Prison. The Applicant also has a family that is willing to welcome him back in the fold and support him start life afresh.

19. In the circumstances of this case, I am persuaded that no more sentencing objectives would be achieved by the continued incarceration of the Applicant. The Probation Report is in accord. It concludes that the Applicant has strong social support system back at home, and that he enjoys support from local leaders and administration at the village level. The Report recommends that the Applicant is ripe for a Probationary sentence. I concur.

20. The upshot is the following:

a. The death sentence imposed on the Applicant herein is set aside.

b. In its place, the Court sentences the Applicant:

i. to time already served; and

ii. A Probationary sentence of three years.

c. Due to the family feud that gave rise to this offence, the Applicant shall not reside in Subukia sub-county during the Probationary period. He shall, instead, serve the Probation in Kinangop in Nyandarua County.

21. Orders accordingly.

Dated and delivered at Nakuru this 18th day of June, 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, Mr. Chigiti, 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.