



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 14 OF 2019

CONSOLIDATED WITH

MISC. CRIMINAL APPLICATION NO. 424 OF 2016

CLEMENT MUNYAO KATIKU.....1<sup>ST</sup> APPLICANT

ANTHONY MUTHIE MATI.....2<sup>ND</sup> APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**RULING**

1. The Applicants, **Clement Munyao Katiku** and **Anthony Muthie Mati** alongside others were convicted of the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code** in **Nairobi High Court Criminal Case No. 15 of 2010**. The particulars were that on the 23<sup>rd</sup> day of October, 2009 at Garden Estate in Nairobi within Nairobi province, jointly with others not before court murdered Moses Mbaabu Gituma. The Applicants were sentenced to serve thirty (30) years imprisonment each. On appeal to the Court of Appeal in **Nairobi Criminal Appeal No. 88 of 2014**, their convictions were affirmed but the said sentences were set aside and substituted with death sentences.

2. The Applicants have now approached this court for resentencing in view of the Supreme Court decision in **Francis Kariokor Muruatetu & Another v Republic [2017] eKLR** which declared the mandatory nature of the death sentence under **Section 204** of the **Penal Code** unconstitutional. Their respective applications were consolidated and heard together for purposes of this Ruling.

**Submissions**

3. The Applications were canvassed by both written and oral submissions tendered through Microsoft Teams video conferencing platform. The 1<sup>st</sup> Applicant appeared in person and relied on written submissions filed on 5<sup>th</sup> May, 2020. He submitted that he was remorseful though he still denies being involved in the murder of the deceased. He asked for forgiveness from God and the victim's family. He stated that he is fully rehabilitated and will be resourceful to the community if given a second chance as he will use the skills and knowledge gained during his incarceration. He added that he is reformed and has been put in charge of small groups within the prison.

4. Further, he urged the court to consider that he is now 65 years old and suffers from high blood pressure, diabetes, chronic peptic ulcers and gum infection for which he attends clinic. He attached medical documents from Kenyatta National Hospital (KNH) and Kamiti Prison in proof of the same. It was also his submission that he lost his mother, wife, two daughters and lastborn son in an accident. He urged for a second chance to go and take care of his remaining two daughters who dropped out from JKUAT and Moi Kabarak University respectively. He also urged for a chance to go and continue practicing his medical career. Finally, he submitted that he was a first offender. He asked the court to consider the period of twelve years that he has spent in custody since his arrest as sufficient punishment and release him. He relied on several authorities from the High Court and the Court of Appeal in support of his submissions.

5. Learned counsel, Ms. Njoroge appeared for the 2<sup>nd</sup> Applicant and relied on submissions dated 13<sup>th</sup> July, 2020. She submitted that the 2<sup>nd</sup> Applicant was aged 36 years at the time of his arrest and is now 46 years old. She stated that while in custody, the 2<sup>nd</sup> Applicant engaged in various rehabilitation programs such as carpentry and stress management and was awarded certificates for both. That he shall use the skills for his benefit, his family and the society if he is released. Further, that he was a first offender, remorseful and prayed for a second chance in life as he understands that the law must punish him for the crime he committed.

6. It was also submitted that at the time of his conviction, he was married with children then aged 11 and 4 years respectively. After his

conviction, his wife left their matrimonial home and he lost contact with them. He wishes to be given a chance to reconnect with his family and make amends before it was too late. It was also stated that he has served nine years in prison without any negative incident report from prison officers. He attached a recommendation letter dated 26<sup>th</sup> February, 2019 as proof of this. He prayed for leniency and promised to continue cooperating with prison officers until his release.

7. In support of the submissions, Ms. Njoroge cited various case law amongst them **Janet Karamana Gituma v Republic [2019] eKLR** involving the Applicants' co-accused whose death sentence was set aside and substituted with ten (10) years imprisonment from the date of resentencing.

8. Learned State Counsel, Ms. Kibathi for the Respondent not oppose the resentencing applications but urged the court to consider the following aggravating circumstances of the offence: that this was a gang attack; the attack was pre-planned; the assailants took their time waiting at the deceased's residence from 8.00 pm to 2.00 am in the morning when grievous injuries were inflicted on the deceased immediately he arrived then the assailants left; that the deceased died a painful death as he succumbed after five months.

9. Ms. Kibathi urged for an appropriate deterrent sentence for each individual circumstance commensurate with the offence.

### **Determination**

10. The only issue arising for determination by this court is whether the Applicants death sentences should be substituted with other appropriate sentences.

11. In the **Francis Karioko Muruatetu [supra]** decision, the Supreme Court set out the following guidelines for consideration in applications for re-sentencing:

*“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:*

*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.*

12. At para. 72 the Court delivered itself thus:

*[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:*

### **“25. GUIDELINE JUDGMENTS**

**25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”**

13. A brief summary of the evidence will suffice in appreciating the circumstances in which the offence was committed. On the night of 23<sup>rd</sup> October, 2009, four masked men entered the house of the deceased with his wife. For several hours, at least between 8.30 pm and 2.00 am the next morning, the deceased's two children, wife and maid were confined in a bathroom. At about 2.00 am, the deceased arrived home and was attacked by the four assailants who left him with severe injuries. Among the injuries was a ruptured appendix to which he succumbed on 2<sup>nd</sup> March, 2010.

14. The Applicants herein were linked to the murder of the deceased by virtue of the recovery of two mobile phones belonging to the deceased's maid and wife respectively that were allegedly stolen by the assailants on the night of the attack. The mobile phones were traced

to the Applicants herein soon after the attack but they failed to tender satisfactory explanations of how they came to be in possession of the same. The inference drawn by both the High Court on trial and the Court of Appeal therefore was that they were involved in the attack on the deceased's home.

15. From the evidence, it is clear that the Applicants played a similar role in the commission of the offence. They were part of the gang of four that inflicted serious injuries on the deceased on that fateful night which eventually led to his death.

16. I will therefore proceed to consider the Applicants' respective mitigation on resentencing in light of the circumstances in which the offence was committed so as to determine the appropriate sentence.

17. As regards the 1<sup>st</sup> Applicant, the many certificates that he has accumulated in prison are a positive indication that he has indeed reformed. His remorsefulness is however questionable since he still denies that he was involved in the attack of the deceased despite the strong circumstantial evidence against him.

18. As for the 2<sup>nd</sup> Applicant, it is clear that he is sincerely remorseful. That he has been reformed and rehabilitated is also evident from the letter dated 26<sup>th</sup> February, 2019 from the Officer in Charge of Kamiti Maximum Security Prison. The letter confirms that for the nine (9) years he has been in Prison, he has been well behaved, disciplined and has acquired various qualifications and certificates through the prison's rehabilitation programs. His conduct has also been noted to be worth emulation by fellow inmates.

19. Be that as it may, this court cannot lose sight of the aggravating circumstances that far outweigh their respective mitigation. The crime they committed was serious. They took a record five to six hours waiting for the deceased in his own house in order to undertake the heinous act without developing a change of mind. The deceased lived in great pain from the moment the injuries were inflicted on him until his demise.

20. All the factors considered, I form the view that the death penalty is not appropriate in the present circumstances. I set it aside and substitute it with twenty-five (25) years imprisonment each commencing from their respective dates of arrest which are 15<sup>th</sup> November, 2009 for the 1<sup>st</sup> Applicant and 16<sup>th</sup> January, 2010 for the second Applicant. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2020.**

**GW NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. 1<sup>st</sup> Applicant in person.
2. Miss Njoroge for the 2<sup>nd</sup> Applicant.
3. Mr. Momanyi for the Respondent.