



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 73 OF 2019

AYUB BAINITO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON RE-SENTENCING

1. The petitioner was on the 17th May, 2002 convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to the mandatory death sentence as provided under Section 204 of the Penal Code. His appeal to the Court of Appeal did not bear fruit. He has now approached this court for re-sentencing pursuant to the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another -Vs- Republic (2017) eKLR** wherein the court held that the mandatory sentence for murder as provided in section 204 of the Penal Code is unconstitutional as it deprives courts of the discretion to impose any other sentence other than the death in an appropriate case. The petition is therefore properly before the court.

2. The petitioner mitigated that he is reformed. That while serving prison sentence he has done various courses in carpentry and that he has been of exemplary character while serving the sentence.

3. The court called for a pre-sentencing report that was prepared by a probation officer, Kakamega County. The report indicates that the petitioner is aged 45 years. That he was aged 19 years when he was convicted. That he has been in custody for a period of 22 years. That he was unmarried at the time he was convicted. That his parents are still alive and that he has 5 siblings. That the family members are willing to receive him back home. That community members and neighbours described him as very hardworking and well behaved. That the father and a brother to the victim who were interviewed did not have any problem with the release of the petitioner. The report recommended the release of the petitioner from prison.

4. The circumstances under which the petitioner killed his victim were that the victim and his relatives were attending a burial night vigil. The petitioner stormed the house where the victim and his relatives were relaxing while armed with a knife. He stabbed the victim with the knife. The motive of the attack is not apparent from the proceedings. The probation report however quoted the father and brother of the victim as saying that the victim and the petitioner were drunk and were fighting over women when the offence was committed.

5. Sentencing is a discretion of the trial court. In **Ambani Vs Republic**, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

6. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

***“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.*”**

7. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.

2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.

4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. **Community protection:** To protect the community by incapacitating the offender.

6. **Denunciation:** To communicate the community's condemnation of the criminal conduct.

8. In **Nicholas Mukila Ndeti –V- Republic (2019) eKLR**, Odunga J. considered what the court has to consider in a re-sentencing hearing and held that:-

“In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.”

9. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

10. I have considered the grounds of appeal and the submissions by the advocates for the appellant. The appellant pleaded guilty to the charges. He was a first offender.

11. I have considered all the above. I have also considered some comparative sentences in other murder cases. In **Republic –V- John Nganga Gacheru & Another (2018) eKLR**, Joel Ngugi J. sentenced each of the accused persons to 15 years imprisonment on convicting them for the offence of murder. While sentencing them the learned Judge stated that there was no orchestrated planning for the offence but that it appeared that the same was committed under influence of alcohol or drugs which lowered their degree of blame.

12. In **Alex Mwanza Mutangili –V- Republic (2019) eKLR** where the accused had been sentenced to death for killing his wife after hitting her with a hammer on the head, Nyakundi J. in a re-sentencing hearing sentenced him to 24 years imprisonment.

13. In **Nelson Mwiti Gikunda & 2 Others –V- Republic (2018) eKLR** where the accused had strangled the deceased and his appeal to the Court of Appeal was unsuccessful, Majanja, J. in a re-sentencing hearing ordered that he be placed behind bars for a period of 25 years.

14. In **Mathew Kiptalam Chepkieng –V- Republic (2019) eKLR** where the appellant had been sentenced to death by the High Court after he had killed his victim after cutting him with a panga on the head and back and hitting him with a stone on the chest, the Court of Appeal substituted the death sentence with one of 10 years imprisonment.

15. The petitioner was arrested on 13/12/1997 and convicted on 17/5/2002. He was in custody during the trial. He has therefore been in incarceration for a period of close to 23 years. The petitioner was a young man of 19 years when he was imprisoned. He seems to have killed the victim in a fight over women.

16. Upon considering the circumstances under which the offence was committed, the age of the petitioner at the time of the commission of the offence, the sentiments expressed by the family members of the victim, the favourable pre-sentencing report and comparative sentences stated above, I am of the considered view that the long period the petitioner has been incarcerated of over 22 years is sufficient punishment for the offence committed.

17. The upshot is that the death sentence imposed by the trial court is set aside and substituted with one of the period already served. The petitioner is thereby set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega this 30th day of September, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mutua for State/Respondent

Petitioner – Present through video link to GK Prison, Kakamega

Court Assistant - Polycap

14 days right of appeal.