



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION 314 OF 2017

JOHN OUMA AWINO.....1ST APPLICANT

SAMUEL OTIENO AGOT.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant sought to be resentenced pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu and Another v Republic [2017] eKLR**. The Appellants were charged with the murder of contrary to **Section 203 as read with 204 of the Penal Code**. The particulars were that on the 20th of April 2007 at Soweto Village Kayole, Nairobi County they murdered Quantine Mutua Musuvali. On conclusion of the trial, they were convicted and sentenced to suffer death. Dissatisfied they appealed against the Conviction and sentence. The Court of Appeal dismissed their appeal.

2. They sought to be resentenced and therefore made their submissions. They were represented by Miss Oseko. It was her submission that the incident was a case of a bar brawl turned fatal. It was her submission that this was occasioned by a mobile phone that was lost and the deceased was caught up in it. She submitted that the Applicants were remorseful.

3. Miss Oseko asked the court to consider the 1st Applicant's plea. It was her submission that he had a family and children. Further, that he had since undergone rehabilitation. As well that the 1st Applicant was incharge of a compound 2000 inmates at the prison where he was serving his sentence.

4. It was the submission of the Miss Oseko that the 2nd Applicant also had a family. She submitted that the 2nd Applicant's wife fled leaving his three (3) children to the care of his aged mother. Further that the Applicant was suffering from TB. She also urged that the period the Applicants have been in custody to be considered in the determination of the Application.

5. The court ordered for a probation officer's report. This was meant to focus on the victim sentiments and society's reception of the Applicants. The reports were filed on the 28th of May, 2019. It depicts the 1st Applicants as being remorseful but he does not admit to committing the offence. His family stated that he had never committed an offence before. It was their view that they were ready to receive him. The 2nd Applicant takes responsibility for the offence and blames himself for it. His family is ready to receive him and insists that they are a close-knit family. The family of the deceased could not be reached as the sister had since passed on and the father's contact could not go through. The report recommended a non custodial sentence.

6. I am clear in my mind that the Applicants were squarely responsible for the offence. It is evident that they set out on a mission to end the life of another. It does not escape my attention that they went as far as hindering a good samaritan from helping the helpless victim. They aggravated the circumstances further by slamming the already unconscious Mr. Quantine on the ground, stomping him on the neck and head. It was a vicious attack and cannot be solely blamed on the fact that they were intoxicated.

7. The Francis Muruatetu jurisprudence called on courts to consider the involvement of a person in determining the appropriate sentence. In this situation I cautiously look at the participation of the Applicants. It is direct evidence that the 2nd Applicant was seen beating the deceased, Mr. Quantine. It is also direct evidence that the 1st Applicant was seen hindering the deceased from escaping. It is also the case that the 1st Applicant stood guard at the door of the store where the deceased was being beaten in to prevent any intervention. He repeatedly hindered a good samaritan who sought to assist the unconscious deceased.

8. The purpose of sentencing is retributive, denunciative, rehabilitative, community protection, restorative and deterrence. In determining the

appropriate sentence all these ends must be proportionately met. It is therefore not enough that the Applicants are rehabilitated. It is also clear, and unfortunately so, that no matter the stiffness of punishment the life of the deceased cannot be brought back. It is a reality that this court and the Applicants have to bear in mind.

9. I have perused the court record and satisfied myself on the appropriate sentence. The Applicants are remorseful and rehabilitated. This is weighed against the aggravating circumstances of beating the deceased even when he was helpless and unconscious, detaining him for the purpose of beating him and lastly refusing to take him to hospital. It appears to me that this was a flagrant use of violence that is inexcusable.

10. Weighing all these factors, I substitute the life sentence with an order that the Applicants shall serve 30 years imprisonment. The period they have been in custody since taking plea on 21st August 2007 will be considered in computing the remainder of the sentence to be served.

DELIVERED AND DATED THIS 31ST DAY OF JULY 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Ondari h/b for for Ms. Oseko for the Applicants.*
2. *Miss Akunja for the Respondent.*