



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION 283 OF 2018

BERNARD KUNG'U KARIUKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant sought a rehearing of sentence by way of a Petition dated 19th June, 2018. This application arose from the conviction and sentence in **Criminal Case 68 of 2008** delivered in the High Court in Nairobi by Honorable Ochieng, J dated 26th January, 2012. He was convicted for murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 19th July 2008, at Ndumberi within Kiambu County murdered Denis Ng'ang'a Waithaka. He pursued an appeal to the Court of Appeal which was dismissed.

2. The application is anchored on the **Francis Karioko Murutetu and Another v Republic [2017]Eklr** case in which the Supreme Court declared that death sentence is no longer mandatory. The decision now mandates trial courts to hear the mitigation of the Applicant to determine the suitable sentence. The Applicant made oral submissions in this regard. The court also ordered a probation officer's report to be filed to focus on the family victim's impact and community preparedness to receive the Applicant.

3. The Probation Officer's Report was filed on the 29th May, 2019. It highlighted the views and sentiments of the area chief in Ndumberi, the deceased's grandmother, prison authorities and the Applicant himself. The Applicant admits culpability stating that he was tired of his wife's infidelity and resorted to committing the crime. He however seeks that the court grants him a second chance to fend for his family. The grandmother to the deceased stated that they had since forgiven the Applicant. The Prison authorities vouched for the character of the Applicant stating that he had been elevated to being in charge of over 250 inmates. In sum, the report recommended that the Applicant be given a favorable sentence review including an option of a non-custodial sentence.

4. Miss Kiteng'e, counsel for the Applicant urged the court to consider that the Applicant was a first offender. Further, that the Applicant was reformed and that he had attained skills that would be of benefit to the society. It was her submission that the court should consider that his wife fled after his imprisonment and left their three children that needed his care. Lastly, it was her submission that the Applicant had lost his sense of hearing in his right ear and therefore a release from custody would afford him an opportunity to get treatment.

5. Miss Akunja for the Respondent urged the court to consider the period the Applicant had stayed in remand since the trial began in 2008. It was her submission that it is at the discretion of the court to issue a favorable sentence.

6. The Muruatetu case laid out the rationale for consideration in resentencing. It cited the circumstances of the offence. In addition, the Sentencing Policy Guidelines suggest both mitigating and aggravating circumstances should be considered. In regard to the mitigating brunt of the offence, an applicant's remorsefulness and being a first offender should be considered. In the instant case, the aggravating circumstances that play in are the following-

- a. Targeting vulnerable groups particularly children;
- b. Intricate planning of the offence;
- c. An attempt to conceal or dispose of the evidence; and
- d. Abuse of a position of trust or authority.

7. This is an offence that was intricately planned. From the facts, it is evident that the Applicant found a group of children playing. He chased

away a number of them and remained with four including the deceased. The others were **LWN(PW2), MN and SK (PW3)**. He then proceeded to poison three of the four children and then sent them to PW2's home. It is clear that the offence was choreographed to first, ensure the death of the three children and secondly, to distance the Applicant from any involvement. The Applicant attempted to dispose of and conceal evidence by cleaning the cups that he had used to administer the poison in. It is also clear that he took advantage of a position of trust and authority by giving his children and nephew poison. He told them that it was medicine intended to deworm them. Lastly, he targeted a vulnerable group which ultimately led to the death of one of them.

8. I am satisfied that the Applicant deserves to pay for his crime. He committed offences against children over whom he was supposed to be the first line of defense and protection.

9. In this application, he raises mitigating circumstances, including his remorsefulness, being sick, having a family and being a first offender. Of importance is that the mother of the child was not reached for an interview by the probation officer. It is difficult to assess how she has coped with the death of her child since. The grandmother to the child can hardly express the pain the mother went through. Even though she spoke that the family had forgiven the Applicant, she did not voice the sentiments of the mother of the child, the most affected victim. It is my view that the murder and the circumstances under which it was committed were grave. The fact that the Applicant was aggrieved by the unfaithfulness of his wife did not warrant him to visit it with revenge of the death of a relative. It is an offence that deserves a punishment in equal measure. The mitigation offered does not lessen the veracity of the offence. It can only be mitigated by the fact that life cannot be brought back.

10. Having regard to all these circumstances, I find a sentence of thirty five years imprisonment as sufficient sentence. I accordingly set aside the life imprisonment and substitute it with thirty five years imprisonment. The period the Applicant was in custody prior to sentencing of three years five months and twelve days shall be deemed to constitute part of the sentence.

DELIVERED THIS 25TH JULY, 2019 AT NAIROBI.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss Kiten'ge for the Applicant.*
2. *Mr. Momanyi for the Respondent.*