



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL NO. 204 OF 2018

DAVID KAMAU THUTHO....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. David Kamau Thutho (the Applicant) was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 23rd December, 2007 at Kwa Haraka Trading Centre, Nyakio Location, Nyandarua South District, he murdered Mwangi Wainaina Kirichu (hereinafter referred to as the Deceased).
2. The Applicant denied the charges and a fully-fledged trial ensued. In a judgment dated 08/11/2013, the Learned Hellen Omondi convicted the Applicant. The Learned Judge subsequently sentenced the Applicant to death as the law then provided.
3. The Applicant appealed against the conviction and sentence. However, on 11/06/2019, the Applicant withdrew his appeal at the Court of Appeal. He informed the Court that he wished to pursue re-sentencing before this Court.
4. The re-sentencing hearing was held on 18/07/2019. The hearing is predicated upon the doctrine propounded by the Supreme Court 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.
5. The Applicant seeks a substitution of the death sentence imposed on him.
6. The circumstances in which the offence was committed is contained in the judgment of the High Court. In short, the Applicant and the Deceased were friends. They were drinking together on 23/12/2007. They ate *nyama choma* together. They then went to eat lunch prepared by one of their mutual friends. While there, the Applicant thought the Deceased had stolen his phone. That suspicion led to the Applicant attacking the Deceased with a knife – inflicting two stab wounds. The Deceased died at the scene. The Applicant ran away upon realization of what he had done. Both the Applicant and the Deceased were drunk at the time.
7. In mitigation before me, the Applicant informed the Court that he is now completely blind. He suffered glaucoma while in prison and lost sight on both eyes. That was in 2011 while he was still in pre-trial custody. He told the Court that he deeply regrets what he did and that he is remorseful. He asked the Court to show mercy upon him given his condition. He told the Court that Prison is nearly impossible for the visibly impaired. The Applicant says he is now a born-again Christian and will never re-offend.
8. Mr. Maragia, counsel for the Applicant, told the Court that the Applicant is a first offender and that he has substantially reformed. He told the Court that the Applicant has pledged to be of good conduct if released. He begged the Court to consider the Applicant's condition and release him to his family. Mr. Maragia thought that the eleven years the Applicant has been in Prison is enough punishment.
9. The State Prosecutor, Ms. Doreen, asked the Court to consider that the Applicant had a knife when he committed the offence and that he stabbed the victim; and that the Applicant clearly had an intention to kill.
10. In fashioning the appropriate sentence, the Court is called upon to look at the totality of the circumstances and tailor the sentence to the individual including all the mitigating and aggravating circumstances.
11. I did not note any particularly aggravating circumstances in this case. Although the Applicant was armed, there was no evidence of intricate planning. Neither was the offence committed for financial gain. It was committed on the spur of the moment and was clearly a

consequence of alcohol-fueled rage.

12. There are weighty mitigating circumstances, in this case. They include the fact that the Applicant is a first offender. He also showed deep remorse for his actions. He has substantially reformed while in Prison. He also abandoned his appeal and was forthright about his actions. It is clear that the offence was committed in the heat of the moment. The Applicant was also drunk at the time. Finally, the Court must consider the Applicant's present circumstances. He is permanently blind. He has been so since 2011. As such he has been in Prison for more than 8 years without the gift of sight. That is a long time to be incarcerated in that condition.

13. My view is that in the circumstances of this case, no sentencing goals would be achieved by incarcerating the Applicant any further. He is no danger to society. He has reformed. He is remorseful. He can no longer see. He needs to be in the care of his family now.

14. In the circumstances, I sentence the Applicant for the period already served. Consequently, the Applicant shall be set free forthwith unless otherwise lawfully held.

15. Orders accordingly.

Delivered at Nakuru this 25th day of July, 2019.

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JOEL NGUGI

JUDGE