



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.319 OF 2018

DICKSON MWANGI MUNENE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Dickson Mwangi Munene was convicted of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. According to the trial court and the Court of Appeal, the prosecution was able to establish that on 24th January 2009 at Westlands in Nairobi County, the Applicant murdered James Ng'ang'a Muiruri. The Applicant was sentenced to death. The death sentence was commuted to life imprisonment by the President. That would have been the end of the matter but for the window opened by the Supreme Court in **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**. In that case, the Supreme Court declared the mandatory death sentence to be unconstitutional. The court further stated that a convict was entitled to give his mitigation before a sentence is meted out in any circumstances.

The Applicant filed an application before this court seeking to be resentenced. In his application, the Applicant reiterates what he told the trial court and the Court of Appeal that he did not intend to cause the death of the deceased. He stated that although he has accepted the consequences of his action, he was still of the view that the facts of the case should be reconsidered with a view to this court favourably considering his application for resentencing. The Applicant stated that he had made effort to be reconciled with the family of the deceased but had been rebuffed. He was still willing to be reconciled with the family of the deceased. He stated that he was remorseful and regrets the events that led to the death of the deceased. He urged the court to take into consideration the fact that in the ten (10) years that he had been in prison he had reformed and had been rehabilitated. He had undertaken a Masters degree programme while at prison and had graduated. He was also undertaking a Bachelors degree in law from the University of London. He was awarded the overall outstanding prisoner Award during the Kamiti Prisons Award ceremony graced by the Commissioner General of Prisons. This award was made in December 2018. As regard his personal circumstances, he told the court that he was the sole breadwinner of his wife and child. He also took care of his aged parents. His incarceration had resulted in loss of living standard for his family. He pleads with the court to also take into consideration that he suffers from hypertension due to the conditions in prison. He was of the view that his medical condition required a special diet which can only be available if the court favourably considers his application for resentencing. He urged the court to take into consideration that the objective of sentencing was not to needlessly punish him but to give him an opportunity to be rehabilitated. He was of the opinion that the ten years that he has been in prison is sufficient punishment. He urged the court to allow his application.

The application is opposed. The family of the deceased opposed the application. In their written submission, they noted that the High Court and the Court of Appeal had observed that the Applicant had, with malice aforethought, caused the deceased's death. The family of the deceased was particularly irked by the defence adopted by the Applicant during trial that it was the deceased who had wrested the gun from the Applicant before the same accidentally shot him. The family of the deceased was of the view that the Applicant was not remorseful and neither did he regret the death of the deceased. They urged the court to take into consideration the fact that what the Applicant stated in court was at variance with what he told the probation officer who prepared the resentencing report. They submitted that the Applicant's changed story is a reflection of his state of mind i.e. a person who was willing to do anything to escape from criminal liability for causing the death of the deceased. They urged the court not to interfere with the sentence that the Applicant is currently serving because the same fitted the crime.

On its part, the Director of Public Prosecution opposed the application on the grounds that the circumstances in which the Applicant caused the death of the deceased was such that this court should not interfere with the sentence that was imposed by the trial court and confirmed by the Court of Appeal. The State submitted that the Applicant did not appear remorseful neither did he demonstrate that he regretted the action that he took. The State was of the view that taking into consideration of the fact that the Applicant was a police officer, he was expected to have known that his action in shooting the deceased could cause him to sustain injuries that in many cases proved fatal. In the case of the deceased, his death was therefore a direct consequence of the Applicant's act.

During the hearing for the application for resentencing, this court heard oral submission made by Mr. Wandugi for the Applicant, Mr. Moda for the State and Mr. Onyancha for the family of the deceased. The court also had the opportunity of reading the resentence report prepared

by the Probation Officer. The issue for determination by this court is whether the Applicant made a case, through his mitigation, for this court to vary the sentence that was imposed upon him by the trial court and upheld by the Court of Appeal.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on 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.***

[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 bounded 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.”

In the present application, it was apparent to this court that the Applicant does not still accept the finding made by the court in regard to his role in causing the death of the deceased. In considering whether or not to favourably consider the application by the Applicant for resentencing, one of the factors that this court must take into account is whether the Applicant is remorseful and is willing to accept that the crime that he committed was wrong. When resentencing an applicant, this court is not rehearing or reconsidering the finding of facts that have been concluded by the Court of Appeal. Its role is restricted to considering the mitigation of the Applicant, and whether, from that mitigation, a case has been made for the Applicant's sentence to be varied.

In the present application, this court heard from the family of the deceased. It was clear from their submission that they were still hurting. The life of their son who was about to graduate with a PhD degree in Law was snuffed off in circumstances that can only be described to be avoidable. It was clear that the Applicant abused his powers as a police officer to unnecessarily cause the death of the deceased. This court has taken into consideration that in the period of ten (10) years that the Applicant has been in prison, he has applied himself gainfully. He has become a model prisoner. He has even undertaken further studies. He has obtained a Masters degree in Business Studies. He was given an Award by the Commissioner General of Prisons for being a model prisoner. Those are factors that work in his favour when this court is considering the Applicant's application for resentence. However, the life of the deceased cannot be restored. The gap that he left in the lives of his family can never be filled. It is a void that will remain for the remainder of the lives of the parents and siblings of the deceased. The pain that the family of the deceased suffered and continue to suffer must be weighed with the circumstances of the Applicant. This constitutes an aggravating factor in sentencing.

Having carefully considered the rival facts of this application, this court formed the view that the Applicant made a case to have his sentence reconsidered. Taking into account the entire circumstances of this case, this court is of the view that the sentence of life imprisonment that was imposed on him will not serve the ends of justice. In the premises therefore, the sentence of life imprisonment is set aside and substituted by a sentence of this court sentencing the Applicant to serve of twenty (20) years imprisonment with effect from 12th October 2011 when the Applicant was sentenced by the trial court. The court has taken into consideration the period of two (2) years that the Applicant was in custody. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2019

L. KIMARU

JUDGE