



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. APPLICATION NO. 4 & 5 OF 2018**

**ESTHER WANJERI KAMAU ....1<sup>ST</sup> APPLICANT**

**LUCY WANJIKU KAMAU .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The two Applicants are mother and daughter. Twenty two years ago, they were convicted of the offence of murder. They were each sentenced to death as the law then mandatorily provided.
2. The victim of the murder was Joseph Jasai Kamau. He was the husband to the 1<sup>st</sup> Applicant and father to the 2<sup>nd</sup> Applicant. By all accounts, the Deceased and the 1<sup>st</sup> Applicant had a troubled marriage. The 1<sup>st</sup> Applicant admits to angrily forming the intention to kill her husband. The 2<sup>nd</sup> Applicant knew about the plans and was an accomplice but did nothing to stop the crime. She was convicted under the doctrine of common intention. A sister to the 2<sup>nd</sup> Applicant was sentenced to three years imprisonment for her role as well.
3. The Applicants now seek to be resentenced pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. They seek for substitution of the death penalty they received with a prison term. 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.
4. In *Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)*, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional.
5. To determine whether the Application is meritorious and to what extent, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicants themselves.
6. As aforesaid, available evidence points to a troubled marriage that triggered the unfortunate incidence. Both Applicants have admitted their role in the murder. They have each expressed remorse and begged for forgiveness. They have both told the Court that they have reflected on their actions and they have deeply regretted it.
7. The Prisons Authorities filed a recommendation letter with respect to the two Applicants. The letter speaks of both in glowing terms. Neither of them have had any behavioural problems in Prison. The 2<sup>nd</sup> Applicant has risen to become a Trustee within the Prison system. They have both taken several courses while in Prison. The 2<sup>nd</sup> Applicant has taken vocational training in Dress Making and has certification for it. She has taken several other courses in counselling and theology. She told the Court that she is now a Preacher. The 1<sup>st</sup> Applicant also took basic literacy classes despite her advanced age.
8. The 1<sup>st</sup> Applicant is now eighty-six (86) years old. She is old and frail but of good cheer. She has many documented health issues. She lost all her teeth. She has ulcers and arthritis. As a result, she is having a really tough time in Prison.
9. The 2<sup>nd</sup> Applicant was 24 years old when she was arrested. She has been in custody since then – meaning that she has been in custody for half of her life. She had a six-year old daughter. The daughter, now a 28-year old adult woman, came to Court to give support to her mother. She was accompanied by her great-uncle (2<sup>nd</sup> Applicant's uncle and 1<sup>st</sup> Applicant's brother) and her aunt (2<sup>nd</sup> Applicant's sister and

1<sup>st</sup> Applicant's daughter).

10. At the Court's request, the Probation Department filed Probation Reports. They are both very favourable to the Applicants. The reports state that the Applicants are deeply remorseful; are fully rehabilitated and are likely to have productive lives outside Prison.

11. These are recommendations which the State Counsel, Ms. Malimu agreed with. She informed the Court that she agreed with the assessment of the Probation Officer. She thought that the time served was sufficient for the crimes committed.

12. I agree too. The extenuating circumstances in this case tell a story of sentencing objectives which have already been achieved: two Prisoners who have demonstrated remorse; have asked for forgiveness; have owned their past mistakes; have demonstrated that they have reformed; and have demonstrated that they have support system to help them ease to life outside Prison. There are no further sentencing objectives to be achieved through the continued incarceration of the two Applicants.

**13. Consequently, I hereby substitute the death sentences imposed on the Applicants with term sentences of imprisonment equal to the terms already served. The two Applicants shall, therefore, be released from Prison forthwith unless otherwise lawfully held.**

14. Orders accordingly.

**Dated and Delivered at Nakuru this 19<sup>th</sup> day of December, 2019.**

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**JOEL NGUGI**

**JUDGE**