REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLICATION NO. 394 OF 2017

consolidated with

MISC. CR. APP. No. 614, 28, 560, 589, 590 and 586 OF 2018

FRANCIS KARIOKO MURUATETU.....1ST APPLICANT.

ROSE NJOKI MURUATETU.....2NDAPPLICANT.

WILSON THIRIMBU MWANGI.....3RD APPLICANT.

ANNE NGONYO.....4TH APPLICANT.

DAVID KARUGA NJUGUNA.....5TH APPLICANT.

STEPHEN WAMBUA KAMAU.....6TH APPLICANT.

STEPHEN NJOKI alias BLACKIE.....7TH APPLICANT.

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT.

RULING.

1. Francis Karioko Muruatetu, Rose Njoki Muruatetu, Wilson Thirimbu Mwangi, Anne Ngonyo, David Karuga Njuguna, Stephen Wambua Kamau and Stephen Njoki alias Blackie, herein the 1st to 7th Applicants respectively, brought their respective applications urging this Court to consider revising the sentences meted out in High Court at Nairobi Criminal Case No. 40 of 2000 and as upheld by the Court of Appeal at Nairobi Criminal Appeal No. 51 of 2004. The 1st, 2nd, 3rd, 5th, 6th and 7th Applicants were all sentenced to suffer death while the 4th Applicant was sentenced to life imprisonment.

2. They based their respective applications on the Supreme Court's decision in **Petition 15 of 2015, Francis Karioko Muruatetu & another *v.* Republic[2017]eKLR,** hereafter the Muruatetu decision, which directed the High Court to consider the revision of the sentences meted out on the 1st and 3rd Applicants. The gist of the monumental decision was that the mandatory death sentence as provided under Section 204 of the Penal Code was unconstitutional as it fettered a trial court's discretion to impose an appropriate sentence given the circumstances of the case and the mitigation an accused gives. It was the finding of the Court that since the death sentence was mandatory, it took away the right of an accused person to mitigate, thus infringing on his right to a fair trial.

3. As pointed above, the Petition in the Supreme Court was filed by the 1st and 3rd Applicants. Although the application therein related to death sentence under Section 204 of the Penal Code, the letter and spirit of the pronouncement in the decision was that death sentence, as long as it is couched in mandatory terms, is unconstitutional. That is why an avalanche of resentencing hearing applications have been filed in various courts where the Petitioners/Applicants were sentenced to a minimum mandatory sentence as provided in the law.

4. It suffices then to add that apart from the 1st and 3rd Applicants, the rest of the Applicants had filed respective resentencing hearing

applications listed in the heading in order of their serialization and since they were jointly charged with the 1st and 3rd Applicants, it was only prudent to consolidate the applications and hear them simultaneously.

Applicants' submissions.

5. The applications were canvassed before this court on 23rd October, and 1st November, 2019. Learned counsel, Mr. Thiongo appeared for the 1st Applicant and relied on written submissions filed on 21st September, 2019. He submitted that the Applicant had spent sufficient time under incarceration which period was adequate to meet the ends of justice. He added that the Applicant had suffered extremely poor health since his incarceration as he suffered from chronic diseases, namely diabetes, high blood pressure and peptic ulcers. Further, that he had undergone surgery for renal calculi and kidney stones. He submitted that the 1st Applicant's behavior since his incarceration, as set out in a letter from the Prison authorities showed that he was a model prisoner and had acquired several skills for which he was certified. Further, that the Applicant was the author of the Kamiti Times Magazine. That the Applicant's good behaviour was buttressed by the fact that he had been appointed a trustee at the prison. He submitted that the Applicant was now 65 years old and had a family which would embrace him upon his release to society.

6. In support of the submissions, Mr. Thiongó cited several case laws amongst them Court of Appeal decision in **Criminal Appeal No. 12 of 2013 (Mombasa) Mulamba Ali Mubada vs Republic** where the Court emphasized that the trial court must be accorded the discretion in sentencing. More so, where an accused person offers mitigation that would warrant a lesser sentence than is provided under the law. Also in **Criminal Appeal No. 56 of 2013 (Kisumu)** in the case of **William Okungu Kitinyi vs Republic (2018) e KLR** life sentence was set aside and the case resubmitted to the Magistrates Court for resentencing.

7. In the High Court, whilst emphasizing the need to set aside death sentence, he cited, *inter alia*, **High Court Criminal Appeal No. 142 of 2017 Moses Kuria Vs Republic** where death sentence was set aside and substituted with 15 years imprisonment. In Meru **High Court Misc. Cr Application No. 425 of 2015 – Douglas Muthauri M'toribi vs Republic** death sentence was substituted with five years imprisonment.

8. Learned Counsel, Mr. Eredi appeared for the 2nd Applicant and relied on the grounds of mitigation and submissions dated 23rd October, 2019. He urged the Court to be guided, in addition to the Muruatetu decision, by the Judiciary Sentencing Policy Guidelines and the Attorney General's Proposal on Resentencing, in reaching its decision. He submitted that the Applicant was extremely remorseful to the family of the deceased and was willing to reconcile with the family of the victim. She had the opportunity to personally address this point in court. That she took full responsibility for her actions and that she was now reformed and undertook to never participate in crime if faced by similar circumstances. Further, that while in custody, she had undertaken a course on a Prisoner's Journey and obtained certification. Counsel submitted that she had received a recommendation from the officer in charge of Langata Women's Prison which highlighted that she had reformed. He urged the court to note that the Applicant was now 58 years old and in ill health as she suffered from hypertension, diabetes and arthritis for which she required constant care and a special diet not easily available in prison. Further, that she was a first offender with no prior convictions. That as at the date of hearing the application, she had spent 19 years and 8 months in custody during which period her family had suffered immensely particularly after her husband passed away in 2001. He urged the court to release her.

9. Counsel in making a comparative of a similar charge of murder where death sentence was set aside and substituted with an imprisonment term cited, *inter alia*, the cases of **John Khaemba vs Republic [2018] eKLR** where death sentence was substituted for 13 years imprisonment. In the case of **Elizabeth Mwiyayi Syengo vs Republic [2019] eKLR** a 20 years imprisonment was found as sufficient sentence. In the case of **Justus K Sila Kyula vs Republic, [2018] eKLR,** the court considered the 19 years spent in custody to be sufficient sentence.

10. Learned counsel, Mr Kabaka appeared for the 3rd Applicant and relied on submissions filed on 20th October, 2018. He submitted that the Applicant had been in custody for more than 19 years and had been reformed which meant that he could easily reintegrate into the society. He submitted that the Applicant had undertaken paralegal training of fellow inmates, amongst other courses learnt. He urged the court to be guided by the Judiciary Sentencing policy Guidelines. He added that the 3rd Applicant came from a humble background and had been the sole breadwinner to his family. Further, that he was 34 years old at the time of his arrest and had since grown wiser with the passage of time and could therefore not go back to crime. That, his wife had since passed away and his children needed his presence. He urged the court to be guided by the probation officer's report which indicated that the Applicant was now reformed as a result of which he was assigned certain duties in prison. That the Applicant was remorseful and sought a second chance in life. Further, that he had sought forgiveness from the society and prayed that the time he had spent in custody be taken into account when the court passes the sentence.

11. Mr. Kabaka relied on the case law cited by both Mr. Thiongo and Eredi adding that it was no longer prudent to impose a death sentence. He also relied on the Probation Officer's Report dated 9th September, 2019 which indicated that the Applicant had reformed and would be of use of he was released to the society.

12. Learned Counsel, Mrs. Ndegwa appeared for the 4th Applicant. She submitted that the Applicant was cognizant of her role in the commission of the offence and regretted her actions. Further, that she was contrite, repentant and begged for forgiveness from the deceased's family. She urged the Court to be guided by the Judiciary Sentencing Policy Guidelines as well as the Muruatetu decision. She submitted that the 4th Applicant was only 29 years old when the sentence was passed and had delivered a child on 9th April, 2003 while still in custody. That her child was now 17 years old and she urged the court to allow her to be a mother to it. She detailed steps the Applicant had undertaken to rehabilitate herself and the certifications she had received to that end. She also urged the court to note that the Applicant had received commendations from the officer in charge of Langata Women's Prison and the Prison Chaplain. She concluded by stating that the 4th Applicant was remorseful and sought a second chance at life.

13. Mrs. Ndegwa too relied on authorities previously cited by other counsel. In addition, he referred to the case of **Lorex Othiambo Akeyo vs Republic [2019] eKLR** which was a resentencing hearing case where the Applicant was charged with murder and the death sentence was substituted with 15 years imprisonment. In the case of **Peter Kariuki Manthi vs Republic [2019] eKLR** was a case of robbery with violence and in resentencing, death sentence was substituted with 15 years imprisonment. She urged the court to give the Applicant a second

chance in life.

14. The 5th Applicant appeared in person and submitted that he was extremely remorseful and sought forgiveness from society and the deceased's family. Further, that he had been in custody for 19 years and was currently serving a life sentence. He submitted that he had learnt skills while in prison and urged the Court to be guided by the Probation officer's report in meting out an appropriate sentence. Further that he was also a first offender.

15. The 6th Applicant also appeared in person and submitted that while in custody he had undertaken a number of courses and was duly certified and as such, would be useful to the society if released. Further, that he was extremely remorseful for what he did and urged the Court to be guided by the authorities that were submitted by counsel for the 1st to 4th Applicants.

16. The 7th Applicant also appeared in person and also sought forgiveness from the family of the deceased, the court and society.

Respondent's submissions.

17. Learned State Counsel, Mr. Momanyi appeared for the Respondent. He did not oppose the resentencing of the Applications. He laid out the evidentiary basis of the Applicants' convictions and pointed out that the Applicants, except the 4th who was sentenced to life imprisonment, had been sentenced to suffer death. He urged the Court to consider the aggravating circumstances of the offence and any other relevant issues when undertaking the resentence.

18. In summary, he underscored the impact the death of the deceased had on the victims as analyzed in the various probation officers' reports stating that the deceased had left behind a widow and eight children and that soon after his death the wife went into depression before passing on. That the deceased's father also passed away soon after, leaving the family in a desolate state since the deceased was the sole breadwinner. Further, that the deceased's family members were still affected by the incident, having suffered trauma to this date which could be deduced by their refusal to talk to probation officers out of fear.

19. Mr. Momanyi submitted that this was not a case where the Court should easily consider clemency. He averred to the Applicants' respective submissions that they should be allowed to go back to their families, without regard to the fact that the deceased had been denied such an opportunity. Further, that the aggravating circumstances of the offence outweighed the mitigation the Applicants offered. He urged the court to note that hat the Applicants had not indicated the motive for committing the murder of an honest businessman in a well-planned operation. He urged the court to consider the role each of the Applicant played in the offence before determining the appropriate sentence to impose.

20. Mr. Momanyi distinguished a few of the cited case law with the present case. For example, in the case of **Mulamba Ali Mubanda vs Republic (Supra),** he noted that it was a case of robbery with violence and the Court of Appeal noted that the Appellant was a first offender, the stolen goods were of modest value and no one had been injured in the robbery. In the case of **William Kitini vs Republic (Supra)** the High Court ordered the Applicants to go back to the trial court for resentencing. In the case of **Moses Kinyua vs Republic (supra)** it was a case of robbery with violence where death sentence was substituted with 15 years imprisonment. In the case of **Douglas Muthaura vs Republic (supra**) a fabourable sentence was imposed because it was a case of simple robbery. He also referred to the case of **R vs John Gacheru and Joseph Kamau Wanyoike High Court (Kiambu) Criminal Case No. 31 of 2018**. He submitted that in the trial, the court noted that what led to the death of the deceased was a fight between the accused persons and the deceased prompted by theft of a cap by the deceased from one of the accused persons.

21. Referring to the need to be objective in resentencing, he submitted that the court must evaluate the evidence in respect of each case and determine whether there existed aggravating factors. It was his view that this was a case where the aggravating factors far outweighed the mitigation the Applicants had offered.

22. With regards to the Applicants' previous records, he submitted that the 3rd Applicant had been sentenced on 7th April, 1993 to seven years imprisonment with hard labour by the Chief Magistrate's Court at Nairobi on a charge of preparation to commit a felony. That on 19th April, 1996 he had also been sentenced to four years imprisonment and four strokes of the cane by the Senior Principal Magistrate's Court at Nairobi. With regards to the 5th Applicant he submitted that he had been sentenced to one year probation on 5th July, 1990 on a charge of stealing.

23. It suffices to state that during the proceedings the 1st Applicant conceded that he was previously convicted for the offence of being in possession of narcotic drugs namely hashish and sentenced to 20 years imprisonment but that before his appeal was heard by the High Court he was released through a presidential pardon.

Determination

24. After a thorough consideration of the respective submissions and the background of the trial that the Applicants went through, I have deduced that only two issues arise for determination, namely what effect the Presidential pardon had on the 1st Applicant's previous conviction and whether the death sentences should be substituted with other appropriate sentences.

The effect of the Presidential pardon to the 1st Applicant's previous conviction.

25. This issue arose with regards to the 1st Applicant's submission that, although he had previously been convicted for being in possession of a narcotic drug he had received a Presidential pardon. There were no opposing submissions by the Respondent and therefore, this Court shall proceed from the point of view that the Applicant received a Presidential pardon. There was also no information presented to the Court

to demonstrate what led to the pardon. The 1st Applicant only informed the court that he did not pursue his appeal after the pardon. The court can then only assume that a full pardon was granted as then provided under Section 27(a) of the Constitution of Kenya, 1963. The Section provided, *inter alia,* that the President may grant a person convicted of an offence a pardon either free or subject to lawful conditions.

26. The question thus arises whether a pardoned offence could be considered to constitute a record of previous conviction(s). Black's Law Dictionary, 4th Edition defines a pardon as:

> ***"The act or an instance of officially nullifying punishment or other legal consequences of a crime."***

27. The above definition presumes that once pardoned a court would be curtailed from relying on such conviction when considering a future sentence as this would subject the pardoned convict to legal consequences for the pardoned offence.

28. But is this the common law position? I find guidance in the decision of the High Court in England in **Shields, Regina(on the application of) *v.* Secretary of State for Justice[2008] EWHC 3102(Admin)** that:

> ***"A pardon is a common law extra-judicial power exercised by the [****Executive****] under the [****Executive****] Prerogative of Mercy… In modern times, the Prerogative had been exercised in at least three situations, … First, there is special remission, as where the prison authorities miscalculate a release date or release a prisoner early by mistake. Secondy, there is conditional pardon, of which commutation of a death sentence was an example… Third, there is free pardon, which may relate to miscarriages of justice…"***

29. The court went on to quote from the speech **of Watkins LJ in Regina *v.* Foster(1984) 79 Cr. App. R 61** that:

> ***"…, it was held that the effect of a free pardon was to remove the subject of the pardon "all pains, penalties and punishments whatsoever that from the said conviction may ensue", but not to eliminate the conviction itself."***

30. From the foregoing, it is clear that the conviction is not eradicated by a full or free pardon. The only thing eliminated by the pardon is a continued suffering by having to complete the punishment. I thus entirely concur with the court in the case of **Shields, Regina(on the application of) *v.* Secretary of State for Justice[2008] EWHC 3102(Admin)** that an executive order cannot purport to treat a person who has been convicted as innocent. I hold that view thus, once pardoned, the convicted person only enjoys the freedom from prison, but remains convicted unless that conviction is upset by a court of higher jurisdiction than the one that convicted him/her.

31. Respectively, the 1st Applicant's previous conviction bear him as a person who was convicted a second time in the murder trial. He thus opted not to pursue an appeal as a matter of choice but not because he was pardoned by the President.

32. It is paramount that, before I delve into what appropriate sentence each of the Applicants should carry, that I consider the victims' impact statements as borne out in the Probation Officer's Reports.

Victim impact statements' consideration

33. The victim impact statements are all borne out in the various Probation Officer's Reports that were filed in this court. I need not summarize each one of them but broadly they depict how the offence was orchestrated. It points to a murder most foul. Its impact created wounds in the family of the deceased that, close to twenty years down the line still feels raw and painful. This explains the apprehension of the victim's family to participate in the resentencing process or to discuss matters relating to the murder. The family members indicated that the continued reporting on the matter by the media meant that their psychological trauma could not heal. This led to the members of the immediate family refusing to give their views to the probation officers as they were still fearful. In view therefore, I conclude that the psychological wounds in the family members are still raw, notwithstanding that the murder took place in the year 2000, a factor that must weigh in whilst determining the appropriate sentences to impose on each of the Applicants.

Whether the Applicants' sentences should be reconsidered affirmatively.

34. The Judiciary Sentencing Policy Guidelines at paragraph 23. 4 to 23.7 direct that in passing a sentence, the court should consider both the aggravating and mitigating circumstances. Further, that an accused person should be accorded an opportunity to mitigate. At sub-paragraph 7, a long list of mitigating circumstances is given. Nevertheless, each court should consider the circumstances of the respective case. For the purpose of this ruling, the Muruatetu case is the key guide in how the court will consider the respective circumstances that will mitigate for a lesser sentence.

35. The Applicants were all granted an opportunity to offer mitigation and submit on the appropriate sentence. Hence, the court in reaching its decision shall be guided by the mitigating and aggravating factors in respect of each Applicant and pay special attention to the advisory mitigating factors enunciated at paragraph 71 of the Muruatetu decision.

36. The Court rendered itself thus;

> **"….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 gen'der-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."

37. It is important to point out that the court cannot make an objective decision before it gives a summary background of the case. The same is pretty long as summarized by the High Court at trial and the Court of Appeal in its judgement rendered on 20th May, 2011. It would therefore not be prudent to do a full summary of the evidence of the case. It however suffices to briefly state that the Applicants were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 4 th February, 2000 in Kitengela Reserve in Kajiado District within the lift Valley Province jointly murdered Lawrence Githinji Magondu. The deceased was lured by the 3rd and 4th Applicants over a period of time beginning 11th January and 4th February 2000 when he met his death. He was being enticed to sell a piece of land in Kitengela to the 4th Applicant who was indicated as the sister of the 3rd Applicant (which was not the case).

38. The 5th, 6th and 7th Applicants were supposedly laborers who were supposed to fence off the property once it was identified. To hoodwink the deceased that the story was factual, they were in possession of barbed wires and other metal implements used for fencing. The 1st and 2nd applicants were the masterminds who had hired the 3rd Applicant to execute the murder. The 3rd Applicant further roped in the rest of the Applicants to assist in executing the murder. After the parties (including the deceased) and PW1 who was his driver viewed the land, the 4th Applicant asked to be shown developments within the vicinity. They thus went towards Maasai Ostrich Farm where the deceased, 3rd, 4th and 5th Applicants went into one car which the 3rd Applicant had earlier driven in. the 6th and 7th Applicants were left the deceased's car. The car in which the deceased entered then drove off. The deceased driver (PW1) could not follow him as he did not have enough fuel and he decided to drive back to the plot that was for sale to await the rest of the parties. They would later show up at which point the 3rd Applicant suggested to the deceased that they should make preparation for lunch.

39. The 3rd Applicant gave PW1 Kshs. 1000/= for food and was directed by the deceased to a butchery where food could be prepared. He was accompanied by the 6th and 7th Applicants. At the butchery he went in to order the food. When he returned outside, he saw the 7th Applicant running towards the car. The 6th Applicant then informed him that the 7th Applicant had been called by the 3rd Applicant. After a while, PW1 saw the 3rd Applicant's car drive past them. He and the 6th Applicant then entered into their car and followed the 3rd Applicant's car with the intention of reminding him that he did not have sufficient fuel. The 3rd Applicant's car joined old Mombasa Road and at some point slowed down. That is when he realized he could not see the deceased which raised his suspicion. The 3rd Applicant's car then stopped and he too stopped. That is when the rest of the Applicants attacked him and left him for the dead.

40. The 1st and 2nd Applicants were connected to the murder of the deceased by virtue of money transactions they had made which was linked to the 3rd Applicant. The same was intended for use to execute the murder. The body of the deceased was later found within Kitengela Reserve area with head injuries which were confirmed to be the cause of the death.

41. In the interest of uniformity I shall first consider the aggravating circumstances for each of the Applicants before delving into the individual mitigating factors. In so doing my approach will be that assumed by the Court of Appeal in the appeal preferred by the Applicants. It is cited as the case of ***Elizabeth Gitiri Gachanja & 7 others v. Republic Criminal Appeal No. 51 of 2004 [2011] eKLR*** where the Court divided the Applicants into three categories whilst determining their criminal culpability.

42. **The first category**, which was the second category in the judgment, comprises the 1st and 2nd Applicants whom the Court found that although they never went to Kitengela on the fateful day were the conduit through which money flowed to the 3rd Applicant, they were "the architects of the heinous murder". It is also clear that a weapon was used to commit the offence and that there was intricate planning carried out by a cadre of accomplices.

43. **The second category** is composed of the 3rd and 4th Applicants who according to the Court played the part of ensnaring the deceased in a death trap and were also the recipients of money from the 1st and 2ndApplicants. The Court found that there was a clearly intricate plan undertaken to lure the deceased under the ruse that they planned to purchase a piece of land from him. 3rd Applicant was described as the henchman who was tasked with ensuring that the plan came off without a hitch.

44. It must be noted that there was an overlap of players when it came to the third category which was comprised of the 3rd,4th ,5th and 7th Applicants who were the last persons seen with the deceased and were deemed to have undertaken the actual murder. The Court of Appeal found that these were the parties present when the deceased was executed and that they were responsible for kidnapping the deceased. The inference drawn was that they were jointly culpable for the causation of the serious physical harm that led to the demise of the deceased. The injury was caused by a weapon and there was clearly an attempt to dispose of evidence when they stashed the deceased body in the bush and got rid of the deceased's gun which was not recovered. Finally, they attempted to cover up their actions by attempting to get rid of a crucial

witness, the deceased's driver, but their attempts were only foiled by the witness' ingenuity.

45. **The fourth,** and final, category was composed of the 6th Applicant. It is clear that he did not take part in the actual murder but the Court of Appeal found that he was a party to the grand plot from the fact that he took part in the consequent attempt to silence a witness and that he had been cleverly deployed to ensure that the witness' suspicions were not aroused as the rest of the gang undertook the heinous act.

46. Having laid out the evidentiary backing of the respective convictions I state that I have considered the respective submissions by the Applicants and Respondent together with the probation officers' reports before delving into the final decision here under. I add that I agree with the categorization accorded to the Applicants by the Court of Appeal which will immensely guide me in arriving at the final determination.

1st Applicant:

47. From the evidence above it is clear that he was instrumental to the commission of the offence as per the finding of the Court of Appeal, that he was one of the architects of the offence. It is also clear that he utilized his previous relationship with the 3rd Applicant to procure his services in the commission of murder. The Probation Officer's Report (POR) shows that has undertaken a path of reform while in Prison and is clearly remorseful for his actions.

48. Nevertheless, by virtue of his previous conviction, it points to a possibility of recidivism. No wonder he went ahead and planned the death of the deceased in the present case. This is a case of a murder most foul, represented by unwarranted acts of greed. A proportional punishment that takes into account the pain that the family of the victim went through must be meted. The purpose of a punishment must also be served.

49. Thus, taking into account the aggravating and mitigating circumstances I have arrived at a decision that the most appropriate sentence would be 40 years imprisonment. But given his advanced age, I will grant him a concession of five years. I accordingly set aside the death sentence and substitute it with 35 years imprisonment commencing from 10th February, 2000, the date of his arrest.

2nd Applicant:

50. She was also pinpointed as one of the architects of the murder. She was tasked with withdrawing the money from the bank accounts and transferring it to the 1st Applicant for onwards transmission to the rest of the gang. The Court has considered her remorsefulness and her submission that she would seek reconciliation from the deceased's family. Further, it is clear that she has undertaken rehabilitative steps while in custody. However, the aggravating circumstances of the offence out weight the mitigation she offered. Interests of justice demand that penance be paid through a retributive sentence. The death sentence would be harsh retribution, all the same. I accordingly set it aside and substitute it with a sentence of 30 years imprisonment commencing from 10th February, 2000, the date of her arrest.

3rd Applicant:

51. The 3rd Applicant was found to have played three crucial roles in the murder, namely; (i) he procured the services of the 4th, 5th,6th and 7th Applicants, (ii) he ensnared the deceased through an elaborate ploy and (iii) he was present and took part in the actual murder of the deceased.

52. Although he was not the architect of the plan he was clearly the main henchman who was entrusted with ensuring that the heinous plan was achieved. The POR points that he has been rehabilitated during his incarceration and has acquired skills that would make him a productive member of the society.

53. As for his remorsefulness, submission was made that he was truly remorseful but this was clearly at odds with what was captured in the POR which was that he still denied having taken part in the murder. This calls into question his contrition and contrasts the seeking of penance. Further, the Court was informed of his previous convictions for felonious offences.

54. The aggravating circumstances no doubt outweigh the mitigation offered. The 3rd Applicant represents a case for retributive custodial sentence. Further, the chances of recidivism are live in view of his earlier convictions. All the same, the death sentence is not appropriate in the present circumstances. I set it aside and substitute it with 50 years imprisonment commencing from 9th February, 2000, the date of his arrest.

4th Applicant:

55. She was unique as she was serving life imprisonment that was imposed as a result of the fact that she was pregnant as at the time of sentencing. She played two crucial roles, namely; (i) she lured the deceased to his ultimate death and (ii) she took part in the actual murder. As stated above, the circumstances of the murder demand that a retributive sentence be imposed on all involved in the offence. She undertook rehabilitative programs during her stint in prison and sounded remorseful for her actions. Thus, a death sentence is apparently not an appropriate sentence. Having considered the mitigating factors and taking cognizance of her role in the murder, I hereby set aside the death sentence and substitute the same with a sentence of 40 years imprisonment to start running from the date of her arrest, 10th February, 2000.

5th and 7th Applicants:

56. They played a quintessentially similar role as the 4th Applicant in the commission of the offence. They were the muscle that was brought in to carry out the kidnapping and actual murder of the deceased person. They were not involved in the planning of the murder. They acted under the instructions of the 3rd Applicant. The Court has already stated that the aggravating circumstances of the offence far outweigh the mitigating circumstances, which means that the only appropriate sentence is a term of imprisonment.

57. The ***5th Applicant*** was clearly remorseful for his actions and has earned certain skills whilst in custody. He has a previous conviction which points to a possibility of recidivism. After considering his mitigation and analyzing the role he played, I hereby set aside the death sentence and substitute the same with a sentence of 40 years imprisonment. The sentence starts running from the date of arrest, 10th February, 2000.

58. The ***7th Applicant*** is also clearly remorseful and has undertaken rehabilitative programs whilst in prison. Having considered his mitigation and taking cognizance of his role in the murder, I set aside the death sentence and substitute the same with a 30 year jail term to commence from 10th February, 2000.

6th Applicant:

59. The 6th Applicant's role in the murder was to dupe the deceased's driver in ensuring that the murder was executed smoothly. He also was involved in the consequent attempt to silence the driver which was through an attempt to take away his life so that he does not testify against the culprits. I noted that the trial court indicated in its judgment that these actions were the subject of another trial. However, nothing was put before the Court to show the outcome of that trial.

60. Once again, the court has already indicated that the aggravating circumstances clearly outweighed the mitigating circumstances and therefore a term of imprisonment is the only appropriate retributive remedy for the 6th Applicant. Having considered the Applicant's mitigation and having cognizance of his role in the murder, I set aside the death sentence and substitute the same with a 20 year jail term which shall start running from 10th February, 2000.

61. In conclusion, it suffices to emphasize that the period each of the Applicants has been in custody shall be deemed to constitute part of the sentence.

Dated and Delivered at Nairobi This 16th Day of December, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Mr. Thiong'o for the 1st Applicant.*
2. *Mr. Kabaka for the 2nd Applicant.*
3. *Mr. Eredi for the 3rd Applicant.*
4. *Mrs. Ndegwa for the 4th Applicant.*
5. *5th Applicant in person.*
6. *6th Applicant in person.*
7. *7th Applicant in person.*
8. *Miss Akunja for the Respondent.*