



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 71 OF 2018

JOHN KIBAKI KAMAU.....APPLICANT

VERSUS

REPUBLICSTATE

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. AWG was a young and brilliant girl. She sat for her Kenya Certificate of Secondary Education in 2002. She emerged the top of the class at the prestigious academic giant, Alliance Girls High School. She had the whole world at her feet; and a bright future ahead of her.
2. Unfortunately, the promise and the brilliance that A espoused was tragically cut short on 12th June, 2004. On that day, A left home to go to her temporary job at Gilanis Super Market. She never made it back home. Her mutilated body was discovered the following day on the path to her home at Ahero near her house. She had horrific injuries: deep cuts on the forehead; left knee and right ankle. The evidence suggested that she had also been sexually assaulted.
3. A full trial at the High Court established that John Kibaki Kamau was responsible for the death of Ann. He was duly convicted and sentenced to death. An appeal to the Court of Appeal yielded an affirmation of both conviction and sentence.
4. Having reached the end of the judicial path, John Kibaki Kamau now seeks to be re-sentenced for the offence. This is as permitted by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. He seeks for substitution of the death penalty he 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.
5. 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.
6. In support of the Application, Mr. Nyaga, Counsel for the Applicant submitted on four mitigating factors:
 - a. First, he submitted that the Applicant has already reformed and that in the fifteen years in which he has been in Prison, he has learnt various skills including soap making and shoe-making. He produced a letter of reference from the Prisons Authorities.
 - b. Second, he submitted that the filed Probation report showed that the Applicant was no longer a threat to the society.
 - c. Third, Mr. Nyaga urged the Court to consider a lenient sentence due to the advanced age of the Applicant (he is 65 years old) and his medical conditions (he suffers from asthma).
 - d. Fourth, the counsel submitted that the Applicant is remorseful.
7. Ms. Nyakira, the Prosecution counsel, reminded the Court that the circumstances of the case are horrid; that the victim was very young; that she had just finished school at Alliance Girls High School and was waiting to go to the University; that she was murdered while coming from work; that she was raped; that she was cut on the forehead and ankle. And that she was killed for only for a phone worth Ksh 2,000/=. Prosecution Counsel asked the Court to consider the death penalty in the circumstances of the case.
8. I have now considered the mitigating and aggravating circumstances in the case. The four mitigating circumstances are as Mr. Nyaga submitted: the expressed remorse of the Applicant; he demonstrated rehabilitation; his advanced age; and the favourable Probation Report. As Ms. Nyakira submitted, however, there are profound aggravating factors in the case as well: the depraved and inhuman way in which the

killing was done; the sexual assault that accompanied it; the robbery involved; the extremely young age of the victim; and the failure to reach out to the Deceased's family through the passage of time which seems to contradict claims of remorse.

9. All considered, while I am not persuaded that the acts of the Applicant here should attract the irreversible punishment of death, they come very close. Despite his advanced age, the Applicant does not deserve to be out in the streets so soon after his horrific and atavistic acts. And the society deserves to communicate unequivocally its opprobrium and horror at the actions of the Applicant.

10. In my view, a sentence of thirty years will signal the message that the society needs to send on the actions of the Applicant and serve a measure of justice. Consequently, I hereby substitute the death sentence imposed on the Appellant in this case with a sentence of imprisonment for thirty (30) years. The prison term will be computed from the date of sentence.

11. Orders accordingly.

Dated and delivered at Nakuru this 19th December, 2019

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JOEL NGUGI

JUDGE