

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPLICATION NO.41 OF 2018

JUSTUS SILA KYULI.....PETITIONER

VERSUS

REPUBLICRESPONDENT

RULING ON RE-SENTENCING

1. The Applicant herein **JUSTUS SILA KYULI** has filed a Petition dated 9th April, 2018 seeking for an order of re-sentencing.
2. The Applicant's case is that he had been convicted and sentenced to suffer death for an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was his case that his appeal to the Court of Appeal was subsequently dismissed and as such he has already exhausted the chances available on appeal. He further averred that the death sentence was later commuted to life imprisonment which sentence he has been serving for about nineteen (19) years now. He is now seeking for a re-sentencing so that a commensurate sentence could be imposed in line with the Supreme Court decision in **FRANCIS KARIOKO MURUATETU and OTHERS =VS= REPUBLIC [2017] eKLR**.
3. The Applicant herein had been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on the 25th day of March 2000 at Kanyonga village, Githyoko location in Machakos District within Eastern Province murdered **Musyoka Nzwii**.
4. The facts and circumstances surrounding the murder of the deceased herein have already been captured in the judgment of this court by Nambuye – J (as she then was) dated 23rd September, 2002.
5. The Applicant herein Justus Sila Kyuli presented his own mitigation. He stated that he is a first offender and promised not to repeat the offence again. He further stated that he has been in custody for almost nineteen (19) years. He further submitted that he has since undergone several courses while in prison and has obtained several certificates. He seeks for leniency from this court to allow him go back to his family.
6. Mr. Machogu learned Counsel for the Respondent submitted that he was not opposed to the Applicant's Application for re-sentencing. He further submitted that the trial court had noted that there was no motive disclosed. The learned counsel pointed out the fact that the Petitioner has been in custody for a long period which the court should consider.
7. This court in line with the provisions of Section 216 and 329 of the Criminal Procedure Code called for a report from the County Probation Officer Machakos. The same was duly provided and is dated 18th October, 2018. The report reveals that the Petitioner was then a teenager at the time of the commission of the offence. The report indicates that the Petitioner's family and the community are willing to accept him back since it was the first time for him to come into conflict with the law. It is also revealed that the victim's family are related to the Petitioner's family as they hail from the same grandfather and clan. The family of the Petitioner is reported to be ready to revive the Kamba traditional custom of compensating the victim's family. The report further indicated that the Petitioner has been rehabilitated while in prison and that he had been nominated by the prison authorities for consideration for release through the power of Mercy Committee.
8. It is noted that the Petitioner had been sentenced to death and which was later commuted to life imprisonment. Following the decision of the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER =VS= REPUBLIC [2017] eKLR** the trial courts have been given an opportunity to consider the appropriate sentences after receiving submissions from the parties on the aspect of mitigation during sentence hearing. As this matter has now been remitted to this court for re-sentencing, it is necessary to revert back on the circumstances surrounding the murder of the deceased as disclosed in the judgement dated 23/09/2002. It transpired that the Petitioner herein had waylaid the deceased and stabbed him with a knife and left him for dead. The body of the deceased was later collected and a post-mortem conducted on it by Dr. Simon Kioko Muli who formed the opinion that the cause of death was cardio pulmonary arrest due to penetrating left chest wound leading to massive haemopneumothorax. The judgment revealed that the issue of the motive was not revealed by the witnesses and hence the possibility of a hidden motive by the Petitioner could not be ruled out. It has since been revealed in the report of the County Probation Officer that the two had picked a quarrel over a past disagreement in Nairobi and which degenerated into a fight in which he fatally stabbed the deceased. The Petitioner prior to the incident had persuaded the deceased to join him for a friendly stroll only to fatally injure him. It was not proper for the Petitioner herein to escalate his past differences with the deceased who at the time did not even provoke him at all. As a result of the petitioner's actions, a precious soul in the name of his first cousin was lost. The unprovoked attack was unwarranted in the circumstances.
9. This court notes that the Petitioner is a first offender. He has clearly confirmed that he is remorseful and regrets the incident. He has been in custody since the year 2000 to date. The report by the County Probation Officer indicates that the home and community report is favourable. It is also indicated that the Petitioner has been adequately rehabilitated and has been nominated by the prison authorities for consideration towards his release through the Power of Mercy Committee. I find the almost nineteen (19) years served in prison is found to be sufficient atonement for the offence committed.

10. After considering all these factors, I find that the period already served in prison is sufficient punishment. Subsequently, the Petitioner herein **JUSTUS SILA KYULI** is hereby ordered released from prison custody forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 19th day of October, 2018.

D.K. KEMEI

JUDGE