Kipkorir & 2 others v Republic (Miscellaneous Criminal Application E016 of 2021) [2025] KEHC 2389 (KLR) (Crim) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2389 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION E016 OF 2021

K KIMONDO, J

MARCH 13, 2025

BETWEEN

THOMAS KIPKEMOI KIPKORIR .... 1ST APPLICANT

JOSEPH KOMEN YATICH .... 2ND APPLICANT

SEBASTIAN YANO KOMEN .... 3RD APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The three applicants were all police constables. They were tried and convicted by the High Court (Mutuku J) for murder contrary to section 203 as read with 204 of the *Penal Code*. They were sentenced to suffer death. That was in Nairobi High Court Criminal Case 29 of 2012.
2. The particulars were that on the night of 30th March 2012 at Kwitu Classical Bar in Eastleigh Section III within Nairobi County, they jointly murdered Nicholas Ochieng Odongo (hereafter the deceased)
3. Their joint appeal to the Court of Appeal at Nairobi in Criminal Appeal 89 of 2017 partially succeeded but only to the extent that the matter was remitted back to the High Court for resentencing. The learned judges of appeal held as follows-

    (58) Before the trial court passed sentence, each appellant was given an opportunity to mitigate. Ms Odembo, learned counsel for the 2nd accused during the trial who also held brief for Mr. Nyagito and Mr. Koech for the other co-accused, told the trial court that none of the accused

persons wished to offer any mitigation. The learned judge asked the appellants whether they wished to mitigate, and each responded:

> " I have no mitigation to make." In the circumstances, the learned judge remarked: "In the matter before me, the accused persons have waived aside their right to mitigate. Even where mitigation is offered and received by the court, it does not play its intended role in informing the court of the proper sentence to pass in a murder trial just like in any other capital offence trial. The reason for this is obvious. There is only one sentence for murder, and it is death as provided under section 204 of the *Penal Code*."

(59) The learned judge held that she had no discretion in the matter and therefore sentenced each of the appellants to death. We think that the appellants' failure to mitigate may have been informed by the fact that at the time of the conviction the law did not provide any alternative sentence upon conviction for murder. The position has since changed, thanks to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* (*supra*).

(60) It is therefore in the interest of justice that we remit this matter to the trial court for re-sentencing only. To that extent, the appeal against sentence succeeds. For avoidance of doubt, the appeal against conviction is dismissed in its entirety [underlining added].

4. The applicants have thus returned to the High Court for resentencing through an undated chamber summons filed on 19th January 2021.

5. Each of the applicants has also filed in person an undated document styled "submissions in mitigation" received by the High Court Registry on 26th October 2022. Annexed are various certificates for courses taken in prison to reinforce their claim that they are fully rehabilitated and ought to be granted a non-custodial sentence.

6. Their learned counsel, Ms Odembo, filed separate submissions on behalf of all the applicants dated 7th January 2022 together with a list of authorities. She submitted that the applicants have now spent close to 12 years in prison which is sufficient punishment. Counsel submitted that they are first offenders, remorseful and ought to be given a fresh start in life.

7. The application is opposed by the republic through submissions dated 20th February 2025. Learned prosecution counsel, Ms. Awino, contended that the applicants, as police officers, were mandated to protect the rights and dignity of the people as provided for in Article 244 of the *Constitution*. She submitted that the assault on the deceased followed by reckless behavior of neglecting to take him to hospital betrayed their humanity.

8. Learned counsel also submitted that the applicants have never shown true remorse or approached the family of the deceased for reconciliation. Accordingly, she prayed for a deterrent sentence that takes into account the impact of the offence on the victim's family.

9. On 21st February 2025, I heard further submissions from both learned counsel for the applicants and the republic.

10. I should add that on 29th January 2024, I called for pre-sentencing reports and victim impact reports to be furnished by the Probation and Aftercare Service. The reports dated 20th February 2025 were filed under the hand of Mary Abima, Probation Officer, Nairobi.

11. I take the following view of the matter: This is not a fresh appeal. It is a petition for re-sentencing following the directions by the Supreme Court in *Francis Karioko Muruatetu & another v Republic*,

Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR. The court declared that the death sentence has not been outlawed; but it is no longer mandatory. The learned judges held-

> "The mandatory nature of the death sentence as provided for under Section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the *Constitution*." [Emphasis added]

12. The Supreme Court then gave the following directions-

> "(111) It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."

13. The High Court thus has jurisdiction to re-sentence the applicants; a position reinforced by the order of the Court of Appeal in this matter aforementioned. See also *William Okungu Kittiny v Republic*, Court of Appeal at Kisumu, Criminal Appeal 56 of 2013 (2018) eKLR, *Michael Kathewa Laichena & Another v Republic*, High Court, Meru, Petition 19 of 2017 [2018] eKLR.

14. I am alive that the petitioners were granted a full opportunity to mitigate at the High Court but opted to say nothing. This is well captured by the Court of Appeal in this matter. The learned judges explained the reason perhaps for their failure to mitigate as follows-

    (59) The learned judge held that she had no discretion in the matter and therefore sentenced each of the appellants to death. We think that the appellants' failure to mitigate may have been informed by the fact that at the time of the conviction the law did not provide any alternative sentence upon conviction for murder. The position has since changed, thanks to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* (supra).

15. The circumstances under which the murder occurred are material in determining the appropriate sentence. According to two attendants at the Kwitu Classical Bar in Eastleigh (PW4 and PW6), the deceased was trying to retrieve his national identity card from the 1st applicant. As he left, he accidentally knocked the applicants' table dislodging beer bottles and glasses that tumbled to the floor. The three applicants then started beating the deceased. He fell down face-up but the 2nd applicant stepped on his head. The other two applicants continued with the assault.

16. The deceased succumbed to those injuries on 2nd April 2012 at Kenyatta National Hospital while undergoing treatment. This was just about four days after being viciously assaulted by the applicants.

17. I have considered the mitigation captured in their individual submissions as well as the additional submissions by their learned counsel. All the three convicts are first offenders and are aged 51, 52 and 54 years respectively. They plead for leniency and claim to have reformed or undergone diverse courses, counselling or learnt useful trades in prison. I have seen their certificates and testimonials attached to the submissions.

18. But there is then the other side of the coin: The family of the victims are still hurting from the loss of their loved one. He used to work in the matatu industry and had two children who are now aged 12 and 16 years. Their daily struggles and pain are well captured in the pre-sentencing reports as follows-

> The sudden demise of the deceased engraved deep sorrows into their lives. Life has never been the same; the children have had to grow without the comfort, guidance and provision of a father. the mother is at pains supporting the children and relies on relatives for support. It pains the family that the applicant's family has never approached them for any form of reconciliation. lastly they opine that the sentence given to the applicants is commensurate [*sic*] the offence [they] committed and does not deserve any leniency.

19. Murder is a grave felony that still attracts the sentence of death. However, following the momentous decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic*, [*supra*], the mandatory nature of the death sentence as provided for under Section 204 of the *Penal Code* was declared unconstitutional. As I stated earlier, this did not outlaw the death penalty, but it left the court with discretion to impose a lighter sentence.

20. I have weighed the mitigation against the level of violence, cruelty and impact on the family of the victim. Sentence should be commensurate to the moral blameworthiness of the offender but also guided by the nature and gravity of crime. The petty disagreement between the applicants and the deceased in a bar or the mere fact that he caused their beers and glasses to fall off their table did not call for the punishment he received. The applicants were police officers. The fact that even after the deceased fell face up, the 2nd applicant continued to step on his head while his colleagues continued with the vicious assault is a major aggravating factor. The murder was clearly pre-meditated as confirmed by both the High Court and the Court of Appeal.

21. I accordingly re-sentence the applicants to serve twenty (20) years in jail. The sentence shall be deemed to run from July 21, 2016, the original date of their conviction. Further, and in accordance with section 333 (2) of the *Criminal Procedure Code*, any period spent in remand custody from the date of their arrest (but excluding such period as when each of them was out on bail) shall be deducted from the sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2025.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

Ms. Odembo for the applicants instructed by Ceylene Odembo & Associates Advocates.

Ms. Awino for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. Edwin Ombuna, Court Assistant.