



**Gathuri v Republic (Miscellaneous Criminal Application E282 of 2020)
[2024] KEHC 487 (KLR) (Crim) (22 January 2024) (Resentence)**

Neutral citation: [2024] KEHC 487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E282 OF 2020**

LN MUTENDE, J

JANUARY 22, 2024

BETWEEN

JAMES MWINGA GATHURI APPLICANT

AND

REPUBLIC RESPONDENT

RESENTENCE

1. James Mwinga Gathuri, the Applicant, was charged and convicted of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Following the conviction, he was sentenced by Muchemi J. to suffer death on the 3rd day of June, 2014 as authorized by law. Following the decision of *Muruatetu v Republic* (2017) eKLR, a judgment delivered on 14th December, 2017; the applicant seeks re-sentencing.
2. Briefly, evidence adduced was that deceased, BG aged seven (7) years and KG aged five (5) years, respectively, were sons of the applicant. On the 19th day of February, 2010, the applicant returned home to find his wife that he had disagreed with having deserted the home. She left with their one (1) year old baby but left the two children behind. He left the house and returned while under influence of alcohol and cannabis sativa. Thereafter, he killed the two children.
3. In mitigation, the applicant expresses remorse. He submits that his other child died soon after his wife remarried. He seeks forgiveness as he has made peace with himself and God. That he has acquired skills while in prison that will enable him to be useful in the society if given a chance to go back.
4. In response the republic through learned Prosecution Counsel, Ms. Ntabo conceded the application but urged the court to consider the young lives that were lost due to the applicant's action. That the offence was aggravated and a gruesome murder where the deceased were the applicant's children. The court was called upon to give a deterrent sentence.



5. A report filed by the probation officer following the social inquiry conducted revealed that the secondary victim, the mother of the children has not healed as she expressed pain that is unbearable. That she has been receiving threats from the applicant while in prison and fears for her life in event of an early release. The applicant's family on the other hand and the local administration have expressed willingness to assist him resettle in event of early release. However, an early release was not recommended.
6. The applicant has been incarcerated for a period of twelve (12) years. He has adduced evidence of having undergone counselling and formal training while in prison that may have impacted on him.
7. The [*Judiciary of Kenya Sentencing Policy Guidelines*](#) lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.”
8. In the case of [*Francis Karioko Muruatetu & Another v Republic*](#), Petition No. 15 of 2015, the Supreme Court stated that:

“(71) To avoid a lacuna, 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; -37- Petition No. 29 of 2014
- e. commission of the offence in response to gender-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.”

9. When the applicant was sentenced to suffer death, it was the authorised sentence that demonstrated to the public generally the consequences of committing such a heinous crime. The applicant became incapacitated for a period that he has been incarcerated. However, following jurisprudence today, the ultimate form of removing a person from the society is rarely considered. Imprisonment and non-custodial sentences have become the most favoured approach.
10. The applicant argues that he has reformed and forgiven himself. However, he has not made any effort of engaging the secondary victim with a view of seeking forgiveness given the circumstances that surrounded the entire situation. He is forty-five (45) years old. Though a first offender, he never saved judicial time by admitting the offence at the outset. Although the applicant availed certificates of participation of the training that he attended, there was no recommendation from the officer in charge of prison to attest to the allegation that he had truly reformed.
11. Death sentence has been rendered unconstitutional giving the court the discretion to impose any other sentence. Factors to be considered in exercising discretion in this respect are set out in the *Judiciary Sentencing Guidelines*. Paragraph 7.19 subsections (1), (4), (5) and (6) provide interalia that the following factors should be considered:
 - (1) Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.
 - (2) Character of the offender: Non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - (3) Protection of the community: Where there is evidence that the offender is likely to pose a threat to the community; a non-custodial sentence may not be the most appropriate. The probation officer’s report should inform the court of such information.
 - (4) Offender’s responsibility to third parties: Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons, who depend on him/her, a court should consider a noncustodial sentence if, in light of the gravity of the offence, no injustice will be occasioned. Information on the offender’s responsibility to third parties should be substantiated.
12. The principle of proportionality of punishment enjoins the court to consider sentence along with the accused behaviour and participation as well as the severity of the offence.
13. Paragraph 3.1 (f) of the sentencing guidelines that refers to the principle of Proportionality provides that: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
14. The act of killing his own children was heinous and the murder was committed in aggravating circumstances as the children he clobbered to death were innocent oblivious of the disagreement between him and their mother.



15. In the premises, I hereby re-sentence him to serve forty (40) years imprisonment on each count, sentences that will run concurrently, effective from the date of arrest, 20th day of February, 2010.

16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22ND DAY OF JANUARY, 2024.

L. N. MUTENDE

JUDGE

In the presence of:

Court Assistant: Habiba

Applicant

Ms Ntabo for the Respondent

