



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Miscellaneous Criminal Case E258 of 2020)
[2024] KEHC 5995 (KLR) (Crim) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5995 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL CASE E258 OF 2020**

LN MUTENDE, J

MAY 9, 2024

BETWEEN

FRANCIS KAMUNYU KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Francis Kamunyu Kamau, the applicant was jointly charged with Paul Ndai Ndungu for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 26/12/2013 at 0900hrs in Ndenderu village in Kiambu County they murdered Michael Munji Njeri.
2. Following the decision of the court the applicant was convicted and sentenced by Lessit J (as she then was) to suffer death as authorized by the law.
3. Pursuant to the decision of the Supreme Court in the case of *Francis Kariokor Muruatetu -vs- Republic* (2017) eKLR the applicant seeks resentencing and further that the court invokes Section 333 of the *Criminal Procedure code (CPC)*.
4. The application is brought under the provisions of Article 50(2) (p) (q) of the *Constitution* and premised on the grounds that the applicant was sentenced to suffer death a sentence that has been found to be unconstitutional.
5. The applicant case is that he is a first offender; he is remorseful; has spent ten (10) years in jail; and, has since reformed. He attributes the commission of the offence to peer pressure, lack of self-control in his youthful days but has now learnt to resolve conflicts.



6. He prays that the court considers the probation report which confirms that he was arrested at the age of thirty-three (33) years and had a young family with his youngest child being three (3) years while the oldest was six (6) years. That his family is willing to resettle him at their farm in Kinangop far from the complainant's family. The applicant further refers court to various programs which he had benefitted from as offered by the Prison facility and recommendation reports from the chaplaincy.
7. The applicant submits that his mitigation was not considered at trial and that he did not get a fair hearing. Further that the life sentence is also unconstitutional as per the decision of the Court of Appeal in the case of *Manyeso -vs- Republic* (2023) KLR. The applicant also refers to the *Judiciary Sentencing Policy Guidelines on Resentencing* set out by the apex court in *Muruatetu (2017)* (*supra*). He urges that mitigation factors and the aggravating factors in his case justify variation of the death penalty with a non-custodial sentence, also that the mitigating factors outweigh aggravating factors.
8. That the 10-year period be considered as proportionate to the crime as found in the case of *Samson Njuguna Njoroge -vs- Republic* (2018) eKLR where the accused had served six (6) years from the date of plea and the death sentence was set aside and he was released. Also, the case of *Daniel Nzioki Mbuti & Anor -vs- Republic* (2021) eKLR where the death sentence was substituted with 20 years imprisonment and directed to run from the date of sentence.
9. He prays that the death sentence be reduced to a lenient definite sentence which is fair, just and reasonable and further computation of the time spent in remand. Further that he serves 3 years custodial sentence and the rest be commuted to a probation sentence.
10. The jurisdiction of the court is not contested by the Respondent who submit that the applicant is entitled to seek resentencing as per the decision of the Supreme Court in *Muruatetu 1* and further the declaration that the mandatory nature of the death sentence is unconstitutional. It is however urged that life was lost due to the applicant's actions hence the court is called upon to consider the aggravating circumstances in which the crime was committed.
11. Briefly, the facts of the case were that the the deceased was burnt to death after he was frog matched from his home to a local market where he was set ablaze. The trial judge found that there was circumstantial evidence that the applicant was with the deceased and was also part of the mob. Further that the applicant was from the same family with deceased and as he was his cousin. In sentencing the applicant, the court relied on the probation officer's report which indicated that the deceased elder brother was also lynched in similar circumstances for criminal activities. That the community was happy with the applicant's actions.
12. The applicant filed certificates showing that he became a qualified pastor and a peer counselor while in prison. These were also considered alongside the circumstances of the case.
13. The court found that no one had right to take away another person's life and it is not justified even if the action would be popular in the eyes of the community. That the accused actions were detestable, abhorable and criminal. That a young man lost his life. Despite considering all the above the court found that there was only one sentence for the offence and sentenced both accused to death as prescribed by law.
14. I have considered the application, affidavit in support and submissions alongside authorities cited. Section 204 of the *Penal Code* enacts that :

“ Any person convicted of murder shall be sentenced to death.”



15. The decision of the Supreme court in *Francis Karioko Muruatetu & Another vs. R* (2017) eKLR which was later affirmed in the year 2021 in *Muruatetu & Another -vs- Republic & Others* (2021) eKLR has settled that the mandatory nature of the death sentence is unconstitutional and that applicants convicted and sentenced under Section 204 of the *Penal Code*, (Murder) before *Muruatetu & Anor. - vs Republic* (2017) eKLR are entitled to resentencing. But, the death sentence is still part of our law and may be meted out where circumstances are befitting.
16. This court has already determined the aggravating factors and also balanced them with the mitigating factors. It was appreciated that the applicant had become a qualified pastor and peer counselor during his stay in prison.
17. In the case of *Republic -vs- Daniel Mbolu Mutisya* (2020) eKLR Odunga G.V J (as he then was) held that:

“In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant’s incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant’s conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.”
18. The presentencing report filed in this court shows that the applicant was married and had 2 children. His wife left following his incarceration and the children are living with his parents at Kinangop. 2. Prior to the crime, the applicant was working as a conductor. On the date of the offence he was stated to have seen a big crowd at Ndenderu shopping centre, joined the crowd and participated in lynching the deceased and that he was the one who bought the paraffin used to douse the deceased. 3. The applicant seeks forgiveness and he admits that he embarrassed the local SDA church where he was a member. There was no negative report from the community and they agree to his release and a 2nd chance. The victim’s uncle and aunt admit that the accused is rehabilitated and that also wounds heal with time. However, the deceased mother stated that there was no effort for reconciliation and she is still very bitter. The deceased mother and grandmother also witnessed the crime. The deceased was the 2nd born and his elder brother was also murdered 3 years earlier, the 3rd born escaped in fear of his life. The probation officer recommends that the accused be sentenced to specific years.
19. The *Sentencing Policy Guidelines* provide that non-custodial sentences are most suited for first offenders or where there is evidence of rehabilitation. The *Guidelines* also provide at Paragraph 7.19 provide that:

In deciding whether to impose a custodial or a noncustodial sentence, the following factors should be taken into account: Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a noncustodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.
20. Further, *Guidelines in Muruatetu 2021*, which are also instructive to this court, allow the court to consider inter alia the age of the offender, the victim impact whether it was a gender based violence.



21. In the case of *Thomas Mwambu Wenyi -vs- Republic* (2017) eKLR , the Court of Appeal citing the Supreme court of India decision in *Alister Anthony Pereira vs State of Mahareshra* held that :

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

22. The balance between the aggravating and mitigating circumstances were considered in 2016 when the applicant was first sentenced. Further records annexed to his application show completion of various prison projects as at April 2023, Biblical certificates were awarded in 2015 thus before the trial Judge and all demonstrate that he has rehabilitated.
23. Although no sentence would adequately compensate loss of life, the offender must also be seen to have atoned his wrong and justice for the victim must be served. This is a case where a family has lost all its children and still lives in fear to date. The living one has deserted home for fear of his life.
24. Considering the impact on the victim and the fact that the applicant and /or his family have not taken action to extend an olive branch speaks against his chances of benefitting from the court’s leniency. The heinous and cruel manner the murder was executed calls for stringent terms.
25. Looking at comparable cases, in the case of *Republic v Peter Mutuku Mulwa & Another* [2020] eKLR where the accused had sawed some timber and left for a meal. On their return they found the deceased stealing the said timber and they beat him up, tied his hands then left to get some help. When they returned, they found him dead. The accused were sentenced to death. During resentencing the court found that the 17 year period served was sufficient and the accused were released. Rehabilitation and process of reconciliation were confirmed at the resentence hearing.
26. In *Republic -vs- Jumaa Kaviha Kalama Ndolo* (2020) eKLR the accused burnt the deceased to death after whisking him from his home to allegedly perform a healing. The deceased was being punished on account of performing witchcraft and later whisked to an unknown place where his body was burnt beyond recognition. The accused were sentenced to 45 years by Nyakundi J who referred to the case of *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; (2015) eKLR, where the High Court held that the objectives of sentencing include:

“deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

27. The upshot of the above is that the applicant is not suitable for a non-custodial sentence. He was a first offender, at the age of 33 years he was capable of making a sound decision of not taking the law into his hands but he did not. In the circumstances taking into consideration the fact of having been



rehabilitated, I hereby resentence him to serve thirty (30) years imprisonment, with effect from the date of arraignment, the 20th April 2016.

28. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 9TH DAY OF MAY, 2024.**

L. N. MUTENDE

JUDGE

