



**Mukhwaya v Republic (Miscellaneous Application E081 of 2021)
[2024] KEHC 6000 (KLR) (Crim) (8 May 2024) (Resentence)**

Neutral citation: [2024] KEHC 6000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E081 OF 2021
LN MUTENDE, J
MAY 8, 2024**

BETWEEN

DESMOND MUKHWAYA APPLICANT

AND

REPUBLIC RESPONDENT

RESENTENCE

1. Desmond Mukwaya, the Applicant, upon arraignment was found guilty and convicted for murder as provided by Section 203 of the *Penal Code* and sentenced pursuant to the provisions of Section 204 of the *Penal Code*, to suffer death as authorized by law.
2. In the sentence delivered on 2nd February, 2017 by Mutuku J. the court considered mitigating factors and circumstances under which the deceased, Mary Tsisika, died, time spent in custody but found its hands tied as it had no power to deviate from the penalty prescribed by the law.
3. Subsequently on 14th December, 2017, the Supreme Court of Kenya in the case of *Muruatetu & Another -vs-Republic* (2017) eKLR found the death sentence being unconstitutional and directed that accused persons convicted and sentenced before then were entitled to resentencing hence this application.
4. Briefly, the facts were that the deceased and applicant were playing cards and drinking alcohol on the fateful night. The deceased's husband had gone to work as a night guard, while their ten years old daughter was asleep. The applicant was introduced to the deceased by her husband as a job seeker and they accommodated him at their house for nine (9) months previously.
5. The deceased daughter was woken up by screams at 5:00am to find the applicant sitting on her mother holding a knife. She intervened in order to stop the applicant from assaulting her only to be cut with



- the knife on the right thumb. Neighbours who went to her aid found the deceased still talking and she mentioned the applicant as her assailant. Shortly thereafter she died. The postmortem carried out showed that the cause of death was decapitation due to sharp trauma.
6. In mitigation the applicant urges that he was 32 years old and had indulged in alcohol and deeply regretted his actions. That he is a first offender. That he has engaged in rehabilitative programs.
 7. A report filed by the Probation Officer following the social inquiry carried out shows that the family of the applicant are willing to support him after cleansing him through a traditional ceremony.
 8. The secondary victim, the deceased's husband Benson Shikokoti is still angry and wondering what the matter was all about? The community through the area chief are still shocked by the crime committed considering that the applicant was considered a good person prior to the crime.
 9. The applicant has been incarcerated for fourteen years, he has alluded to having participated in rehabilitation programs although there has been no recommendation from the Prison authority to that effect.
 10. In the case of *Francis Karioko Muruatetu & Another vs. Republic; Katiba Institut & 4 Others* (Petition No. 15 of 2015) (2021)eKLR the Supreme Court gave directions 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;
 - (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.
11. 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.”
12. When the applicant was sentenced to suffer death, the court 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.
 13. The applicant argues that he has reformed. Although the question of having been rehabilitated is the applicant's allegation, it is prudent that he gets the opportunity to return to the community/society so as to become a productive citizen.
 14. The applicant was a first offender, he is stated to be 46 years old. Although he has sought forgiveness from the court he has not extended an offer or gesture of conciliation to the family of the deceased. Therefore, this court does not know how he will relate with members of the community. But, what was and is still intriguing is what he was doing at the house until some wee hours of the morning!
 15. In the premises, I hereby re-sentence him to serve Twenty-Eight (28) years imprisonment to be effective from the date of arraignment, 29th day of November, 2007.
 16. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY
THROUGH MICROSOFT TEAMS AT NAIROBI,
THIS 8TH DAY OF MAY, 2024.
L. N. MUTENDE
JUDGE**

