Kebane v Republic (Miscellaneous Criminal Application E002 of 2024) [2024] KEHC 9424 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9424 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2024

WA OKWANY, J

JULY 18, 2024

BETWEEN

LEONIDA MONG'INA KEBANE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars on the Information were that on 18th July 2020 at Keboba village in Masaba North Sub-County within Nyamira County, the Accused jointly with others not before the court murdered Hyrine Kerubo Nyakundi. The Applicant was sentenced by Hon. E.N. Maina J. to serve 15 years' imprisonment.

2. The Applicant filed the present Application in which she prayed for resentence and leave to appeal out of time based on her deteriorating health. The Application was supported by her Affidavit in which she averred that she was elderly, aged 68 years and was currently very ill as she was suffering from asthma, ulcers, severe arthritis, high blood pressure, indigestion and severe dorsalgia (sic) that had been worsened by the conditions in custody. She averred that she has been in custody since 11th November 2021 and that her husband had sunk into depression following her incarceration and that he equally needed special attention. She urged the Court to allow her to serve a non-custodial sentence.

3. At the hearing of the Application, learned Prosecution Counsel Mr. Chirchir was not opposed to the Application and submitted that the Applicant had never appealed and that the Court has jurisdiction under Article 50 (6) (a) and Article 165 of *the Constitution* together with the precedent set by the Supreme Court in Petition No. 15 and 16 of 2015 (*Muruatetu 2*) KESC, KLR 2021 in which the judges outlined the circumstances when a court could resentence a person who was charged and convicted with the offence of murder.

4. This Court's jurisdiction on resentencing in murder cases emanates from the Supreme Court's landmark decision in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) wherein the apex court issued the following directions: -

> " 16. To the extent directly relevant to the matters under review in these directions, we note the Attorney General in his Report, together with the Task Force recommended, that:
>
> a) Life imprisonment be substituted where the Penal Code previously provided for the death penalty, with the option of life imprisonment without parole for the most serious of crimes; and that if not abolished, the death penalty should only be reserved for the rarest of rare cases involving intentional and aggravated acts of killing.
>
> b) All offenders, subject to the mandatory death penalty, including those convicted and sentenced prior to 2010, who are serving commuted sentences, will be eligible for re-sentencing, including all offenders sentenced to death as at the time of the decision which was made on December 14, 2017.
>
> c) Where an appellant has lodged an appeal against a conviction and/or sentence, the appellate court must, at any stage before judgment, remit the case to the trial court for re-sentencing.....
>
> 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:
>
> i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*;
>
> ii. The *Judiciary Sentencing Policy Guidelines* to be revised in tandem with the new jurisprudence enunciated in Muruatetu;
>
> iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
>
> iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
>
> v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the *Criminal Procedure Code*, as well as those of the victims before deciding on the suitable sentence.
>
> vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

(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) The manner in which the offence was committed on the victim;

(g) The physical and psychological effect of the offence on the victim's family;

(h) Remorsefulness of the offender;

(i) The possibility of reform and social re-adaptation of the offender;

(j) Any other factor that the court considers relevant.

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in *Muruatetu*.

5. My understanding of the above principles is that this Court's powers when considering the re-hearing of sentence are limited to circumstances where the trial court imposed a death sentence under Section 204 of the *Penal Code*. In the present case, however, this Court (differently constituted) considered the circumstances of the case and the mitigating factors before imposing the 15 years' sentence as opposed to a death sentence. Strictly speaking, the facts of this case do not reflect the scenario envisaged in the *Muruatetu case* (*supra*) where the court dealt with the issue of sentence re-hearing for death penalty cases. Indeed, the judges in the said case were clear that the guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*.

6. Be that as it may and my above findings notwithstanding, I note that the Respondent did not oppose the Applicant's application to be given a non-custodial sentence on account of her advanced age, poor health and the fact that she has already served a substantial part of her 15 years' sentence. I find that the Applicant has made up a case for the granting of the orders sought in the instant application. This court holds the view that the Applicant has learnt the painful lesson that crime does not pay during the period that she has been in custody.

7. Consequently, I set aside the sentence of 15 years' imprisonment imposed on the Applicant and substitute it with a sentence for the period that she has already served in prison and make a further

order that the Applicant will serve 6 months' probation under the supervision of the Probation Officer Nyamira County.

8. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE