



**Akara v Republic (Miscellaneous Criminal Application  
E106 of 2021) [2023] KEHC 2952 (KLR) (4 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 2952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION E106 OF 2021**

**GL NZIOKA, J**

**JANUARY 4, 2023**

**BETWEEN**

**THOMAS MOKAYA AKARA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By a chamber summons application filed in court on 14<sup>th</sup> April, 2021, the applicant is seeking for re-sentencing in the High Court Criminal Case No. 4 of 2015. He was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal code*. He pleaded not guilty to the information, was tried, convicted and sentenced to death.
2. However, following the decision of the Supreme Court of Kenya, in the case of; *Francis Karioko Muruatetu & Others vs Republic* Petition N0(s) 15 and 16 of 2015, where the mandatory nature of death sentence was declared unconstitutional, he seeks that the court reviews the death sentence meted against him.
3. The applicant relies on a document filed on 10<sup>th</sup> November 2021 entitled “mitigation submissions” and states that he is a first offender and greatly remorseful for the loss of life occasioned by his action. That, the circumstances of the offence were that he got into a fight with the victim who is his relative over a debt of Ksh, 40,000 owed to him and was driven by rage, jealousy and anger.
4. That he did not have a pre-existing grudge with the victim prior to the incident. He further submits that, the seven (7) years he has been in custody he has undergone punishment, repercussions and the effects of the offence and profoundly regrets it. That, he reiterates he is remorseful and prays for a lenient sentence taking into account the period he was in custody during the trial.
5. The applicant further states that he has been rehabilitated through various programs undertaken while in Prison and has joined Naivasha Education Centre currently in grade 4. That he has obtained



certificates in theological courses and undergone total behavioral changes, is disciplined, hardworking and God-fearing.

6. He relies on the case of, *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR to submit the period he was in custody be considered.
7. However, the Respondent filed submissions dated 20<sup>th</sup> May, 2022 and argued that the applicant ought to be handed a life sentence for the reasons that:
  - a. The applicant was employed by the deceased to work at her farm.
  - b. The applicant hacked the deceased on the head using a panga and she bled to death.
  - c. The appellant was seen sharpening a jembe.
  - d. Postmortem confirmed the cause of death to be massive blood loss following sharp force trauma injuries to the left major neck vessels.
  - e. The appellant exercised no mercy on the deceased, he hacked her to death like an animal.
  - f. The appellant failed to exercise restraint on his temperaments and opted to murder the deceased in cold blood.

8. I have considered the application in the light of the materials placed before the court and the proceedings and judgment of the trial court as to the circumstances of the case. The right to re-sentence in murder case was expressly provided for in the aforesaid famous case of *Muruatetu* where the court stated:

“[110] We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.

(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.



9. The decision for re-sentencing was based on the finding of the court where it was stated that:

“(112) Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

- a) 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*.

10. However, in order for an applicant to be heard in a case for re-sentencing, he should withdraw any pending appeal before the Court of Appeal as was held by the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) famously known as “Muruatetu 2” where it directed that: -

“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:

- 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”

11. In this case, the applicant’s trial file was forwarded to the Court of Appeal, the same has not been returned to the High Court, and the only inference that can be drawn is that there is an appeal that is still pending before the Court of Appeal. In the circumstances, this court cannot entertain the application for re-sentencing while the matter is the subject of appeal in the Court of Appeal. Furthermore, even if the court were to attempt to do so, it does not have the trial court record.

12. The applicant should withdraw the appeal in the Court of Appeal or pursue it. He cannot litigate this matter in two different courts at the same time. The application is dismissed.

13. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 4<sup>TH</sup> DAY OF JANUARY, 2023**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

Applicant in person virtually

Mr. Ndiema for Respondent

Ogutu; Court Assistant

