



**Macharia v Republic (Miscellaneous Criminal Application  
E124 of 2021) [2023] KEHC 691 (KLR) (4 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION E124 OF 2021**

**GL NZIOKA, J**

**JANUARY 4, 2023**

**BETWEEN**

**PETER NJUGUNA MACHARIA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By an application filed in court on October 12, 2022, the applicant is seeking for re-sentencing and/or review of the sentence of death meted out against him vide High Court Criminal Case No 50 of 2015.
2. The applicant 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 charge, was tried, convicted and sentenced to death.
3. He avers that, following the decision in the case of; *Francis Karioko Muruatetu & Others vs Republic* Petition N0(s) 15 and 16 of 2015, the mandatory nature of death sentence was declared unconstitutional, as it deprives the trial court of the discretion in sentencing.
4. He states in mitigation that, he is a first offender, and a young man whose life is affected by imprisonment. That he has been rehabilitated through various programs undertaken while in Prison.
5. He further submits that, he is 42 years old and was convicted while 32 years. That, he is remorseful and prays for a lenient sentence taking into account the period he was in custody during the trial.
6. However, the application was opposed by the respondent vide a replying affidavit sworn by; John Kangure Maina, the brother of the deceased and submissions filed in court dated October 11, 2022.
7. The deceased brother avers that, he appeared before the Probation Officer, Mr. Joel Kamau and clearly stated that, the victim's family objects to the release of the applicant and fear for their safety in view of the fact that, the two live in the same place with a distance of 500 meters apart.



8. Further, the applicant, who is his cousin is a violent person prone to fights. That he swore to return and “finish” what he started if released, and that the victim’s family is content with the sentence mete out.
9. The Respondent submitted that, the circumstances of the offence were aggravated as evidenced by multiple injuries inflicted on the deceased a clear indication of intention to kill.
10. 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.
11. I note that, the right to re-sentence in murder case was expressly provided for in the Supreme Court of Kenya, in the Muruatetu case referred to herein, following the declaration of mandatory death sentence as unconstitutional. The “court stated thus

(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.

12. In so doing the Court gave guidelines as follows:

“(71) As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. 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.

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process--”.

13. Similarly, the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing 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."
14. In considering the aforesaid guidelines, in the light of the circumstances of this case and the social inquiry report, and/or pre-sentence report prepared by the Probation Department, I find that, the applicant is a first offender. That he is 39 years old as opposed to his submissions that he is 42years.
  15. Further, there has been no reconciliation efforts between the family members and in fact, there is bad blood between the deceased and applicant's families and the victim's mother has suffered high blood pressure as a result of the loss of her son.
  16. The probation officer's report also indicates that, the Community through local administration and neighbours are opposed to his release terming him as a bully who abuses drugs and are not ready to re-integrate him into the society.
  17. The trial court record indicates that, he totally denied committing the offence and has only purported to allude to the commission of the offence due to the influence of alcohol through submissions filed herein. I therefore, find that the applicant is not remorseful as purported. It is also noteworthy that, he actually murdered his own blood cousin for unknown motive.
  18. In my considered opinion he deserves a deterrent sentence. Having taken into account the period he was in custody during the trial of about four (4) years, I sentence the applicant to serve 40 years' imprisonment, thus, he will serve that sentence from the date of initial sentence on; June 28, 2017.
  19. It is so ordered. The applicant is advised of his right of appeal within 14 days hereof

**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**

