



**SMN v Republic (Miscellaneous Criminal Application  
20 of 2020) [2023] KEHC 17793 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17793 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION 20 OF 2020**

**GL NZIOKA, J**

**MAY 9, 2023**

**BETWEEN**

**SMN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The applicant was charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence read that, on diverse dates between 25<sup>th</sup> March and 4<sup>th</sup> April 2012 within Nakuru County, he murdered his estranged wife ZN.
2. He pleaded not guilty to the charge and the case was fully heard. He was found guilty of the offence, convicted and sentenced to suffer death on 3<sup>rd</sup> March 2017.
3. He then appealed against the sentence vide a notice of appeal dated 7<sup>th</sup> March 2017, received at the Court of Appeal on 27<sup>th</sup> June 2017. However, on 28<sup>th</sup> January 2021, the trial court file was returned with indication that the applicant had withdrawn the appeal for the purpose of filing an application for re-sentencing.
4. By a notice of motion application filed in court on 8<sup>th</sup> day of 2020, the applicant seeks for re-sentencing on the basis of the decision of the Supreme Court of Kenya decision in Petition 15 & 16 of 2015 (Consolidated) *Francis Karioko Muruatetu v Republic* [2017] eKLR.
5. The application is supported by his affidavit in which he states as here-below reproduced: -
  - a. That I am a Kenyan male adult of sound mind hence competent to make oath.
  - b. That I was charged with the offence of murder contrary to section 204 of the penal code and sentenced to Death.



- c. That I humbly make this application in regard to the above mentioned articles in reliance to article 165(3)(b) of the constitution which empowers this Honourable court to handle application of this nature.
  - d. That I am the applicant herein relying on the case of and in the case Francis Karioko Muruatetu and another v Republic (Supreme Court Petition No. 15 of 2015) Douglas Muthaura Ntoribi Misc No. 4 of 2015 at Meru High Court of murder of John Nganga Gacheru and another in HCCR case No. 31/016 at Kiambu High Court that mandatory death penalty is unconstitutional thus seeking appropriate sentence.
  - e. That, I swear this affidavit in support of my application herein by way of motion and what I have deponed herein is true to the best of my knowledge information and belief.
6. The application was disposed of through filing of submissions. The applicant filed submissions dated 4<sup>th</sup> April 2022, in which he states that the Supreme Court in Francis Karioko Muruatetu v Republic [2017] eKLR rendered the mandatory nature of the death sentence a nullity as it does not afford the accused person the right to mitigate nor the court the right to consider mitigating factors in sentencing and accords court full discretion for rehearing of mitigation factors for resentencing.
  7. That in resentencing the applicant, the outcome shall reflect and/or promote restorative justice and value rehabilitation. He relied on the case of; Oscar Leonard Carl Pistorious CC 113 of 2013 High Court of South Africa Gauteng Division Pretoria. Further, in Mulamba Ali Mabanda v R, Court of Appeal CRC 12 of 2013, the Court quashed the death sentenced and substituted it with the period of nine (9) years already served.
  8. Similarly, in William Okungu Kittiny v R Court of Appeal No. 56 of 2016 the Court of Appeal ordered the matter to be remitted for resentencing. That during the eight (8) years he was in incarceration he realized his mistake and is remorseful. That, he apologizes to the deceased family and seeks for forgiveness for what happened and is willing to teach others the value of living upright life.
  9. Further, he has been rehabilitated through counselling by the church and life mentor, and undertaken vocational courses. That he does not have any disciplinary cases in prison facility as confirmed by pre-sentence report.
  10. That he is forty- four (44) years old, thus of advanced age and HIV/AIDS positive. That, he has six school going children; three with the deceased and three other children with his previous wife who is also deceased.
  11. The Respondent on its part filed submissions dated 12<sup>th</sup> May 2022 and argued that the applicant lured the deceased and strangled her to death with a barbed wire. Thereafter, he tried to conceal the death by burying her in a shallow grave, and refused to report the case. As such the applicant is a danger to society.
  12. Further, that the pre-sentence report is not cogent as it fails to capture the views of the deceased family and only captured the views of the applicant's mother despite the deceased siblings testifying in court.
  13. The respondent urged the court to uphold the sentence on the ground that domestic violence and murder cases are prevalent and therefore the applicant ought to be handed a deterrence sentence. Reliance was placed on the cases of Daniel Nzioka Mbuti & Another v R [2021] eKLR, Republic v



Ruth Wanjiku Kamande [2018] eKLR, Republic v Muema Mkali [2019] eKLR, and Mary Muthoni Muturi v Republic [2020] eKLR.

14. In the same vein, following the court's direction, the Probation Department filed a pre-sentence report dated, 18<sup>th</sup> January 2022 which reiterates the age of the applicant as 48 years. That, he married the deceased when she had two children but they had separated. That he has studied up to standard 8 but not engaged in any technical courses and prior to his arrest he was engaged in casual jobs in a quarry and sand harvesting.
15. The report confirms his at HIV/AIDS status since in 2003 and regularly uses ARV medication. Further, he uses an alcohol and used other drugs which he attributed to the commission of the offence. That, he has been rehabilitated during his ten (10) years in custody and prays for lenient and for a definite sentence of 15 years.
16. The report further states that family, prays for a reduced sentence with definite years and requests the court to consider his medical circumstances, and period he has been in custody during the whole trial and that they are willing to give him the necessary assistance when he is released.
17. However, the village elder, Mr. Karia is quoted to have stated that the applicant is an alcoholic though without any record of crime. That, the murder herein shocked the whole village but as the applicant has been in custody for ten (10) years and considering his health condition he is agreeable to a favorable review for a definite sentence.
18. The report states that he has undertaken rehabilitative programs such as psychological counselling, theology, bead and detergent making and received various certificates and recommendations from Rift Valley Prison's Chaplaincy. Further, he is involved in peer counselling and mentorship for his fellow inmates and has no record of indiscipline.
19. However, the views the victim's family is not captured in the report as the mother of the deceased is said to have passed away due to an illness and other members of the family could not be reached. The Probation Officer recommends a definite sentence of 15 years due to the applicant's medical condition.
20. To revert back to the matter herein in a re-sentencing matter It suffices to note that, Supreme Court in the case of Francis Karioko Muruatetu & Another v. Republic [2017] eKLR gave guidelines as follows:
  - “(71) ..., 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.”



21. Similarly, in *Muruatetu 2, Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) the Court stated that: -

- “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.”

22. As regards the circumstances of the offence herein, the material facts herein indicate that, the applicant had stayed with the deceased as husband and wife for a period of 5 to 6 years. That the disagreements between them arose due to the money the applicant owed the deceased following the sale of her motorbike and indeed the deceased had moved out of the matrimonial home to stay on her own.
23. In fact, it is the appellant who called her to go and pick the money and simply bolted off leaving a sick child whom she was to return and take to hospital. She least suspected the deceased would murder her. Indeed, there is no shred of evidence that, the deceased provoked the applicant in any way.
24. It is also in evidence that; the applicant was heard threatening that he would kill her. Therefore, he had formed the mens rea and the death was not accidental. Furthermore, his conduct after the incident of calling the deceased’s mother to inquiry about her where about after the murder clearly indicates he was not remorseful of what he did.
25. Similarly, despite having been found in possession of the deceased phone and the body recovered from his house, he felt no remorse and continued to deny the offence before and during the hearing of the case. By burying her in his house where no one would suspect the body was, was in furtherance of the intention to fully cover up she disappeared with no trace and/or the crime.
26. He committed a very heinous and inhuman act of strangling the deceased using a barbered wire, a painful death. An incident the area chief says shocked the entire village,
27. The pre-sentence report is not reliable and objective as it does capture the victim’s family views and the allegation that the applicant is reformed is not supported by any tangible evidence.
28. Having considered the aforesaid and medical status of the applicant and considering the ten (10) years already spent in custody, I sentence him to serve thirty (30) years imprisonment. The sentence to run from the 9<sup>th</sup> May 2023.



29. It is so ordered. Right of appeal 14 days

**DATED, DELIVERED AND SIGNED ON THIS 9<sup>TH</sup> DAY OF MAY 2023**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:-**

Mr. Gichuki for the Applicant

Mr. Atika for the state

Ms. Ogutu - Court Assistant

