



**Njoroge v Republic (Miscellaneous Criminal Application
E099 of 2021) [2023] KEHC 18498 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E099 OF 2021**

GL NZIOKA, J

JUNE 2, 2023

BETWEEN

ELIJAH KIRUTHI NJOROGE APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

JUDGEMENT ON RE-SENTENCING

1. The applicant was charged vide Criminal Case No. 1 of 2014 at Naivasha High Court, with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code* (cap 63) Laws of Kenya. The particulars of the offence are that, on November 4, 2014 at Nyondia village in Naivasha Sub-County within Nakuru County, he murdered Margaret Wanja Ndungu.
2. He pleaded not guilty to the charge and the case was fully heard. He was subsequently found guilty, convicted and sentenced to suffer death, being the mandatory sentence provided for under section 203 as read with section 204 of the *Penal Code*
3. However, by a chamber summons application filed in court on; April 13, 2021, he seeks for re-sentencing on the basis that the decision of the Supreme Court of Kenya in Petition 15 & 16 of 2015 (Consolidated) *Francis Karioko Muruatetu v Republic* [2017] eKLR declared the mandatory death sentence is unconstitutional and stated that it deprives the trial courts of the legitimate jurisdiction to exercise discretion in sentencing. Further, article 50 (2) (p) of the *Constitution* of Kenya 2010 provides that a convicted person should benefit from the least severe punishment.
4. The application is supported by the applicant's affidavit in which he avers that he is not contesting the conviction but only seeks for substitution of the death sentence with a definite term sentence. That he is remorseful for having committed the offence.



5. The application was disposed of through filing of submissions. The applicant filed his submissions on January 18, 2023, in which he states that the trial court did not consider his mitigation that he is first offender, a young man, and committed the offence out of anger and rage. That, he is not a danger to the community if released from prison.
6. Further, in the eight (8) years he has been in custody, he has reformed and undergone rehabilitation programs; having undertaken biblical courses and become God fearing, disciplined and hardworking.
7. That in *Francis Opondo v Republic* [2017] eKLR the court held that the sentence meted out should reflect that the accused is a first offender, encourage reform and discourage recidivism. Further in the case of *Douglas Muthaira Ntobiri v Republic* [2014] eKLR the court held that a good working Prison Institution should reform convicts.
8. Furthermore, the trial court did not take into consideration the period he spent in custody while on trial contrary to section 333 (2) of the *Criminal Procedure Code*. He relied on the decision of the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* {2018} eKLR.
9. However, the respondent on its part filed submissions dated; May 25, 2022 and argued that the applicant ought to be handed a life sentence for the reasons, here below reproduced verbatimly that: -
 - a. The applicant murdered the deceased in the most inhuman manner of strangulation and hitting the deceased with a rungu on the head wherein she sustained severe injuries.
 - b. The appellant was the neighbor to the deceased and he exercised no mercy at all to this lady when he strangled her and murdered her in cold blood.
 - c. On the fateful night the appellant was seen armed with a rungu which matched with the blood of the deceased when DNA samples were taken out.
 - d. That the appellant ought to have exercised restraint on his temperaments and be a good neighbor.
 - e. There is no evidence of any attempt by the appellant reaching out to the family of the deceased.
 - f. There is nowhere on the record showing remorse on the part of the appellant.
10. In addition, pursuant to the order of the court, the Probation Department filed a pre-sentence report dated; October 27, 2022, which indicates that the applicant is aged thirty (30) years old and was raised by his grandmother from the age of 5 years old following the demise of his mother. That he is not married.
11. Further that he completed primary education but was unable to continue with secondary education due to financial constraints and that prior to his arrest he was engaged in casual jobs at a quarry and construction site.
12. The applicant is stated to have admitted to over indulging in use of alcohol and bhang which distorted his normal behavior and functions and attributed it to the commission of the offence. That his family members' states that he is viewed negatively by the community due to his behavior but are hopeful that he has learnt a lesson during his incarceration.
13. That the Area Chief stated that the applicant is an alcoholic, drug user violent and engages in frequent fights and quarrels especially when drunk.



14. That the Prison authorities stated that he does not have any record of indiscipline, is resourceful and on the right path of rehabilitation. Further, he enrolled in school while in Prison and had studied up to Form 2. Further, he has completed several other courses like the Prisoner's journey and New Life in Christ.
15. That the report further indicates that the victim's husband is bitter and has refused to forgive the applicant describing him as brutal and dangerous who should remain in custody for the rest of his life.
16. In conclusion, the probation Officer notes that, the applicant has a negative family and community report. However the remand period of about two (2) years may be considered and that the death sentence be commuted to a definite sentence give him hope in his rehabilitation.
17. Be that as it were, the power of the court to entertain the application herein is founded on the Supreme Court's decision in the case of *Francis Karioko Muruatetu & another v Republic* (*supra*) where the court stated thus:

“ [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.

18. Having considered the aforesaid, I note that, the law that governs sentencing is settled. article 50(2) (p) of the *Constitution* of Kenya 2010, provides the right of the convict to benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.
19. In the same vein the objective of sentence must be considered. Paragraph 4.1 of the Judiciary Sentencing Policy Guidelines, stipulates the objectives of sentencing as follows: -
 - a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 - d. 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.
 - e. Community protection: To protect the community by incapacitating the offender.
 - f. Denunciation: To communicate the community's condemnation of the criminal conduct.
20. In giving directions on the factors to consider while exercising the power of resentencing 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) stated as follows: -
- “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.”
21. To revert back to the matter herein, it is noteworthy that the offence the applicant was charged with is serious as evidenced by the fact it attracts a death sentence albeit not mandatory. Further it suffices to note that, as much as a convict is entitled to the benefit of the least severe sentence and rehabilitation, the rights of the victim of crime should not be ignored and especially in view of the fact that, in cases of murder, their loss is permanent and cannot be compensated by any amount of money or severity of sentence.
22. In this matter, the applicant cannot pass the threshold for re-sentencing as set out in the *Muruatetu case*, on the grounds of inter alia: his character, the circumstances of the offence, the victim's and Community views and re-integration into the society.



23. In that regard, the pre-sentence report indicates that the family and community reports received are negative, and that the applicant is an “unwanted person”. Therefore, it is not safe to release him back to the society and/or his family because he may cause more harm or be subjected to harm, for example mob justice or lynching.
24. Further, it is clear that the victim’s family members are still bitter and unable to come to terms with the death of the deceased and therefore, the applicant may not survive outside the prison.
25. Furthermore, the circumstances under which the offence herein was committed cannot be ignored, in that, the applicant attacked the defenseless and least expecting deceased for no apparent reason and hacked her to death. She died within less than twenty (20) minutes of the attack, indicating the severity of injuries occasioned on her and pain associated with it. That in itself shows an attacker whose motive was clear “to kill”. That murder was brutal.
26. In the given circumstance, a definite term sentence is not appropriate, as the applicant is “undesirable” in the society and should be kept away. Further he submits that he acted in a rage of anger and it has not been established whether the anger has been managed.
27. In my considered opinion, the appropriate sentence as of now is life imprisonment and therefore I set aside the death sentence and substitute it with the life imprisonment. It is so ordered.
28. Right of appeal within 14 days explained.

DATED, DELIVERED AND SIGNED ON THIS 2ND DAY OF JUNE, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant in person, virtually

Mr. Atika for the respondent

Ms Ogutu: Court Assistant

