Kagwi v Republic (Miscellaneous Criminal Application 173 of 2019) [2023] KEHC 20572 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION 173 OF 2019

TA ODERA, J

JULY 18, 2023

BETWEEN

BENARD WANAINA KAGWI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The applicant Benard Wainaina was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Nakuru HCCR No 80 of 2004 and upon trial he was convicted and sentenced to suffer death on August 3, 2007.
2. Being dissatisfied with the said decision, he lodged an appeal to the Court of Appeal being criminal appeal No 143 of 2008 but the same was dismissed on May 28, 2010.
3. On November 4, 2019, the applicant filed the instant notice of motion dated November 4, 2019 seeking for sentence rehearing. The application is supported by his affidavit sworn on November 21, 2019.
4. He deposes that this court has jurisdiction under article 165(3) (b) of the *Constitution* to hear and determine this application.
5. He also contends that he was not accorded fair trial in sentencing from the trial court all the way to the Court of Appeal in accordance with the provisions of article 50(2)(q) of the *Constitution*. In support of this contention he cited the cases of *Douglas Muthaura Ntoribi v Republic* [2018] eKLR and John Nganga Gacheru and another in HCCR case No 31/016 at Kiambu High Court
6. He asserts that mandatory death sentence is unconstitutional and relying on the Supreme Court case of *Francis Muruatetu & another v Republic* petition No 16 of 2015 he seeks this court to mete out sentence appropriately.

7. The state did not oppose the application.

8. The applicant filed his submissions on April 20, 2022.

9. In his submissions, the applicant admits that he committed the offence and is remorseful. He avers that he is a first offender and pleads for leniency.

10. The applicants submits that after serving 17 years in custody, he has reformed and has undertaken rehabilitative programmes while in prison. To demonstrate his reformation, he attached certificates to show he taken course which will serve him well after prison. He has earned certificates in:Trade test certificates in tailoring grades III;Bible study program;Challenge disciplinary process;Connect discipleship processDiploma in Bible Correspondence CourseCertificate in Ombi Classes;Master Life Leadership Diploma;Prisoners journey;Celebrate recovery;C.l.i.m.b Certificate, Diploma & Higher Diploma

11. He stated that he has developed stomach ulcers while in custody which has caused deterioration in his health status. He attributes his offence to youthful ignorance and lack of focus. He prays to be released to the society before his productive years waste away and also so that he can go back to his family of children as well as aging parents.

12. He relied on the Sentencing Policy Guidelines (2016). *DPP Guateng v Oscar Pistorius* (96/2015) [2015] ZASCA 204 (3rd December 2015), *Mulamba Ali Mobanda v Republi*c, criminal appeal number 12 of 2013 where the appellant was resentenced to nine (9) years imprisonment , *Mark Nakitare Simiyu v Republic* criminal appeal number 32 of 2011 where the applicant was resentenced to 15 years imprisonment *Republic v John Ngánga Gacheru* [2018] eKLR (sentenced to 15 years), Lawrence Nkonge Mwiandi [2018] miscellaneous application 72 of 2018,where the applicant was sentenced to the period already served, section 333 (2) of the *Criminal Procedure Code* and *Ahmed Nkonge Abdulfathi Mohamed & another v Republic* criminal appeal number 135 of 2016 on the position that any sentence is to run from date of arrest provided that applicant has all along been in custody.

Analysis & Determination

13. Having carefully considered the applicant's application, submissions by the applicant and all the authorities cited, it is my considered view that the only issue that falls for determination is whether the applicant's plea for resentencing is merited.

14. Re-sentencing is a proceeding undertaken within the court's power to review sentence only. The court in resentencing will check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

15. The revisionary power of the High court is set out in article 165 (6) & (7) of the *Constitution* which provides: -

    (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.

    (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

16. The supervisory jurisdiction in criminal matters is expounded under section 362 & 364 of the *Criminal Procedure Code*. Under the said sections, this court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

17. On August 3, 2007 the applicant was sentenced to death which, according to section 204 of the *Penal Code*, was the only penalty for such an offence.

18. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others v Republic* (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The court took the view that:

> " Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the article 25 of the *Constitution*; an absolute right."

19. In clarifying the import case of its earlier decision, in Muruatetu 2 the Supreme Court gave the following guidelines:

> " 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
>
> i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 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 victim 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 respect of 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. Possibility of reform and social adaptation of the offender.

j. Any other factor the court considers relevant.

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

l. 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.

20. In light of the fact that there is no pending appeal before the Court of Appeal in regarding this matter and of the directions of Supreme Court (supra) under paragraph (iii), (vi) & (viii) I am of the view that this court is clothed with jurisdiction to determine this application.

21. On June 18, 2020 the court called for a pre-sentence report which was filed on July 14, 2022. According to the report, the applicant's parents passed on while he was in prison. The applicant has three siblings though one of them is now deceased. He was born in 1968 and he schooled up to class 8. He engaged in farming until the time of his arrest. The applicant was married to the victim herein and they were blessed with two children. He also has another child from a previous relationship. He does not know the whereabouts of his children.

22. The victim's family could not be traced. According to the area chief, the victim's family relocated from his area of jurisdiction to unknown place. The Community & the Local administration are not opposed to the applicant's release and they are ready to welcome him back home.

23. The applicant admit committing the offence and he is remorseful. He has no prison disciplinary issues. The report is favourable and the Probation Officer one Samuel Ndungu recommends that he be placed on probation for three years.

24. I have considered the circumstances leading to the incident, the pre-sentence report, the period the accused has been in custody, his age and the fact that the community and local administration ready and willing to receive the applicant back home and to re-integrate him to the society. The applicant was a first offender. He is remorseful and has demonstrated reformation and rehabilitation through the various courses and trainings he has received while in prison.

25. The applicant was first arraigned in court on July 30, 2004 and he has been in custody since then which is about 19 years now. I am of the view that he has learnt his lessons in prison, further incarceration is not appropriate in the circumstances the pre-sentence report is favourable for a non-custodial sentence.

26. In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the applicant in this case with imprisonment for 20 years imprisonment. He has already served 17 years in prison. I order that he serves the remainder period on probation for period of three (3) years under the close supervision of the Nakuru County Probation Officer.

27. Orders accordingly.

T. A. ODERA

JUDGE

18/7/2023

RULING DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Applicant.

Ms Mburu for State.

Court Assistant: Bor

T. A. ODERA - JUDGE

18/7/2023