



**Ngota v Republic (Miscellaneous Criminal Application E108 of 2021)
[2023] KEHC 20140 (KLR) (Crim) (12 July 2023) (Resentence)**

Neutral citation: [2023] KEHC 20140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E108 OF 2021**

DR KAVEDZA, J

JULY 12, 2023

BETWEEN

SAMSON ALUBE NGOTA APPLICANT

AND

REPUBLIC RESPONDENT

RESENTENCE

1. The applicant was initially charged, convicted, and sentenced to death for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. He filed the instant application seeking re-sentencing pursuant to the Supreme Court decision of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR whereby the mandatory death sentence for the offence of murder was declared unconstitutional. The applicant is seeking that the death sentence imposed on him be set aside and for the court to impose an appropriate sentence or in the alternative, he be set at liberty forthwith.
2. The applicant submitted that he was arrested in his early twenties. He argued that if given a second chance, considering the skills gained in prison, he can have a fresh start in life. He cited the case of Sebastian Okwero Mrefu vs Republic HC Petition No. 151 of 2012 to support his argument. He further submitted that his family and friends are ready to accept him back into society after his rehabilitation. He pleaded with the court to give him another opportunity. He swore that if given another chance, he will neither depend on anyone nor engage in any criminal activity. He maintained that he is remorseful and urged the court to allow his application.
3. Mr. Mutuma learned prosecution counsel conceded that the application is properly before the court on the issue of jurisdiction. He cited the Supreme Court's guidelines issued on 6th July 2021 and



submitted that the applicant is entitled to a re-sentencing hearing but also urged the court to consider the aggravating circumstances of the case.

Analysis and determination.

4. The applicant herein invites this court to review the sentence of death imposed by the High Court. The application is premised on the Supreme Court decision in *Francis Karioko Muruatetu* (supra), in which the Supreme Court outlawed the mandatory minimum sentence of death for the offence of murder. The apex court gave the following guidelines with regard to mitigating factors applicable in a re-hearing sentence for the conviction of a murder charge thus:

“[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. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. Guideline Judgments

25.

1. Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”



5. Having considered the foregoing, I find that indeed this court has jurisdiction to entertain the application. The Applicant has given his mitigation which I will consider alongside the circumstances of the case.
6. This court has taken into account the submissions of the applicant as well as the respondent's counsel, Mr. Mutuma. The court has also taken into account the applicant's mitigating circumstances. The applicant submits that he was a first offender. The applicant has further stated that he is remorseful for his actions and that he has used the time he has spent in custody to reform. He stated that given the opportunity he will use the acquired skills to search for gainful employment in the event of his release. The applicant has also averred that his family is ready and willing to take him back and reintegrate him back into the community.
7. On the facts of the case, the applicant in the company of one Robinson Nginya Kamanu, attacked Jane Akinyi Otieno, at Dandora Phase 2 while she was fetching water for domestic use. It was at midnight and due to chronic water problems, it was not unusual to fetch water at that time of the night. She was being assisted by her daughter Winnie Achieng and James Oyongo, the deceased. The three were confronted by the applicant and the said Robinson who demanded money from them. Robinson then guarded the gate while the applicant pushed the deceased away from his mother and sister. Jane and her daughter, the said Winnie Achieng, were ordered to go inside the house which they did. After some time, the attackers left and when Jane and Winnie went downstairs, they found the deceased stabbed in the chest.
8. The postmortem report indicated that the deceased had a penetrating stab wound on the left anterior chest wall inwards of the left nipple measuring 5cm by 2cm; the left ventricle was perforated and there was blood in the cavity surrounding the heart. It was a deep and fatal wound that caused excessive bleeding leading to the death of the deceased.
9. Indeed, the deceased suffered a painful death. He was stabbed in his heart before succumbing to the injury. The attack was executed viciously and brutally. I, therefore, find that the offence was aggravated.
10. Nonetheless, whereas the circumstance in which the crime was committed is serious, this court is inclined to take into account the fact that the applicant should be given an opportunity for rehabilitation. The applicant pleads that while in prison, he has achieved a certificate in Islamic Religion and has reformed. He wishes to start a new life to serve God and contribute to building the economy of this country as a law-abiding citizen.
11. In the circumstances, I accordingly set aside the death sentence and substitute therefor with a sentence of 30 years imprisonment to run from the date of his conviction, 30/1/2017.

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JULY 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Akunja for the respondent.

Habiba C/A

Appellant present in person (Virtually).

