



**Maina v Republic (Miscellaneous Criminal Application 26 of 2019)
[2023] KEHC 22150 (KLR) (12 September 2023) (Resentence)**

Neutral citation: [2023] KEHC 22150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION 26 OF 2019
GL NZIOKA, J
SEPTEMBER 12, 2023**

BETWEEN

SIMON MWAURA MAINA APPLICANT

AND

REPUBLIC RESPONDENT

(High Court Criminal Case No. 48 of 2015 at Naivasha)

RESENTENCE

1. The applicant was charged vide High Court Criminal Case No. 48 of 2015 at Naivasha, with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63), Laws of Kenya. The particulars of the offence are that, on 25th February 2015 at Good for village in Silibwet location in Nyandarua West District within Nyandarua County, he murdered Kosgey Sienyo. He pleaded not guilty and the case was fully heard. He was subsequently found guilty, convicted and sentenced to suffer death.
2. However, by a notice of motion application herein he seeks for resentencing. The application is supported by his affidavit in which he avers that the sentence of death was commuted to life imprisonment by the President of the Republic of Kenya but he has not exhausted his right to appeal. That, Article 165 (3) of the *Constitution* of Kenya, 2010 grants this court jurisdiction to determine the matter.
3. That, he was not accorded fair hearing during sentencing in the trial court in contravention of Article 50 (2) (q) of *the Constitution* of Kenya, 2010. He relies on the decision(s) in Douglas Muthaura Ntoribi Misc App No. 4 of 2015, John Ng'ang'a Gacheru & Another, Kiambu HCCR Case No 31 of 2016 and *WillOiam oungu Kittiny vs Rep* (2018) eKLR. Further, the Supreme Court in the case of Francis Kariuki Muruatetu and Another vs Rep Petition 15 of 2015 declared the mandatory death penalty as unconstitutional and he is therefore seeking for resentencing.



4. At the hearing of the application, the applicant informed the Court that he had file an appeal in the Court of Appeal at Nakuru being Criminal Appeal No. 27 of 2017. However he filed a notice of withdrawal on 16th December 2020, confirmed by a letter dated 20th January 2021 from the Deputy Registrar, Court of Appeal at Nakuru.
5. Be that as it may, the application was disposed of by filing of submissions. The applicant filed submissions on 30th September 2020, in which he reiterated that the Supreme Court in Petition 15 of 2015 *Francis Kariako Muruatetu & Another vs Republic* [2017] eKLR declared the mandatory nature of the death sentence in murder cases unconstitutional and the same adopted by the Court of Appeal and the High Court. As a result, offenders have gained access to justice as envisaged in Article 48 of *the Constitution* of Kenya 2010 and benefited from the least severe punishment under Article 50 (2) (p), and (q) of *the Constitution* of Kenya 2010.
6. Further, that the High Court has jurisdiction to deal with sentence review under Article 165 (3) (a) of *the Constitution* and is enjoined to interpret *the Constitution* in a manner that most favours the enforcement of rights and fundamental freedoms under Article 20 (3) (b).
7. He argued that the mandatory sentences having being declared unconstitutional the courts are permitted to examine the peculiar circumstances of each case and arrive at an appropriate sentence. He relied on the case of *R vs John Nganga Gacheru & Another* [2018] eKLR where the court considered the fact that, the accused persons being under the influence of alcohol as a relevant factor to consider in sentencing. That considering the mitigating and aggravating factors, the sentence imposed was excessive. Furthermore, that sentences should be geared towards meeting the objectives set out in the Sentencing Policy Guidelines.
8. That while in custody he has undergone rehabilitation through various programmes such as the Prisoner’s Journey, Discipleship Certificates, Maisha Mapya and Association of Faith in church Ministries. Further, he joined Naivasha Inmates Centre and is undertaking primary level classes. That he is remorseful, suffers from an ulcerative disease, and before his arrest he was taking care of his mother who is old and sickly. That he has already spent five (5) years in prison and prays for leniency to be released to continue with his life.
9. However, the respondent on its part filed submissions dated, 27th May 2022 and opposed the application on grounds here below reproduced verbatimly that: -
 - a. The probation report is negative towards the appellant noting that he had a bad conduct of stealing from his neighbours and even at home.
 - b. The deceased met his death while he was herding his employer’s heifer.
 - c. The appellant in a bid to steal the heifer brutally murdered the deceased who was an old man trying to earn a living.
 - d. The inhuman, brutal and cold manner in which the applicant inflicted injuries on the deceased shows a man who can go to any length to steal in order to satisfy his unquenchable thirst for theft.
 - e. The deceased had multiple injuries on the head and the post mortem confirmed that was the cause of the death.
 - f. Even after murdering the deceased, the appellant threw his body in a well that was being used by other villagers for water. This shows the bad character of



the appellant as the bad contaminated water is a health hazard to the villagers who were using it.

- g. A man who cannot restrain himself from murdering another human being so that he can steal from him is a danger to the society and ought to be restrained from inter mingling with the society.
 - h. The trial court described the appellant as a ruthless and heartless man and we urge the court not to interfere with the sentence but to sentence him to a life sentence noting that the death sentence was outlawed.
10. In addition, the court ordered the Probation Department to file a pre-sentence report which was filed on 14th January 2022, indicating that the appellant is thirty-three (33) years and , the fourth born out of four (4) siblings. Prior to his arrest, he lived on his parents' land in Boiman together with his eldest brother.
 11. That, he is not married and has no children. He dropped out of school in class 5 and became a herd boy and did small scale farming at home prior to his arrest. That, his family members state that he was involved in petty thefts especially from home but is hardworking and useful and are optimistic that he is reformed. That, if released, they are ready to receive and help him settle.
 12. The views of the victim's family are not captured in the report as the victim allegedly lived alone and did not reveal much about himself hence there was no evidence that he had any known family or relatives. Further he migrated to the area where he was murdered.
 13. It is indicated in the report that the Area Chief and the applicant's neighbours state he was known for petty theft but is hardworking from an early age and grew potatoes and horticultural produce for sale. The Chief is not opposed to his release but recommends the applicant relocates from the location due to stigmatization of being labelled a murderer.
 14. The report further indicates that, he has resumed school and is in class 7 and will be sitting for his KCPE examination at the end of the year 2022. The Probation officer, Kamau Joel, states that the applicant is a first offender but with allegations of pilfering in the family and society and recommends his sentence be reviewed to a specific period.
 15. Be that as it were, having considered the arguments by the respective parties I note that the power of the court to hear and determine the application herein is founded on the Supreme Court's decision in the case of Francis Karioko Muruatetu & Another vs. Republic (supra) where it stated that: -

“[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.”

16. In addition, Article 50 (2) (p) of *the Constitution* of Kenya provides for 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.
17. Furthermore, the legal principle underpinning the sentencing process are stated under clause 3 of the Sentencing Policy Guidelines as follows: -
 - 3.1 Proportionality: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
 - 3.2 Equality/Uniformity/Parity/Consistency/Impartiality: Same sentences should be imposed for same offences committed by offenders in similar circumstances.
 - 3.3 Accountability/Transparency: The reasons and considerations leading to the sentence should be clearly set out and in accordance to the law and the sentencing principles laid out in these guidelines.
 - 3.4 Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.
 - 3.5 Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote and not undermine human rights and fundamental freedoms. In particular, the sentencing process must uphold the dignity of both the offender and the victim.
 - 3.6 International and regional standards on sentencing: Domestic law sets out the precise sentences to be imposed for each offence that courts must adhere to. In addition, international legal instruments, which have the force of law under Article 2 (6) of *the Constitution* of Kenya, should be applied. Reference should also be made to recognized international and regional standards and principles on sentencing, which though not binding, provide important guidance during sentencing. Relevant international and regional legal instruments and guidelines include but are not limited to the instruments listed under this sub clause.
18. In the same vein, the objective of sentence must be considered. In that regard 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.
19. Finally while giving 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) 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.”
20. Pursuant to the aforesaid I have considered the following factors in determining the sentence to mete out
- a. The circumstances under which the offence was committed
 - b. The applicant was a first offender
 - c. He was in custody for a period of two (2) years and one (1) month
 - d. He has been serving a sentence for a period of six (6) years



- e. The Pre-sentence report is generally positive.

I deem this to be suitable case for sentence review.

21. However, on the flipchart it should be noted that no kind of sentence can ever return life lost. The victims of crime remain at a loss for all the days of their life. In this particular matter, the views of the victims have not been captured. Therefore the court should not be influenced fully by the sentiments of the applicant's family members and other persons interviewed. The punishment of death prescribed for the offence of murder connotes the seriousness thereof. As such the sentence meted out should not make a mockery of the same, the applicant has to pay for the offence. I therefore sentence the accused to serve a custodial sentence of twenty five (25) years imprisonment

22. On the time spent in custody, section 333 (2) of the *Criminal Procedure Code* is couched in mandatory terms that the court during sentencing to take into account the period spent in custody, and it provides that: -

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

23. The issue of taking into account time spent in custody has been canvassed severally by the courts in this jurisdiction. In *Abamad Abolfathi Mobammed & another v Republic* [2018] eKLR the Court of Appeal pronounced itself thus:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced....“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

24. In this case the applicant was first arraigned in court on 12th March 2015 and took plea on 20th April 2015. There is no evidence that he was given any bail or bond terms on record. Judgement was delivered against him on 13th April 2017. From the record, the applicant was in custody during the trial for a period of two (2) years one (1) month. The sentence will take effect from the date he was arraigned in court.

25. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 12TH DAY OF SEPTEMBER 2023.

GRACE L. NZIOKA

JUDGE



In the presence of:

The applicant present, virtually

Mr. Atika for the respondent

Ms. Ogutu: court assistant

