REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

MISC CRIMINAL APPLICATION NO. 12 OF 2019

EKURE NAPETET.....1ST APPLICANT

EKIRU IKOL ALIAS EMGURANGOR.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RESENTENCING

INTRODUCTION

1. The applicants were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code in a High court criminal case No.2 of 2015 at Lodwar. The Applicants were both found guilty, convicted and sentenced to suffer death by this court (Riechi J) who had this to say;-

> "**The court has taken into account the address by the counsel on sentencing; I have also taken into account the fact that the accused are first offenders. However offence is serious as 4 persons lost their lives. The sentence for offence of murder is under section 204 penal code mandatory. I therefore sentence Ekiru Ikol alias Emgurangor accused 1 to suffer death as per law established. I also sentence Ekure Napetet (Accused 1) to suffer death as per law established" (Emphasis added)**

2. Being dissatisfied with the conviction and sentence, the Applicants filed an appeal to the Court of Appeal being criminal APPEAL NO.164 of 2017 – Eldoret **Ekiru Ikol alias Emgurangor** and Ekure Napetetu –v- Republic in a judgment dated 25th day of June, 2019 the Court of Appeal had this to say;

> [9] …….in regard to sentence the court was urged to follow the Supreme court decision in **Francis Karioko Muruatetu and Another –V- Republic [2017] eKLR, set aside the death sentence and order that the Appellant be subjected to a re-sentencing hearing so that their mitigation can be considered ……**
>
> [19] Accordingly, we are satisfied that the charge in regard to count 1,2 and 3 were proved against the 1st Appellant to the required standard. **As regards the sentence, the appellants advocates made submissions in mitigation fo the sentence and the learned Judge properly exercised his discretion in sentencing taking into account the circumstances before him. Four lives were lost mercilessly and in our view, the sentence of death imposed upon each applicant was merited. There is therefore no justification for our intervention (emphasis added)**

3. Undeterred with the Court of Appeal determination, the applicants filed this present Notice of Motion and sought the following orders; That

> **1. May this court be pleased to determine petition for hearing of the sentence bestowed upon them.**
>
> **2. That it is within the rule of law to for the same to be considered.**

4. The application was supported by the affidavit sworn by EKIRU IKOL alias ENGU RANGOR in which he deponed that he was tried, convicted and sentenced to suffer death for the offence of murder contrary to section 203 and 204 of the penal code and that his application was based upon article 165(2) (b) of the application which empower this honourable court to hear the application.

5. It was deponed further that he was relying on the following cases;-

- DOUGLAS MUTHAWA NTOMBIRI Misc App No. 4 of 2015 at MERU

- REPUBLIC –V- JON NGANGA GACHERU & ANOTHER HIGH COURT CRIMINAL

CASE NO. 31 OF 2016 at Kiambu

- FRANCIS KARIOKI MURUATETO & ANOTHER -V- REPUBLIC SUPREME

COURT PETITION NO.15 & 16 OF 2015 where it was stated that death penalty was unconstitutional.

6. Since the application was for re-sentencing hearing, the court called for presentencing report and invited the parties to make written submission on the same.

7. The state in opposition to the application filed grounds on opposition in which it was contended

That;-

a) The review of sentence by the court is dependent of the facts and circumstances of each particular case.

b) No new facts and circumstances of the matter to warrant a review of the sentence

c) Death sentence was committed to life imprisonment so the application herein is already spent.

SUBMISSIONS

8. The Applicants filed written submission in which they submitted that they were not accorded fair trial. It was contended that death sentence was unconstitutional as per the Supreme Court decision in FRANCIS KARIOKO MURUATETU (Supra). It was submitted that the hands of court were no longer tied and the court should therefore consider their mitigation and set aside the death sentence and substitute the same with a term sentence.

PRE-SENTENCING REPORT

9. For the purposes of this ruling the court called for pre-sentencing report in which as regards the Applicants, it was stated that on the material day, they were in the company of many other pastoralist when the deceased with other demanded to be given some cows as compensation since EKIRU IKOL had taken away his wife and a confrontation ensued and they were forced to use rifles for self defence.

10. It was concluded that they had been well behaved while in prison with no previous criminal history. On victim impact statement, it was stated that the family members were no longer bitter owing to how long it had been since the commission of the offence and that they had performed some traditional rituals, as a way of cleansing the deeds committed by the Applicants. Reduction in sentence and or non custodial sentence was recommended.

DETERMINATION

11. The following issues have been identified by the court for determination of this application.

a) Whether the court has jurisdiction to hear the application

b) Whether the applicants have made out a case for the grant of orders sought.

12. The Supreme Court of Kenya in the now infamous case of Francis Karioko Muretetu (supra) held that the mandatory nature of the death sentence was unconstitutional as it did not allow the court to exercise discretion on sentencing. The court proceed to hold that mitigation plays an important part as an element of fair trial pursuant to Article 50(2) of the Constitution.

13. It must be noted for record purposes that contrary to the Applicants submissions, the Supreme Court did not outlaw the death

penalty and stated as follows

> **"[69] Consequently we find that section 204 of the penal code is inconsistent with the constitution and invalid to the extent that it provides for the mandatory death sentence. For avoidance of doubt this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**

14. The court thereafter proceeded to give guidelines with regard to mitigating factors 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 regard to gender based violence

f) Remorsefulness of the offender

g) Possibility of reform and social re-adaption of the offender

h) Any other factors that court consider relevant

15. The court produced at paragraph 72 thereof to state as follows;

> "[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are geared to promoting consistencies and transparency in sentencing hearing. They are also aimed to promoting public understanding of the sentencing process. this not withstanding we are obliged to point out here that paragraph 25 of the 2016 judiciary sentencing police guidelines states that

25.1 GUIDELINE JUDGMENT

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

16. In William Okungu Kittiny – v – Republic [2018] eKLR the Court of Appeal had this to say

> [11] Although the Appellant appeal was dismissed by the court of Appeal on 20th June, 2008, which was then the last Appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending. The decision of the Supreme Court only discouraged persons from filing petition to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163(7) of the constitution, the decision of the Supreme Court has immediate and binding effectr on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases".

17. From the above decision it is clear that the court has jurisdiction to hear and determine the application before it.

18. The only issue in dispute is whether the Applicants have made out a case for grant of his orders sought. From the record of Appeal and the judgment in court of Appeal at Eldoret Criminal Appeal No.164/2017, it is clear that the judgment thereon was delivered on 28th day of June, 2019 long after the decision of Muruatetu and in dismissing the Applicants appeal, The court took note of the effect on Muruatetu case and pointed out that the death sentence imposed upon the appellants was merited having taken into account the fact that four lives were lost.

19. Having therefore benefitted from the operation of the Muruatetu case in the Court of Appeal and taking into account Guidelines No, 25 of the Judiciary secretary entering Policy Guidelines, it follows that this court may not therefore grant any other order on sentence, the Court of Appeal having pronounced itself on the same after the decision in Francis Karoko Muruatetu

20. I have further noted that the Applicants are no longer serving death sentence, the same having been committed to life imprisonment which is not what the court of Appeal had confirmed and grounded the doctrine of stare decisis I will differ to the Judgment of the court of Appeal as I take the view that any other sentence given by this court would amount to a revision of the Court of Appeals decision on sentence having taken into account to Mumatetu case.

21. In this holding I find support in PATRICK MUTISO KIMUYU –V- REPUBLIC [2020] eKLR where the court had this to say;-

> **"……. It would also be disrespectful of this court to purport to descent into the arena of the Court of Appeal that found the Appellants appeal as locking in merit. Such an application can only be entertained by a higher court The Supreme Court or the Court of Appeal. The Applicant would as well have moved to the Court of Appeal for review of its orders but not to come to this forum as that amounts to muddling the hierarchy of the courts".**

22. Having had the benefit of the Muruatetu case considered before the court of Appeal as regards the sentence passed against the Applicants and being alive to the Court of Appeals finding that four people lost their lives as a result of the actions of the Applicants, I hereby find and hold that the Application herein lacked merit and is hereby dismissed.

Dated, Signed and Delivered at Lodwar this 4th day of March, 2021

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Tanui for the State

Accused present

Court Assistant: Biwott

Interpreter: Susan