REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSOLIDATED

MISC. CR. 82 OF 2019..(JOHN KOMU VS REPUBLIC)

MISC. CR. 89 OF 2019...(SIMON NJUGUNA VS REPUBLIC)

MISC. CR. 90 OF 2019..(ANTONY MACHARIA VS REPUBLIC)

RULING

Anthony Macharia Mwangi, (Anthony) Simon Njuguna Rimutu, (Simon) John Kiara Komu, (John) John Ng'ang'a Mathare and Peter Kamau Mathare were jointly charged In Nakuru High Court Criminal Case no. 60 of 2010 with **Murder** contrary to **Section 203** as read with Section **204** of the **Penal Code**. It was alleged that on the 5th June, 2010 at Kisumu Ndogo Village, Kiriko Sublocation, Leleshwa Location, Kipipiri District within Central Province they jointly murdered Ann Wanjiku Murugani.

Each of them denied the offence.

After a full trial, they were each found guilty, convicted and sentenced to death.

Anthony, Simon, and John each filed an application for re-sentence following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, where the mandatory nature of the death sentence was declared unconstitutional. Their applications were consolidated in this ruling.

The Notices of Motion filed are exactly the same and supported by the affidavits only differentiated by their names. Each seeks the following order: **THAT this Honourable Court be pleased to determine my application for re-hearing of the sentence imposed against me.**

In the supporting affidavit each depones; THAT he is Kenyan adult male of sound mind hence competent to make oath; THAT he was charged with the offence of MURDER c/s 203 as read with 204 of the Penal Code and sentenced to suffer DEATH; THAT he humbly makes this application in reliance of **article 165(3) (b) of the Constitution** which empowers this Honourable Court to handle application of this nature; THAT he has NOT exhausted all appeals; THAT he was not accorded fair trial of sentencing from the trial court to the last court of appeal thus contravening **article 50(2) (q) of the Constitution** and relies on the case of **Douglas Muthaura Ntoribi Misc. Appl No. 4 of 2015 at Meru High Court** and in the case of murder of **John Nganga Gacheru & Another in HCCR Case No. 31/016** at **Kiambu High Court;** THAT he further relies on the case of: **Francis Karioko Muruatetu & Another vs Republic (Supreme Court Petition No. 15 of 2015** where it was held that mandatory death penalty is unconstitutional and seeks an appropriate sentence.

Antony was represented by Ms. Njoroge, the other two (2) were unrepresented. Ms. Wambui appeared for the state.

The three of them had filed joint written '**Mitigation Submissions'**.

At the hearing of the application the two (2) unrepresented applicants relied wholly on these submissions. For Antony, Ms. Njoroge made additional oral submissions. She submitted that this matter was before me pursuant to the decision of the **Supreme Court** in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** for mitigation and re-sentencing.

On behalf of Anthony she urged the court to consider the period of ten (10) years already served as sufficient retribution and substitute it with the sentence of death and set him free. That he had had time to reflect on what he had done, was remorseful and had reformed. He was a first offender, and had a good prison record. He had undertaken training in theology, and carpentry grades 3, 2 and 1. That upon release he would be able to earn a living and stay away from crime

That at the time of arrest he was forty five (45) years old had wife and three (3) children. That his family was ready and willing to reintegrate him.

Turning to the circumstances of the offence she submitted that it was within judicial notice that there were no eye witnesses to the offence but that it was based purely on circumstantial evidence.

In the written mitigation and submissions, the applicants reiterated the argument that their case was based purely on circumstantial evidence. Citing the provisions of **Section 203 of the Penal Code** regarding malice aforethought, and the court's observation that no one saw them attack the deceased, they argued that before the trial court it was not demonstrated that they had malice aforethought. They went ahead to cite **Republic vs Kipkeriing arap Koske & Another (1949) 16 EACA 135, Abanga alias Onyango vs Republic CRA 32/1990**

They argued that the facts of the case were crucial in resentencing and it was important for this court to appreciate the said fact that their case was based on circumstantial evidence. They told the court that they mitigated before the trial court but their mitigation was never considered because of the mandatory nature of the death sentence and to that end they did not get a fair hearing as was observed by the **Supreme Court** in **Muruatetu** at **paragraph 66.**

In mitigation they submitted that at the time of sentence John was 45 and Simon 42 years old. That each had a young family.

That John had certificates in welding grades III, II, and I and in diplomas in discipleship and Bible study. Simon had similar certificates but in carpentry and joinery.

On the sentence they cited the *Sentencing Policy Guidelines (2016).* They submitted that the Guidelines provide a four tier methodology to the determination of custodial sentence. First that the court must establish the custodial sentence under the applicable statute, second, consider the any mitigating, third, consider any aggravating circumstances, then weigh these in order to determine the appropriate sentence.

That Guidelines did not provide for custodial sentence for the offence of Murder, and that in the **Muruatetu** Case the **Supreme Court** set down the following factors to be considered in resentencing in murder cases. **At paragraph 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."*

They urged the court to exercise its discretion in their favour as these were all but guidelines.

They relied on the holding in **DPP, Gauteng vs Pistorious (96/2015) [2015] 1 ASCA 204 (3/12/2015)** where the **Supreme Court of South Africa** found that the appellant had been convicted of the wrong offence, for which he had served sentence. The court set aside the conviction and sentence for the wrong offence and substituted it with the a conviction of the correct offence, sent the file back to the trial court for sentencing with directions to take into account the punishment already served.

They also relied on **Samson Njuguna Njoroge vs Republic [2018] eKLR** where the court found that where the appellant had been in custody for six (6) years from the date of plea to the time the sentence was delivered. The court was of the view that the circumstances of that case did not deserve the death sentence and held that the six years already served was sufficient.

They also cited **Mathew Kathewa Laichena & Another vs Republic [2018] eKLR** where the Court of Appeal following **Wycliffe Wangusi Mafura v Republic [2018] eKLR** where the appellant was sentenced to 20 years imprisonment for robbery threatening to use a firearm and **Paul Ouma Otieno alias Collera &Another v Republic [2018]eKLR** where the appellant was sentenced to twenty (20) years imprisonment for robbery aggravated by use of a firearm, substituted a sentence of death for robbery with violence with fifteen (15) years imprisonment.

The applicants also relied on **David Kamau Thutho vs Republic [2019] eKLR** where the applicant was re-sentenced to eight (8) years imprisonment. The applicant was a first offender who had become permanently blind and served the eight (8) years without the gift of sight. The court also considered that the offence was committed in the heat of the moment, that applicant was forthright about his actions, had abandoned his appeal, and had shown deep remorse.

The applicants urged the court to consider the individual circumstances of each of the applicants and review their sentences to the period already served.

In response Ms. Wambui the prosecuting counsel, submitted that the applicants deserved a long custodial sentence because of the aggravating circumstances in the case. The deceased was hit with a fork jembe and sustained the injuries that led to her death. That death

resulted from the inhuman acts of the applicants, who had no reason at all to kill her. That the court ought to also consider the trauma caused to the family of the deceased.

The 1st applicant did not have any response to these submission. The 2nd applicant's response reiterated the mitigation submissions.

The issue for determination is whether the application is tenable and if so, what custodial sentence should be substituted for the death sentence.

To assist me to arrive at a sentence I sought for pre-sentence reports on each applicant.

The inquiries were carried out by two (2) officers; one Antony and Simon's, the other, John's. For Antony and Simon the officer recommended probation, for John the officer recommended a review to an appropriate sentence.

The reports confirm what the applicants stated in their mitigation. The applicants' are now aged 50, 50 and 46 years respectively. Each has spent about five (5) years in prison having been committed to prison on 15th October, 2015. Though the offence was committed in 2010, they were released on bond after seven (7) months in remand so they had been out on bond. However the trial took about five (5) years.

I have carefully considered the submissions, the mitigation and the pre-sentence reports. I have also looked at the circumstances of the case.

To begin with I must point out that some of the issues raised by the applicants are not issues for consideration in the resentencing. The issue as to whether the circumstantial evidence was sufficient to prove the charge against them is not for this court to consider. Neither is it within the realm of this court to consider whether they were convicted for the wrong offence. That is for the appeal court.

This court's jurisdiction in resentencing arises out the Supreme Court's holding that the mandatory nature of the death sentence was unconstitutional, that the fact that the accused's mitigation was of no consequence in sentencing amounted to an unfair trial and that...

> ***"It is prudent for the same court that heard this matter to consider and evaluate the mitigation submissions and evaluate the appropriate sentence befitting the crime committed by the petitioners."***

This court is to evaluate the mitigation and the appropriate sentence for the crime committed.

The applicants were sentenced to the mandatory sentence of death, and their mitigation as of no consequence. For these reasons the application is tenable.

Is there reason for this court to exercise its discretion in favour of each or any of the applicants?

From one of the Social Inquiry reports, the victim was a woman, a seventy (70) year old woman. She was unarmed. She was beaten by a mob who included the five (5) accused persons and why? Because there was an allegation that she had planted some witchcraft in the shamba of one of their relatives.

The dark side of this case, the aggravating circumstances is that this victim never got a hearing, nobody listened to her when the allegations were made against her. She was attacked with a fork jembe, among other weapons and never got a chance to make mitigating submissions, this victim is dead.

Granted the case turned on circumstantial evidence but the trial court was persuaded of the applicants' guilt sufficient enough to sentence each of them to death.

I have evaluated each of the applicants' mitigation. Each has spoken about himself at length. It is noteworthy that in each of their submissions there is no mention of the victim or victim's family. The question that skips in my mind is how then can the applicants be said to have shown remorse?

From their submissions regarding the fact that their case turned on circumstantial evidence, the applicants' appear to be questioning the correctness of their conviction, while at the same time asking for the review of their sentence as per **Muruatetu.**

Should this court still proceed to consider their application or refer them to the appeal court?

I go back to the jurisdiction of this court as per **Muruatetu.** To consider their mitigation and consider the appropriate sentence following the guidelines set by the Supreme Court. Hence, I will proceed to deal with re-sentencing. The applicants have the leeway to challenge their conviction at the Court of Appeal

Each of the applicants was a first offender. On average they are in their 50s. They were found guilty after a full trial. None had a previous record and each has had a clean record in prison. The presentence reports each indicate that their families are willing to take them back so the possibility of social re adaptation is high. In two cases there is a recommendation for a non-custodial sentence. There is so much that works in their favour.

Except that against them are the aggravating circumstances of the offence. The attack of a defenceless elderly woman by the five accused persons and others. Except there is no evidence of remorse, save for the statement of remorse in the submissions.

I have looked at the authorities cited. The only authority related to a murder charge is distinguishable as can be seen from the judgment. The applicant was forthright about his actions, meaning he took responsibility for the same. The court found that he was drunk and acted in the heat of the moment. And he was blind. He had been in custody for eight years.

The circumstances in which the applicants committed the offence do not come close to those. Hence they are not comparable. The applicants have been in prison for about five (5) years. In the Robbery with Violence cases which the applicant's cited and where no life was lost, the Court of Appeal substituted the sentence of death with 15 to 20 years imprisonment. I have looked up other cases that dealt with murder cases.

In **Nelson Mwiti Gikunda & 2 others v Republic [2018] eKLR** the court stated:

> "*In* ***John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 [2018] eKLR, the Court of Appeal upheld a sentence of 25 years in a case of murder where the appellant assaulted the deceased several times. In Jonathan Lemiso Ole Keni v Republic NRB CA Criminal Appeal No. 51 of 2016 [2018] eKLR where the appellant shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment… I have taken into account the mitigating and aggravating factors and giving credit to the time served, I therefore re-sentence the petitioners to 25 years' imprisonment commencing the date of sentencing before the trial court…"***

In **Elizabeth Mwiyaithi Syengo v Republic [2019] eKLR** the court expressed itself thus:

"*Taking into account the mitigating and aggravating factors and also factoring the time served, I hereby re-sentence the Petitioner to 20 (Twenty) years imprisonment.*"

In **George Ngugi Mungai v Republic [2019] eKLR** I substituted the sentence of death to 30years imprisonment.

In **Godfrey Muchiri Njuguna vs Republic [2020] eKLR** the Judge said:

> "*The Applicant has been in custody for the last nineteen (19) years. He has demonstrably reformed...In the circumstances of this case, I am persuaded that no more sentencing objectives would be achieved by the continued incarceration of the Applicant…The Report recommends that the Applicant is ripe for a Probationary sentence. I concur…*"

The court then set aside the sentence of death to time already served and three years on probation supervision.

From the foregoing it is evident that each case depends on its facts. Having considered the facts of the case, the mitigation of each applicant, the probation officers' reports, I do not consider that this case is suitable for a non-custodial sentence.

In the circumstances, the following orders issue:

1. ***The sentence of death is set aside with respect to each of the applicants***
2. ***Each applicant is sentenced to 20 years' imprisonment less the 7 months each spent in remand prior to being released on bond.***
3. ***The sentence to run from the date they were sentenced by the trial court.***

Right of Appeal 14 days.

Dated this 18th day of January, 2021.

Mumbua T. Matheka

Judge

Delivered Virtually this 4th Day of March 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Edna

For state: Ms. Murunga

Ms. Njoroge for Antony Macharia

John Komu and Simon Njuguna in person