



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL CASE NUMBER 113 OF 2019

DEDAN KIOKO MUNYAO.....1ST APPLICANT

AWK.....2ND APPLICANT

VERSUS

DPP.....RESPONDENT

RE-SENTENCE RULING

1. Dedan Kioko Munyao and AWK were charged with **Murder in High Court Criminal Case Number 62 of 1999**. From the records before me, Dedan was arrested on 22nd May 1998 at the age of twenty four(24), A on 26th May 1998 at the age of sixteen (16).
2. After a full trial, each was found guilty, convicted and sentenced to death on 21st March 2001. They have been in custody, both in remand and in prison for twenty three (23) years.
3. According to the records before me the deceased was brother to the husband to the sister to Dedan Kioko, and a brother to AK. The two are said to have lured him, ostensibly to rob him of some money, but unfortunately the incident led to his death. Their conviction and sentence was upheld by the Court of Appeal in Criminal Appeal Number 36 of 2001. The appeal was dismissed on 16th November 2001.
4. Unfortunately, neither the **High Court Criminal File Number 62 of 1999 nor the Court of Appeal file Number 36 of 2001** could be traced. Neither of the two judgments was reported.
5. The evidence of this the existence of this appeal is found in **Joseph Ongare Ondulo vs Republic [2001] eKLR** where the Court of Appeal made reference to its judgment *in*;

“AW & Dedan Kioko Munyao vs Republic Criminal Appeal Number 36 of 2001 (unreported) delivered on 16th November 2001”.

6. For this reason this re-sentence has to depend on two facts;-

1. *THAT up until the Constitution of Kenya 2010 the offence of Murder was not bailable hence the petitioners would stay in custody pending their trial.*
2. *The sentence of death was considered to be mandatory and the hands of the court tied, up till the case of **Francis Karioko Muruatetu [2017] eKLR.***

7. The petitioners filed their petition first in at the High Court of Kenya at Mombasa in 2018. They filed their submissions on the unconstitutionality of the mandatory nature of the death sentence. They were then at Shimo la Tewa prison. The mater was transferred to this court. They have been waiting since but the lower court, and the high court files could not be traced. On the issue of missing file they referred me to **Elijah Ngotho Njoroge v Republic [2020] eKLR** where the court made reference to the case of **John Otieno Ombok vs Republic [2017] eKLR** where the court cited the Court of Appeal in **John Ooko Otieno vs Republic, Criminal Appeal No. 137/2002 (UR)** where the entire records and files containing proceedings and judgment of the trial court not be traced and the court was urged in the circumstances to quash the convictions and set aside the sentences thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In rejecting that plea, the court stated, thus:-

“Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court files, judgment,

police file and Attorney General's file is a rare occurrence. It has however, occurred and this court is not a stranger to such a situation. This court has on more than one occasion in the past encountered such as situation. In the case of Pius Mukaba Mulewa and Another vs Republic, Court of Appeal Criminal Appeal No. 103 of 2001, this court, faced with that situation had the following to say: - "What we can make from ZAVÉR'S (Haiderali Lakhoo and Zaver vs Rex (1952) 19EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must considered all the circumstances under which the loss occurred. Who stands to gain from the loss" Is it merely coincident that both the magistrate's file and that of the police are lost" Does the available evidence point to anyone as being responsible for the loss" And if so, can such a party be allowed to benefit from a situation of his making" In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is reasonably feasible to order a retrial, an acquittal must follow as mater of course."

8. I need not belabor the applicant's submissions, suffice it to say that their case falls squarely into the four corners of the Muruatetu Case. The only consideration is what sentence is appropriate.
9. I requested for pre-sentence report on each of them.
10. It is evident from each of the reports that the two (2) accused were very young at the time they committed the offence.
11. Time is said to clarify things, to heal others and to be the long time teacher, in their case, it comes from their mitigation, and their submissions, and from the recommendations from the prison authorities, that they are rehabilitated.
12. They have expressed their remorse, they have expressed their regret for what they did, they have been punished, and they have learnt life lessons. They have also gone through trainings, and have acquired skills they feel will be of use to them in settling out there should their plea be heard and considered.
13. The victim of their crime, their immediate family members have forgiven them. They have reconciled with the loss of the deceased and are ready to receive the applicants back home.
14. The Probation Officer's Report has recommended non-custodial sentence.
15. Taking into consideration all the factors. I find that the petition succeeds. The sentences of death is set aside and substituted with a probation supervisory order of two years.
16. Orders accordingly.

DATED, SIGNED and DELIVERED via ZOOM this 18TH day of JUNE, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:

Court Assistant Edna

Applicants Present virtually

For DPP Ms. Murunga