



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION - MILIMANI COURT

CRIMINAL MISC. APPLN. NO. 150 OF 2013

PETER KARIUKI-MUIBAU.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING.

1. **Peter Kariuki Muibau**, the Applicant, was charged and convicted by the High Court of the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Particulars of the offence were that on the 10th day of November, 2005 at Kawangware Estate Kilimani Nairobi within Nairobi area, he murdered Lydia Njeri Gichuhi. Being aggrieved by the death sentence meted out, he appealed to the Court of Appeal that affirmed the conviction and sentence.
2. The deceased in the case was the Applicant's sister in law, he shot her with a gun after he threatened to kill the entire family following a disagreement with his wife, a sister to the deceased.
3. This application is brought pursuant to the decision of *Francis Karioko Muruatetu & Another verses Republic (2017)Eklr* where the Supreme Court held that the mandatory death penalty was unconstitutional.
4. The Appellant filed written submissions on mitigation in person where he expressed remorse. He urged the court to consider time spent in custody, his age and character that has changed. He regretted his action and called upon the court to take into account his achievement during the period he has been in prison including graduating from London University sponsored long Distance training. That he is a paralegal who is actively involved in legal aid for fellow prisoners; and, he also highlighted his struggles in custody and his current medical condition.
5. Ms. Soweto learned counsel for the Applicant pointed out that the fact of the Applicant having prepared submissions is an indication of steps he has taken to reform and be rehabilitated. She referred to the judicial sentencing policy where courts are implored to consider the age of the offender, whether the Applicant is a first offender, if remorseful, and his social adaptation. She urged that having been involved in several activities and initiatives was an indication of remorse. That the Applicant who joined the Prison Academy in 2015 teaches at the Academy and offers legal aid. She asked the court to consider time served as sufficient to meet the sentence for the crime committed and /or a non-custodial sentence.
6. In addition to written submissions, the applicant was heard orally. He regretted what happened 16 years ago and called upon the court to grant him a second chance.
7. The State through Mr. Mutuma, learned State Counsel, did not oppose the application but called upon the court to consider the victim impact statement and the pre-sentencing report. He urged that the Applicant having been sentenced to death, sixteen (16) years in custody was a short time.
8. The Applicant was sentenced during the pre-2010 Constitution when the court was bound by the mandatory death sentence for the offence of murder. Currently, the High Court has the discretion to impose a sentence other than the death penalty depending on the circumstances of the case. The Supreme Court in the Muruatetu case (Supra) was of the view that the mandatory nature of a sentence deprives courts their legitimate jurisdiction over the sentencing process. It went on to state that 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....”*

9. In *Benson Ochieng & Another vs. Republic* [2018] eKLR Ngugi J. re-phrasing the Sentencing Guidelines stated that:

“.... there are four sets of factors a Court looks at in determining the appropriate custodial sentence.... These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

- i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.*
- ii. Was the offender armed with a gun?*
- iii. Was the gun an assault weapon such as AK47?*
- iv. Did the offender use excessive, flagrant or gratuitous force?*
- v. Was the offender part of an organized gang?*
- vi. Were there multiple victims?*
- vii. Did the offender repeatedly assault or attack the same victim?*

b. Circumstances Surrounding the Offender: The factors here include the following:

- i. The criminal history of the offender: being a first offender is a mitigating factor;*
- ii. The remorse of the Applicant as expressed at the time of conviction;*
- iii. The remorse of the Applicant presently;*
- iv. Demonstrable evidence that the Applicant has reformed while in prison;*
- v. Demonstrable capacity for rehabilitation;*
- vi. Potential for re-integration with the community;*
- vii. The personal situation of the Offender including the Applicant’s family situation; health; disability; or mental illness or impaired function of the mind.*

c. Circumstances Surrounding the Victim: The factors to be considered here include:

- i. The impact of the offence on the victims (if known or knowable);*
- ii. Whether the victim got injured, and if so the extent of the injury;*
- iii. Whether there were serious psychological effects on the victim;*

iv. *The views of the victim(s) regarding the appropriate sentence;*

v. *Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;*

vi. *Whether the victim was targeted because of the special public service they offer or their position in the public service; and*

vii. *Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime.”*

10. When called upon to submit pursuant to **Section 329** of the Criminal Procedure Code, the Applicant had nothing to state in mitigation. In sentencing him the court took into consideration circumstances that prevailed and the fact of the deceased having been shot in cold blood.

11. During re-hearing on mitigation, he has reminded the court of having made bad choices that resulted into alcohol addiction and bad health. His children are almost strangers to him as he did not raise them. That he has not only acquired skills and graduated as a lawyer but he contributes to education in prison by teaching at the Prison Academy.

12. The Applicant is stated to be 48 years old, which means that at the time of commission of the offence he may have been 32 years or thereabout. He committed the gender -based offence after he had separated with the sister of the deceased. At the time of being sentenced, he did not express any remorse and the pre-sentence report that was not contested indicates that to date he still holds unto his innocence.

13. The Probation Officer who interviewed both families concluded that although his family is willing to help in reintegration and rehabilitation of the Applicant, the offence had a serious psychological effect on the family of the deceased. The sister of the deceased, one of the interviewees repeated what was stated in evidence that the Applicant had threatened to kill the twelve members of their family. According to evidence adduced, the threats were made before the deceased was murdered. It was also in evidence that the Applicant threatened to kill his eight (8) months' old son with a screw driver and to burn his mother - in - law hence a dangerous man. In the result, the hostility between the two families is still evident which calls for time to pursue reconciliation.

14. The Applicant cited the case of **Benjamin Kahindi Changawa Vs Republic Criminal Appeal No.99 of 2019**, where the court of Appeal substituted the death sentence with 10 years imprisonment. In the case, police officers killed the deceased at Kawangware, an area described as a volatile high crime area. Unlike the case relied on where the accused persons were law enforcement officers discharging their duties, in the instant case the Applicant was a judicial staff expected to be of upright moral conduct.

15. In the case of **Wycliffe Wangusi Mafura Vs Republic (2018)eklr** where the Appellant who had been in remand custody for 9 years was sentenced to death, the Court of Appeal substituted the death sentence with a sentence of twenty (20) years imprisonment. It was noted that the complainant did not sustain serious injuries though the robbers were armed with a pistol.

16. In **Lowayakuru Ejuroto Elimelim v Republic (2020)Eklr** where the Petitioner had been sentenced to death, a sentence that was affirmed by the Court of Appeal, on re-sentencing, he was sentenced to twenty five (25) years imprisonment.

17. In **George Ngugi Mungai verses Republic(2019)eklr, Matheka J.** had this to state:

“I want to agree with my brother Kemei J. in Elizabeth Mwiyaithi Syengo v Republic [2019] eKLR, where he stated that:

“.....Several courts have given varying sentences during resentencing hearing depending on the particular circumstances of each case. For instance, Majanja -J in Nelson Mwiti Gikunda & 2 Others =Vs= Republic [2018] eKLR re-sentenced the petitioners to 25 years' imprisonment commencing from the date of sentencing. The learned Judge had sought reliance in court of Appeal decisions in John Ndede Ochola alias Obago =Vs= Republic -KSM C.A Criminal Appeal No. 120 of 2014 [2018] eKLR and Jonathan Lemiso Ole Keni =Vs= Republic - NRB C.A. Criminal Appeal No. 51 of 2016 [2018] where the said courts upheld sentences of 25 and 30 years respectively. I am guided by the said authorities.

Having considered the mitigation by the petitioner and the circumstances of the offence, the only issue is what sentence could have been meted to him had it not been for the mandatory nature of the death sentence. I have also considered the aggravating circumstances in this case. The petitioner killed two of his relatives in cold blood.

The petitioner is sentenced to 30 years' imprisonment.”

18. From the foregoing, circumstances in which the offence was committed are of great seriousness and importance such that they outweigh what has been demonstrated by the Applicant as having been rehabilitated.

19. Therefore, I set aside the death sentence meted out which I substitute with thirty (30) years imprisonment, which shall be effective from the date of arraignment in court (Vide **Section 333(2)** of the Criminal Procedure Code), namely the 19th day of January, 2006.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JUNE, 2021.

L. N. MUTENDE

JUDGE

In the presence of:

Court Assistant - Mutai Joshua

Applicant

Ms. Ogweno for the State/Office of the Director of Public Prosecution

Ms. Jacqueline Njoroge holding brief for Ms. Soweto for the Applicant