REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

MISC CRIMINAL APPLICATION NO 16 B OF 2019

SIMON LOKWAWI EKAMAIS ALIAS BLACKIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was tried for the offense of murder contrary to section 2o3 as read with Section 204 of the penal code in Lodwar High Court Criminal Case No. 8 of 2016, the particulars of which were that on the 27th day of August, 2016 murdered Patrick Lokol Edapae.

2. He was tried, found guilty, convicted and sentenced to suffer death as by law then established with the court (Riechi, J) rendering himself thus:

> ***"The court has taken into account the fact that the accused is a first offender. Accused is 41 years old and is married with children. However, section 204 penal code provides only one mandatory sentence. I therefore sentence the accused Simon Lokwawi Ekamaisia to suffer death as per the law."***

3. From the court record the applicant allegedly filed in the Court of Appeal of Kenya at Eldoret Criminal Appeal No. 8 of 2016 but from the memorandum of appeal thereon, it seems that the applicant only referred to the criminal case No. 8 of 2016 filed in this court. In the absence of any evidence to the contrary I take it that no appeal was ever filed as confirmed by the Applicant.

4. In the meantime, the Supreme Court of Kenya in the **Francis Muruatetu case** rendered itself and declared the mandatory nature of death sentence unconstitutional and opened the case for those who had been sentenced to death to have a second bite at the pie through resentencing.

5. By a Notice of Motion filed on 24th September, 2019 the applicant sought an order that this Honorouble Court be pleased to determine the application for re-hearing of the sentence imposed against him.

6. The application was supported by his affidavit wherein he deposed that he was relying on the decisions of **Francis Karioko Muruatetu and Another v Republic petition No 15 of 2015, Douglas Muthaura Ntoribi Misc. Application No 4 of 2015 High Court of Kenya at Meru and John Nganga Gacheru and Another V R HCCR CASE NO 31 of 2016at Kiambu** were death sentence was set aside and appropriate sentences given.

SUBMISSIONS.

7. Directions were given that the application herein be heard by way of written submissions. On behalf of the applicant, it was submitted that this court had jurisdiction to hear and determine the application. It was submitted that in passing the death sentence the court held that its hand was tied and based on the Supreme Court decision, the court now has discretion in sentencing

8. It was submitted that the court should consider his mitigating factors, that he was the only sole breadwinner of his large family with young children. He therefore sought for his death sentence to be substituted with a term sentence of 15 years' imprisonment.

9. On behalf of the respondent it was submitted that the application was premature as the applicant had file an appeal to the court of appeal in Criminal Appeal No. 8 of 2015 and that the Court of Appeal had powers to review the sentence herein, while handling the appeal and therefore the application should be dismissed.

10. At the hearing herein, the applicant stated that since he had committed the offense, he opted not to file an appeal to the Court of Appeal and when the Muruatetu decision was made he filed this application, so that his sentence may be reviewed.

11. In compliance with the Supreme Court directions on re-sentence hearing, the court called for presentencing report dated 29th May, 2021 where it was stated, as regards the circumstances of the offence that the same was riding a motor cycle when all of a sudden he collided head on with another rider, who was carrying a lady passenger and out of the impact he fell down, only for the other ridder and his passenger to attack him with kicks and blows, until he became unconscious.

12. It was stated that when he gained consciousness, in anger he snatched a kitchen knife from the nearby vegetable kiosk and attacked the deceased by stabbing him before running away from the scene.

13. In the recommendation it was stated that the applicant was remorseful and regretful of his action and pleaded for leniency, having acted purely out of anger and self-defence with no intentions of harming or killing the deceased and that it was as a result of motor cycle accident which are common on our roads.

DETERMINATION

14. The concept of re-sentencing hearing was introduced in our jurisprudence through the Supreme Court decision in the Muruatetu case where the court held 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 murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.***
>
> ***Sentencing Policy Guidelines: A way forward.***
>
> ***[70] In 2016, the Judiciary of Kenya published Sentencing Policy Guidelines which gives an analysis on the mandatory death penalty as follows:***
>
> ***Situational Analysis***
>
> ***6.4 Whilst the law still recognizes the death penalty as a mandatory punishment in respect to the offences aforementioned, the last execution took place in 1986.***
>
> ***6.5 Following the decision in the case of Godfrey Ngotho Mutiso v. Republic, which found the mandatory death sentence to be unconstitutional, there have been divergent views with some courts imposing custodial sentences for offences attracting the death penalty and others adhering to the mandatory terms of the statutes. Subsequently, the Court of Appeal in the case of Joseph Njuguna Mwaura and Others v. Republic, emphasized that courts do not have discretion in respect to offences which attract a mandatory death sentence.***
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> ***Policy Directions***
>
> ***6.7 In the absence of law reform or the reversing of the decision in Joseph Njuguna Mwaura and Others v. Republic, the court must impose the death sentence in respect to capital offences in accordance with the law.***
>
> ***6.8 To curb the indeterminate imprisonment at the President's pleasure, the court's recommendation to the President pursuant to section 25 (3) of the Penal Code should include the requirement for a review of the case after a fixed period.***
>
> ***[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.***
>
> ***[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not***

mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

25. GUIDELINE JUDGMENTS

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

15. For those who had been sentenced under the mandatory nature of section 204of the penal code the Supreme Court was of the view that the cases be remitted back to the trial court to determine the appropriate sentence and stated thus:

"[109] Here in Kenya, in the case of Mutiso, the Court of Appeal stated [para 38]:

> ***"In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant."***

[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.

G. Orders

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

> ***a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.***
>
> ***b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.***
>
> ***c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same."***

16. From the record placed before me there is no evidence that the appellant ever filed an Appeal to the Court of Appeal, thereby granting the court the jurisdiction to hear the application herein for purposes of sentence re-hearing.

17. The court of Appeal in the case of **WILLIAM OKUNGU KITTINY v REPUBLIC [2018] eKLR** had this to say on the issue: -

"[11] Although the appellants' 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 petitions 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 effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.

[12] From the foregoing, the learned judge having partly found in favor of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu- Criminal Case No. 181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate."

18. Having confirmed that the applicant did not file an appeal, it therefore follows that the respondent's submissions to that effect has no merit and will therefore proceed to resentence the applicant by way of review of the sentence passed herein by the court on the ground of new matters which were not before the court at the time of sentencing.

19. I have looked at the applicant's mitigation his defence before Riechi J and his account of the circumstances of the offence to the Probation Officer which contradicts his defence before the trial court thereby depicting the same as untrustworthy. From the evidence before the trial court, it is the applicant who hit PW1 with the motor bike while she was standing, scratched her face with the key and stabbed her with a knife, before stabbing the deceased who came to her rescue.

20. The attack on both the deceased and PW1 which was confirmed through the P3 form and the post-mortem report were uncalled for. Whereas the applicant has submitted that a term sentence for a period of 15years would be appropriate, in the circumstances of this case, having noted that in addition to the death of the deceased, the same caused grievous bodily harm to PW1 calls for a stiffer sentence so as to act as a deterrence.

21. I am therefore of the considered view that whereas the death sentence passed by the court was harsh, a sentence of imprisonment for a period of 30 years with effect from 7th June, 2016 when he first appeared before this court would be an appropriate sentence to act as deterrence to would be offenders.

22. I therefore allow the application herein and review the death sentence passed against the accused and substitute the same with an imprisonment term of 30 years from the date when the accused first appeared before this court taking into account the provision of Section 333(3) of the Criminal Procedure Code.

23. And it is ordered.

DATED SIGNED AND DELIVERED AT LODWAR THIS 6TH DAY OF JULY, 2021.

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J. WAKIAGA

JUDGE