



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL DIVISION**

**HIGH COURT PETITION NO.2 OF 2019**

**(IN THE MATTER OF HIGH COURT CR. CASE NO.32 OF 2003**

**AND COURT OF APPEAL CR.APP. NO.4 OF 2005 AT NYERI)**

**DOMINIC MAINA WANJIRU.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. A brief outline of the case was that the applicant Dominic Maina Wanjiru was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; the particulars of the offence are that on the 7<sup>th</sup> October, 2000 at about 4.00pm [particulars withheld] within Nyeri County the petitioner murdered **RWM** a minor aged seven (7) years; the petitioner had defiled the minor who was rushed to hospital for an emergency operation but developed complications and succumbed to the injuries occasioned from the defilement.

2. The petitioner was convicted and sentenced accordingly for murder on the 24<sup>th</sup> November, 2004 by the High Court at Nyeri; the provisions of Section 204 of the Penal Code imposes a mandatory death sentence for the offence of murder; he appealed to the Court of Appeal against his conviction and sentence but the appeal was dismissed and he had therefore exhausted his appellate process; in the year 2009; the petitioner had his sentence commuted to life imprisonment; having exhausted all the channels of appeal, the Petitioner has now petitioned this Court for resentencing and reduction of sentence under the guidelines made by the Supreme Court in the renowned case of **Francis Karioko Muruatetu vs Republic (2017) eKLR**; in this instant petition the applicant is seeking the following orders;

(i) An order for reduction of the life sentence imposed and the sentence to commence from the date of arrest.

(ii) The Court to take into account the fact that the applicant was a first offender and a model prisoner and has shown remorse for his deeds.

3. At the hearing hereof, the applicant was unrepresented and relied on his written submissions; whereas the respondent was represented by Prosecuting Counsel Ms Gicheha who made oral submissions; hereunder are the parties respective submissions;

**PETITIONERS' CASE**

4. His application was for review of sentence under the guidelines set down in the **Muruatetu** (supra) case; the applicant in his mitigation stated that he was remorseful and regrets his actions; he was twenty three (23) years old when he committed the offence and did not understand the repercussions and ripple effect of his actions; he also sought forgiveness from the family; during the long time spent in prison he has embarked on a journey to re-discover himself by accepting that he made a grievous mistake and has made amendments by enrolling himself in rehabilitation programs where he achieved various grades and certificates; he has also maintained high standards of discipline and he annexed his Certificates of Commendation from the Officer in Charge Nyeri Maximum Security Prison;

5. He prayed that the Court considers his mitigation and awards him a sentence that is fair, just and reasonable and also to take into consideration the time spent in remand as provided under **Section 333(2) of the Criminal Procedure Code**.

**THE RESPONDENTS RESPONSE**

6. In response the respondent called for the preparation of a Probation Report which report was not favorable; counsel for the respondent

submitted that the petitioner had informed the Court that the family of the deceased had reached to him for the purposes of reconciliation; but the report presented to Court stated otherwise; the report indicated that the family were still traumatized by the death of their daughter; the family urged the Court to show no leniency to the petitioner who if released posed a danger not only to his daughters but also to other girls in the community; they were strongly opposed to the re-sentencing and urged the court to retain the current.

7. The respondent stated that the petitioner defiled a seven (7) year old minor and did not sound remorseful as he was not truthful on the issue of an attempted reconciliation meeting; the Probation Report was also not favourable and she also reiterated the fact that the petitioner was not remorseful; the State was opposed to the prayer for the review and reduction of the sentence and stated that he was not deserving of a re-sentencing hearing and should continue serving his current term.

### **ISSUES FOR DETERMINATION**

8. After hearing the rival submissions, this Court has framed only one issue for determination is as follows;

- (i) Whether to review the sentence imposed by the trial court;

### **ANALYSIS**

9. The petitioner herein seeks re-sentencing pursuant to the Supreme Court decision in the **Francis Karioko Muruatetu vs Republic [2017] (supra)** where the mandatory death sentence in capital offences was declared to be unconstitutional; persons so convicted were at liberty and entitled to petition the trial court for re-sentencing; in line with the decision the trial court has the mandate to grant alternate sentences after taking into consideration the aggravating and mitigating factors.

10. The petitioner was tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; the particulars of the offence are that on the 7<sup>th</sup> October, 2000 at about 4.00pm [particulars withheld] within Nyeri County the petitioner murdered **RWM** a minor aged seven (7) years; the petitioner had defiled the minor who was rushed to hospital for an emergency operation but developed complications and succumbed to the injuries occasioned from the defilement; upon conviction he was sentenced to the mandatory death sentence which was later commuted to a life sentence.

11. The petitioner now seeks for a less severe sentence and urged the Court to consider the circumstances surrounding the offence which do not warrant a death sentence or a life sentence; he submitted that he was youthful when he committed the offence and that he was remorseful and had now reformed to be a good citizen; but the state was opposed to the prayer for re-sentencing as the crime committed was heinous and the family of the deceased minor had not healed and had not yet forgiven the petitioner; the state submitted that the petitioner was not truthful about his pursuit of reconciliation with the deceased's family as he had never reached out to the family which demonstrated that he was unrepentant and unremorseful;

12. Sentencing is a mandate left to the Court's discretion; in the case of; **Fatuma Hassan Sato vs Republic [2006] eKLR**; the court made the following observation;

*'Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judiciously. The trial court must be guided by evidence and sound legal principles. It must take account of all relevant factors and exclude external factors...'*

13. In resentencing, the relevant factors which must be carefully taken into consideration are the facts of the case, the gravity of the offence, the mitigating and aggravating factors and the scars the incidence left on the victims' family; the guidelines with regard to the mitigating factors are well enumerated in the **Muruatetu** case (supra); the applicable mitigating factors being the age of the offender; character and conduct of the offender and whether he was a first offender; commission of the offence in response to gender based violence; the remorsefulness of the offender; and the possibility of reform and social re-adaptation of the offender.

14. The mitigating factors in the instant case are that the offender was aged twenty-three (23) years and relatively young at the time of commission of the offence; he was a first offender.

15. However, the aggravating circumstances surrounding the commission of the offence in this case are that: the offender defiled a seven (7) year old who succumbed to the injuries occasioned from the defilement and this was indeed a grossly heinous and degrading offence; the Probation Officers Report was not favourable and it did not make recommendations on the reduction of his sentence and sought that it be retained; it also made no mention of the petitioner ever having sought forgiveness from the victim's family nor had he made any attempts towards reconciliation with them; and that the petitioner was therefore not truthful in his submissions on reconciliation.

16. This Court has taken into consideration the circumstances surrounding the offence and that the Petitioner is young and remorseful; it also clear from a perusal of the annexures that he has undergone courses that have assisted in rehabilitation and is now a model prisoner. Given the circumstances of the case, this Court is satisfied that the petitioner's application for a review of his sentence has merit and finds that he is deserving of a reduction on his sentence but undeserving of a non-custodial sentence.

17. The petitioner also urged the Court to consider the provisions of **Section 333(2) of the Criminal Procedure Code** and take into consideration the time spent in custody; indeed, the Court record reflects that the trial court failed to pronounce itself on this issue; at the hearing hereof the state did not address this issue as it was opposed to the reduction and had prayed for the retention of sentence; in the circumstances the application is unchallenged and the petitioner is found to be deserving of the benefits of **Section 333(2) of the Criminal Procedure Code**.

**FINDINGS AND DETERMINATION**

18. For the foregoing reasons, this Court makes the following findings and determinations;

- (i) This Court finds that the petition has merit and it is hereby allowed;
- (ii) The life sentence imposed is hereby set aside and substituted with a custodial sentence for a term of forty (45) years;
- (iii) The period spent in remand be deducted from the sentence.

Orders accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021.**

**HON. A. MSHILA**

**JUDGE**