

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISC. CRIMINAL APPLICATION NO. 90 OF 2018

BENJAMIN SITOT LOMKERENG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, **Benjamin Sitot Lomkereng**, was convicted of the charge of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The trial court found as a fact that the prosecution had established to the required standard of proof that on 15th December 2004 at Sustin village in West Pokot County, the Applicant murdered **Maria Tuliaren**. The Applicant was sentenced to death. The Applicant's appeal to the Court of Appeal was dismissed. The Court of Appeal had this to say in its judgment.

“ 14. We have also no doubt that the appellant had malice aforethought to murder the deceased. PW1, PW2 and PW3 testified that the deceased had left the appellant's home at about two months prior to the incident of 15th December 2004. The Appellant visited the deceased's parents' home several times, the last visit being 14th December 2004, apparently to persuade the deceased to return to their matrimonial home. Although he did not talk to the deceased on 14th December, 2004, this intention is clear from the testimony of his mother-in law, PW1, whom he told on that day that his quarrels with the deceased were on minor things.

15. Although motive is not an ingredient of any crime – Joseph Wambirwa Mwanthi – Vs - Republic Criminal Appeal No. 63 of 2005 (CA Nyeri), we find that the appellant had a motive for assaulting the deceased. She had deserted him for about two months and rebutted his attempts at reconciliation.

16. By shooting the deceased in the abdomen and cutting her with a panga on the neck and head, the appellant intended to cause grievous bodily harm to the deceased, if not kill her. We are therefore satisfied that the appellant had malice aforethought as defined under Section 206 of the Penal Code.

Consequently, we concur with the learned trial Judge that, with malice aforethought, the appellant killed the deceased. We accordingly find no merit with this appeal and hereby dismiss it in its entirety”.

That would have been the end of the matter but for the window opened by the Supreme Court's decision of **Francis Kerioko Muruatetu – Vs – Republic [2017] eKLR** which declared mandatory death sentences unconstitutional as it deprived the accused the right to offer his mitigation before sentence. The court further held that such sentences denied the court the opportunity to exercising its sentencing discretion in appropriate and deserving cases.

The Applicant told the court that he had been in lawful custody since 14th December 2004. He regretted the decision that led him to kill his wife. He pleaded with the court to give him a second chance at life. During the period of his incarceration, he had undertaken various courses including biblical and health education that has enable him to be a better person. He told the court that he had reformed and learnt his lesson. He was ready to return back to the society.

Mr Omooria for the State opposed the application. He submitted that the heinous manner in which the Applicant committed the crime precludes the court from favourably considering the Applicant's plea for resentencing. He was of the considered view that the Applicant should serve a minimum custodial sentence of forty (40) years should the court exercise its discretion in his favour.

This court has carefully considered the submission made by the parties to this application. Among the considerations that this court is required to take into account on re-sentencing are, the severity of the offence that the Applicant committed, the mitigation of the Applicant and finally the length of time that the Applicant has served in lawful custody.

In the present application, the Applicant pleaded with the court to consider the length of time that he has been in prison. He told the court that during the period of his incarceration, he had reformed. He had learnt that crime does not pay. He regrets the folly of his decision that led to the commission of the crime. It was clear to the court that the Applicant made that decision to terminate the deceased's life when it became apparent that she had made up her mind to end the relationship with him. The Applicant could not stomach this fact hence the heinous crime. This court, although convinced that indeed the Applicant has reformed during the period of his incarceration, the heinous nature of the crime that he committed preclude the court from granting his request for immediate release.

However, this court does not agree with the prosecution that the crime committed by the Applicant is such that he does not deserve to have his sentence of life imprisonment converted to a term one. In the premises therefore, this court sets aside the sentence of life imprisonment

that the Applicant is currently serving and substitutes it with a sentence of this court sentencing the Applicant to serve thirty (30) years imprisonment with effect from 14th December 2004 when the Applicant was placed in lawful custody. That sentence will meet the ends of justice. It is so ordered.

DATED AT KITALE THIS 9TH DAY OF NOVEMBER, 2021

L. KIMARU

JUDGE