



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 326 OF 2018

AS CONSOLIDATED WITH 561 OF 2018

FELIX KHESHA SAVAYI 1ST APPLICANT

MABEL KAVATI 2ND APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING ON RE-SENTENCING

1. **Felix Khesha Savayi, herein after the 1st Applicant, and Mabel Kavati, herein after the 2nd Applicant,** have brought their respective applications, now consolidated, seeking re-sentencing. The two Applicants, together with another who was acquitted, were tried by this court for one count of murder contrary to **section 203 of the Penal Code**. Both of them were convicted of the offence and sentenced to death as by law prescribed under **section 204 of the Penal Code**.

2. I have considered the submissions by Ms. Soweto in mitigation on behalf of both Applicants, in which she made a passionate plea to the court to exercise mercy and give them both a second chance and a term sentence. Ms. Soweto informed the court that the Applicants filed an appeal to the Court of Appeal which was dismissed, and in which their death penalties were confirmed; and that their sentences of death have since the appeal been commuted to life imprisonment.

3. I have considered the mitigating circumstances given by the counsel for the Applicants. Since most of the information is repeated in the Re-sentencing Report of the Probation Officer, I will only highlight what was not covered in that report. Also, to mention that she referred to Mabel as the 1st Applicant, which was a mistake. However, in my consideration of the submissions on mitigation, I have allotted them the correct positioning.

4. On behalf of the 1st Applicant, Ms. Soweto urged that he was only 27 years old at the time of the offence and has spent 10 years in jail, loosing out on his university course which he was about to conclude, and that for him the consequences of the offence have been severe, and that the lessons have been learnt. Counsel urged that the 1st Applicant had no intentions of causing the death in question and therefore aggravating circumstances were lacking.

5. On behalf of the 2nd Applicant Ms. Soweto urged that she was a first offender and was extremely remorseful for the offence and her role in it. Counsel urged that in light of the courses he has undertaken while in prison, the 1st Applicant is capable of being useful and productive to the community, was capable of rehabilitation in society. She urged that the 1st Applicant had strong family ties that makes it possible for him to reform.

6. The Applicants counsel relied on several authorities showing how courts have assessed the appropriate sentence to give for murder offences, urging that the severity of the sentence depended on the severity of the aggravating circumstances in each case. Cases cited were; **John Kireme Kaibi Vs Rep [2018] e KLR** and **Elizabeth Ayengo Vs Rep [2019] e KLR**. I have considered both cases.

7. Ms. Onunga learned Prosecution Counsel for the State stated that she appreciated that the **Muruatetu** case, supra, has set out guidelines on Re-sentencing of cases to guide courts on same. Regarding this case, the learned prosecution counsel drew the court's attention to the fact an appeal was filed in the matter, and that the Court of Appeal was convinced, as the trial court that the conviction was correct. She also urged the court to consider that the death penalties for both Applicants had been commuted to life imprisonment, and argued that sentence they now faced was well deserved.

8. In response to the cited case of **Syengo**, supra, Counsel urged that the court observed that even where certificates of various trainings had been earned, no one could tell what was in somebody's heart, and that that was a matter between that person and his maker.

9. Ms. Onunga urged that the deceased was murdered through ligature strangulation and gagging in which his mouth was stuffed with nylon papers and masking tape tied and both hands also tied. Counsel urged that those were aggravating circumstances.
10. The court called for a Re-sentencing Report on both Applicants, and both have been filed by the Probation Department. In the Report regarding the 1st Applicant, the court is informed that he is 37 years old, married with one child and was a University student at the time of the incident.
11. The 1st Applicant admits that he was with the 2nd Applicant and another when they murdered the deceased in the case. The Report shows that the 1st Applicant claimed that he met the two accomplices the same day outside the office of the deceased. He claimed that when the deceased ushered them into his office and declined to give them money when they asked him, they hatched the plot to forcefully rob him of money, which they executed it. The Probation Officer was informed by the 1st Applicant that it was the 2nd Applicant who wrapped a masking tape around the deceased mouth. He was shocked later to hear he died.
12. According to the Report of Ms. Mercy Kanyangi, the Probation Officer, the 1st Applicant regrets the incident and the loss of life and seeks a second chance. Information the Officer received from the Prison where the 1st Applicant is incarcerated shows that he has been of good behaviour and has been helpful to other inmates through giving paralegal assistance, is engaged as a teacher in the High School section of prison and is an assistant coach of the rugby team. He is said to have undertaken Skills Training in Welding Grade 111 and Motor Vehicle Mechanics Grade 111, as well as studies in Religion, Leadership and Drug Abuse.
13. The mother of the 1st Applicant was interviewed and she pleaded for mercy for her son. The Victim Impact Statement was obtained from Father Peter Makau in consultation with the Catholic Authority of the Consolata Missionaries Institute of Rome. The fraternity expressed their deep sense of shock and loss as a result of the death of the deceased, whom they said was a mentor to many young up-coming priests and a beacon to many others who sought help from him. The fraternity indicated that they had forgiven the murderers of the priest and had left vengeance to God.
14. Ms. Kanyangi, the Probation Officer did not offer any direct recommendation in this case but urged the court to be guided by the Supreme Court case of **Muruatetu** in reaching its decision, and concluded by stating that she hoped the information provided would help the court dispense with the matter.
15. Ms. Mercy Kanyangi also prepared the Probation Report in respect to the 2nd Applicant. She states that the 2nd Applicant claimed to be 56 years of age, a mother of two married daughters and grandmother of three; a standard 4 school drop-out due to financial constraints; and that she lives positively with the HIV virus.
16. Regarding the offence, the 2nd Applicant admitted to Ms. Kanyangi that she went to the Catholic Consolata Institute of Philosophy with the co- Applicant and another man. That she told her that the second man whose name she had forgotten had promised her that there was a job vacancy and that she should apply for it. She admitted that the three of them entered the office of the deceased, subdued him, tied him up with robes, put polythene and masking tape in his mouth. She said she was not aware that one of the two men with her had stuffed a handkerchief in the deceased mouth. She said that they panicked and tried to flee but that she was caught before she could escape.
17. In regard to the attitude towards the offence, Ms. Kanyangi reported that the 2nd Applicant admitted the offence, acknowledged the serious nature of it and the impact it has had to the family of the deceased and also her own family. She seeks a second chance.
18. Report from the prison given to the Probation Officer indicated that the 2nd Applicant has been of good behaviour and has undertaken courses in Dressmaking, Beadwork, Mat Making and Soap Making; and has also done Theology.
19. As to her family, they are supportive and ready to help her in the re-integration into the community. On the other hand the Consolata Institute where the deceased worked, as well as the Rome Institute to which the Institute is affiliated expressed their great shock and deep sense of loss with the passing of the deceased in such a tragic manner, but indicated they had forgiven his murderers, have moved on and left vengeance to God.
20. Ms. Kanyangi, the Probation Officer did not offer any direct recommendation in this case but urged the court to be guided by the Supreme Court case of **Muruatetu** in reaching its decision, and concluded by stating that she hoped the information provided would help the court dispense with the matter.
21. I have taken into account all the submissions by Ms. Soweto for the Applicants and Ms. Onunga for the State. I have also considered the Report by Ms. Mercy Kanyangi, a Probation Officer. This is a re-sentencing application, and is based on the Supreme Court judgment in **Francis Karioko Muruatetu & another v Republic (2017) eKLR**. That judgment gave jurisdictions to courts to receive applications for re-sentencing by persons who had been convicted of offences with mandatory penalties, and who had been sentenced to mandatory sentences. That gives this court the jurisdiction to re-consider the sentence in this case, which I concluded as a trial court on 2nd October 2010, and passed the death sentence on both Applicants, being a mandatory sentence for murder for which they were convicted. In that case, also cited by Ms. Soweto, the Court had the following to state:

“We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court’s statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for

pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.”

“If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused’s criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of ‘over punishing’ the convict.”

22. I have taken into account the guidelines given in by the Supreme Court directions in the said judgment. [**Francis Kariko Muruatetu and Another versus Republic**] (supra). It is a guiding judgment from the Supreme Court. It guides that the accused mitigation must both be received and considered as ‘it may be heavy with pathos necessitating the Court to consider an aspect of the case that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness’. The justices of the Supreme Court stated that from accused person’s mitigation, the court may understand the pathos on accused part and may be better able to access the appropriate sentence to pass in the case.

23. In this case the Applicants were convicted of causing the death of the deceased. Both do not deny the offence before this court. The circumstances of the case and the manner in which the deceased met his death is critical to consider. The deceased was an old Priest of the Consolata Fraternity. He was serving at the Consolata Institute of Philosophy. He was on his desk working when the Applicants and another entered and attacked him. From his station and office in life, he was a humble man, doing service to humanity. There was no known motive for the murder. What the Applicants had gone to do there was to rob the deceased. For that reason, his death was excessive and extremely unnecessary. Furthermore, he was strangled with a ligature, then gagged to suffocate him to death. That action of ligature strangulation, and in addition gagging is proof the intention was to murder the deceased. The manner of taking his life was degrading, humiliating and painful. It was not necessary to go to that length, even animals are not killed in that manner.

24. I have considered that the Applicants claim that they have learnt their lessons and can be rehabilitated further by reintegration into society. I have considered that both Applicants have benefited from various skill-based courses and other trainings. The 1st Applicant is already utilizing his in prison which is a good thing. The 2nd Applicant should do the same.

25. I have also considered that the Victims in this case have forgiven the Applicants and have moved on.

26. This was a serious offence. The **Muruatetu** case has managed to benefit the Applicants as the court is minded to give them a term sentence. I must still emphasize that no one has the right to take the life of another, whatever the circumstances. Those prevailing in this case reveal cold blooded robbers thirsty to rob but also quick to spill innocent blood, for nothing. The Applicants must understand that the society, and this court looks upon the offence with disdain and extreme displeasure. The society has a right to live peacefully and in safety. This should continue to be learnt by the Applicants.

27. Having taken all these factors into consideration, in re-sentencing, I order as follows:

- a). Each Applicant will now serve an imprisonment term of 30 years.
- b). The imprisonment term should run from the date of sentence in the original trial, which is 22nd October, 2010.

SIGNED AND DELIVERED THIS 3RD DAY OF FEBRUARY, 2020.

LESIT, J

JUDGE.