



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 70 OF 2018**

**NICKSON KIPCHIRCHIR RUTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RE-SENTENCE**

1. The applicant Nickson Kipchirchir Ruto was charged with **Murder Contrary to Section 203 as read with 204 of the Penal Code**. It was alleged that on 31<sup>st</sup> July, 2013 at Banita in Rongai District with Nakuru County he murdered Ronald Kiprono Korir. His trial commenced on 22<sup>nd</sup> October 2015, after a full trial, he was found guilty vide a judgment delivered on 5<sup>th</sup> May, 2017.

2. For the state it was submitted that he was a first offender.

3. The matter was fixed for the applicant's mitigation on 31<sup>st</sup> May 2017. The counsel for the applicant filed and served proceedings in **High Court Criminal Case Number 74 of 2013**.

4. On 25<sup>th</sup> November, 2019, the application came up for hearing Mr. Maragia for the applicant submitted that this was a re-sentencing issue based on Notice of Motion dated 15<sup>th</sup> May, 2018 brought under **Article 22 of the Constitution, and all enabling provisions of the law**. In that Notice of Motion the applicant seeks orders;

***a. THAT this honourable court be pleased to re-open High Court Criminal Case Number 74 of 2013 between the Republic – versus – myself for purposes of offering the accused an opportunity to mitigate for purposes of reduction of the sentence of death imposed upon him.***

On the grounds:

***1. THAT the Supreme Court has held that the death sentence that is not proceeded by mitigation is unlawful.***

***2. THAT the said court directed the High Court to address all matters where death sentence has been imposed and the instant case falls amongst the cases where death sentence was imposed.***

***3. THAT the applicant was sentenced to death upon being convicted for the offence of murder.***

***4. THAT the applicant states that the death sentence was harsh in the circumstance given that there are mitigating circumstances to warrant the reduction of sentence.***

The application is supported by the affidavit of the applicant sworn on 1<sup>st</sup> May, 2018.

He depones:-

***1. THAT I am the applicant herein hence competent to swear this affidavit.***

***2. THAT I do intent to pursue on resentencing over the conviction on death sentence imposed upon me in respect to the offence of Robbery with Violence.***

3. THAT I was charged in Nakuru High Court Criminal Case Number 74 of 2013. I was sentenced to death on the 6<sup>th</sup> day of July 2017.

4. THAT I am duly informed which I verily believe to be correct that the Supreme Court and the Court of Appeal have made recent pronouncements to the effect that in all matters where there is a plea for resentencing can be placed before the trial court.

5. THAT the Supreme Court directed that the Superior Court handles issues that will emanate from the applications of such a nature. By the wholesome reading of the constitution, the High Court is empowered to entertain a constitutional application of the nature that I have placed before this court for consideration.

6. THAT I do have mitigating factors that will alter the death sentence imposed on me at the time of the trial.

7. THAT I now seek that this honourable court do direct that I appear before the Nakuru Chief Magistrate for resentencing.

8. THAT since I have been in custody for all that period of time, it can be a mitigating factor for reduction of my sentence.

9. THAT while in prison I have undergone several trainings and received spiritual nourishment and help and I can say that I am now a reformed and changed man. I would serve the society better if I am so resentenced and my period of stay in custody is lessened.

10. THAT I make this application with a heavy heart and I am very much remorseful for the incident that led to my arrest and subsequent arraignment to court.

5. In mitigation Mr. Maragia for the applicant submitted

?That the applicant was remorseful.

?That he was a first offender.

?That he had been in custody since 31<sup>st</sup> March 2013.

?That he had learnt his lessons and had reformed.

?That he was still a young man expected to earn his living through lawful means and if released he would engage in activities that would help the society.

?That he was a family man.

?That having been in prison for five (5) years the prison had had an impact on him, and that his family and that of the victim had reconciled.

?That their prayer was that the death sentence be quashed.

5. Ms. Nyakira for the Republic submitted that sentencing was the discretion of the court, but that the death sentence was still lawful that the applicant had attacked an unarmed person, hit him with a rungu on the head. That he purported to have been provoked but the court had found that there was malice aforethought she urged the court to consider the family of the deceased.

6. I requested for a pre-sentence report which I have read. Again I am constrained to call out the quality of the report as I am not sure the officer appreciates the weight of the social inquiry report requested from him. It is evident that the report has not been seen by his superiors otherwise they would have noted obvious omissions. For these reasons I find it appropriate to go the extra mile to indicate what I would expect in a pre-sentence report either for an initial sentence or for a resentence like in this case. The principles are the same because at the end, I will mete out a sentence. I request for these reports because I know they are important in providing the court with a window through which I can look and see the likely effect of the orders I will make not only on the offender, the victims and the community/society. That is why the officers mandated to make them must take them seriously and provide accurate information.

7. A pre-sentence report is a product of a social inquiry or investigation 'is a process of generating data and information on a specific subject matter or an offender for the purpose of documenting and understanding the attendant causes of behaviour and events. See the Probation **and After Care Guidelines for Social Investigations and Pre-sentence Reports**<sup>1</sup> (The Guidelines)[1]. Here the purpose of a pre-sentence report is set out

**Pre-sentence reports provide advisory information to the courts with a view to the court making sentencing verdicts, including decisions on alternative measures to imprisonment.**

*The investigations are conducted with the aim of collating verifiable information and for writing various assessment reports including pre-sentence reports.*

In **sentencing decision making**, social investigations help in:

- Formulating plausible theoretical explanations of the criminal behavior of an offender
- Understanding the personality of the offender beyond the crime committed
- Developing a basis for intervention/rehabilitation
- Identifying resources required to effect change Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitation
- Gain knowledge of the culture and resources available in the local communities
- Propose cogent measures necessary to address the identified 'needs' and forestall any risk of reoffending, including through an appropriate sentence.

8. The **Probation of Offenders Act** as amended by **Act Number 18 of 2018** to add the term pre-sentence report gives a definition;

**“Pre-sentence inquiry reports”** means **‘the reports on accused persons or offenders prepared by probation officers under this Act or any other law in force for purposes of criminal justice administration.’**

9. There is no definition of what this “*criminal justice administration.*” My understanding however that is the reports will be used in the criminal justice system, for the administration (management, supervision) of justice. The **Guidelines** provide an idea of what this may entail:

*In the context of pre-sentence investigations, the aim of social inquiries is to produce information that forms the basis for assessing offenders and advising the courts on the suitability for a particular mode of sentence. Specifically, the aim of social investigations in the light of a pre-sentence report is to: (emphasis mine)*

- Appraise the background, personality and conduct of the offenders in the light of the offence committed and what they think of their ill action
- Identify the criminogenic factors at play (the offender’s risk and needs factors)
- Evaluate the seriousness of the offence and the impact on victims in order to determine a proportionate sanction
- Identify the likely impact of a sentence on any dependents (children or any other dependent members of the (extended) family)
- Engage families, employers, partnership organizations and significant others in the community about the offender

10. The Guidelines also contain a format for the pre-sentence report to assist the officer to capture every requisite detail. It gives guidelines on the **method of inquiry**, on **sources of information** and **data** etc., and what to look for in filling out the various sections including sections on **personal details** and **background information**, **case details**, other details, **victim information** and **views, recommendations**, etc. I note that the report placed before me does not adhere to that format, hence the gaps.

11. In my view a resentence is no different from an initial sentence and these requirements apply in equal measure. The orders the sentencing court may make may result in the applicant being released back to society sooner than expected. Keeping in mind that for most of these resentencing cases the applicants had been convicted for capital offences and were not expected back in their communities, the importance of implementing these Guidelines together with the **Sentencing Policy Guidelines** on the principles of sentencing, cannot be over emphasized.

12. Nevertheless, one can see an apparent limitation that is placed on the scope of the presentence report by placing it under **Section 4** of the **Probation of Offenders Act** which speaks of “*power of court to permit conditional release of offenders.*” The pre-sentence report is then mentioned there under **Section (5) (6) and (8)** only in relation to the making of a **probation order**. At Section:

**5 ..... before making a probation order.**

**6..... court considers making a probation order.**

**8. A pre-sentence report shall include a recommendation of a suitable period of supervision, rehabilitation programs and any measures to reduce risk of re-offending. The maximum period of a probation order is three (3) years and so is the community service order.**

13. However **Section 8** appears to open it up with a provision for recommendations on supervision, rehabilitation programs and measures to reduce re offending.

14. For an offender like the applicant herein who has committed a capital offence, and who seeks re-sentencing under the **Francis Karioko Muruatetu** case to any other sentence, the pre-sentence report for a person seeking a re-sentencing ought to also appear to understand the weight of the issue at hand.

16. The applicant here was convicted of murder and sentenced to death. That requires more than a report containing information gathered only from the person seeking review. I say this because there is no evidence in the report before me that other than the applicant any other person mentioned in the report was interviewed. Not a single contact, even that of the local administrators said to have been interviewed was provided.

17. It is also noteworthy the report has no victim impact statement/ views of the victim. The statement that there was an alleged reconciliation meeting held only a day before the report was filed is not supported by any evidence. Who attended the meeting? It appears tailored to support the applicant's position that the two families are already speaking on reconciliation. If that was the case, then it would not have happened just the day before the report was filed.

18. The widow of the deceased and the children and other relatives defined as victims by the **Victims Protection Act** were not interviewed. The report tells me that the widow who was aggrieved for the loss of the family's sole bread winner 'left the matter to the extended clan'. In the same breathe it tells me 'the issue of translocation of the inmate has been considered to avoid further traumatizing of the victim widow and his children'. The report further tells me that 'the two families wish to go the traditional way for reconciliation and have already initiated talks between them whereby the inmate will participate in cleansing rituals to a void situation of double tragedy'. And on that note the officer proceeds to recommend a probation sentence.

19. It is evident from the report that there are **serious outstanding unresolved issues** that would require action either before a probation order is made or if after the order that would **require action during the sentence**. The report has **no recommendations** on what the Probation and After Care Department or the specific officer will do about these issues if the offender was to be released on probation. That is a clear requirement of **Section 8 of the Act**.

20. It is my further considered view, that with the changes brought by the **Muruatetu** decision, there is need for the that the pre-sentence report for re-sentencing take into consideration the **other statutes and guidelines** that do exist including the Guidelines, relevant Constitutional provisions, the **Probation of Offenders Act, Community Service Orders Act, the Victim Protection Act**, and the considerations set out by the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017]** Case at **paragraph 71**.

**“[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.”**

21. A pre-sentence report in these circumstances is not like a Probation Officer's Report (POR), Community Service Officer's Report (CSOR) which are also pre-sentence reports. Each of these is specific to specific sentence, suitability for a probation sentence, or community service order. While both require a **social inquiry** to be conducted, it is clear that they are expected to address the issue whether the offender is suitable for that specific order and the appropriate recommendations. In my view, a pre-sentence report for re-sentencing is not just about views on a **non-custodial sentence** but in the overall on the suitability of any sentence including the sentence the offender is already serving.

22. Clearly the pre-sentence report for a re-sentencing must be different from the Probation Officers Officer and the CSOR, but it requires a different approach. The offender is already convicted of a serious offence. He may have been in prison for a very long time. The offence may have grave impact on the victims and society. The community, the victims may not have expected that he or she will get another shot at the sentence. Hence, where like in this case the officer recommends a probation sentence then he must adhere section **8. A pre-sentence report shall include a recommendation of a suitable period of supervision, rehabilitation programs and any measures to reduce risk of re-offending.**

24. In addition I am constrained to point out the need for the Department to ensure the court has a way of knowing that the report it is

receiving is genuine. Just having the Court of Arms logo alone does not identify the report as emanating from the Probation and Aftercare Services Department, neither does one name and initials of the author. The report that was filed in this case has neither a reference number nor the office stamp. Basically the report I have before me falls far short of the expectation and requirements of the case. I cannot rely on it. It is necessary that Probation and After Care Services Department to deal with these issues.

26. Coming back to the petition, the record shows that after the Judgment was delivered, the trial judge set aside a date for mitigation. For some reason either inadvertently or conveniently those proceedings were left out. I therefore do not know what was said in mitigation before the trial Judge.

27. However the circumstances of the offence are described in the Judgment – that the applicant hit the deceased with a rungu on the head. After the deceased fell down bleeding the applicant threw a plastic chair at him but missed, it hit a post and broke. The deceased was taken to hospital and treated but died later. The cause of death was head injury with skull fracture following blunt trauma. The court was of the view that the accused in hitting the deceased *‘intended to kill or at the very least to cause grievous harm to the deceased’*,

**Does the applicant deserve a re sentence?**

27. I have considered both the mitigating and the aggravating factors. The applicant is remorseful, he was a first offender, and he is 34 years old. He has been in custody since August 2013. The aggravating factors are that the deceased was unarmed. The applicant hit him with the rungu and threw a chair at him with the intention of, in the very least causing grievous harm. Though brutal it is not what one would consider a vicious attack.

There is now a raft of jurisprudence where the death sentence has in appropriate cases been substituted with a sentence of 30 years in prison. Hence, I would set aside the sentence of death and substitute it with imprisonment for 20 years with effect from the date he was 1<sup>st</sup> held in custody.

30. Taking into consideration the issues I have raised herein on the Pre-sentence report, I direct that the Deputy Registrar, High Court of Kenya at Nakuru to serve this Ruling on the Director, Probation and After Care Services, and the Regional and County Directors Nakuru for necessary action.

**Delivered, Dated and Signed at Nakuru this 9<sup>th</sup> Day of April 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of:-

Edna Court Assistant

Accused Present

Ms. Mburu for state

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[\[1\]](#)

These Guidelines have been revised in 2017 within the project ‘Working towards gender-sensitive community service and probation orders in Kenya’, jointly implemented by the Kenya Probation and Aftercare Service (KPAS) and Penal Reform International (PRI), with funding from the Thailand Institute of Justice (TIJ).