



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO. 420 OF 2018

LESITT, J

ERNEST ASAMI BWIRE ABONGA Alias ONYANGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal for Re-sentencing from the original conviction and sentence by Hon. Mr. Justice Osiemo dated 20th March, 1990 in High Court Criminal Case No. 27 of 1989)

RULING ON RE-SENTENCING

1. The Applicant, **ERNEST ASAMI BWIRE ABONGA** alias **ONYANGO** was found guilty and convicted of one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code** by J. O. A. Osiemo Judge (now retired). He was sentenced to death on 20th March 1990.

2. He filed his appeal to the Court of Appeal, which appeal was dismissed on 2nd March 2001, and the conviction and sentence by the High Court upheld.

3. The Applicant's death sentence was commuted to life imprisonment by the President. He is therefore currently serving a life sentence.

4. The Applicant filed a Chamber Summons application on 20th July 2018 in which he seeks the following orders:

1. That, this application be certified urgent and be heard expeditiously.

2. That, the Hon. Court be pleased to allow a retrial for resentencing to conform with Supreme Court directives in Petition No. 15 of 2015 (as consolidated with Petition No. 16 of 2015).

3. That, this Hon. Court be pleased to make determination that it is within the petitioner's constitutional right under article 22 of the Constitution 2010 to institute this proceeding.

4. That, the court be pleased to give breath to life Sections 216 and 329 of the Criminal Procedure Code in capital cases.

5. Any such other orders that the court may deem fair and just.

5. The application is premised on five grounds cited on the face of the application namely:

1. That, the provision of the constitution, other written laws and regulation thereto did not contemplate sentencing of death without consideration of the accused mitigation as held by the decision in the Supreme Court of Kenya, Petition No. 15 of 2015 (as consolidated with Petition No. 16 of 2015) – Francis Karioko Muruatetu.

2. That, the court be pleased to observe violation of Article 47 and 48 of the Constitution.

3. That, in the interest of justice this court be pleased to allow petition and considering the prolonged period the petitioner had been in the incarceration allow the petition.

4. That, it is in the interest of justice that this application be granted as prayed herein.

5. That the petitioner wishes to be present during the hearing of the petition.

6. The application is further supported by an affidavit sworn by the Applicant which re-states the content of the grounds cited on the face of the application, which I have considered.

7. Mr. Mwesigwa and Ms. Kikanu appeared for the Applicant and highlighted submissions filed in support of the application. Mr. Momanyi learned Prosecution Counsel appeared for the State and also made submissions opposing the application. I considered the submissions by both parties.

8. This application is premised on the Supreme Court Guidelines set out in the case of **Francis Muruatetu and another Vs Rep.** Supreme Court Petition No. 15 of 2015. Mr. Mwesigwa urged that there was only one issue for determination whether the Applicant should be granted the prayer sought. Counsel proceeded to set out the reasons why the Applicant is deserving of the orders sought, giving what can be considered as mitigating circumstances. He urged that the Applicant was 20 years of age at the time of the incident, was a first offender, and has since served a period of 31 years in prison. He urged that the Applicant was remorseful and had learnt his lesson. He has also undertaken several courses and attained certificates which could assist him seek employment. The certificates are annexed and I have noted them.

9. When the court asked the Applicant's counsels to answer the issue of pathos as directed in the Supreme Court guidelines relied on, Ms. Kikanu urged that the Applicant was a refugee from Uganda and that at the time he had escaped political heat there, and had joined the family of his victim who were looking after him. With respect, that submission did not answer to pathos.

10. Mr. Momanyi for the State urged that the Applicant was taken up as a child of the victim's family and treated as a son. He urged that he abused that privileged position by walking away with the deceased who he murdered and then proceeded to seek for ransom of huge sums of money. He was eventually found by the police, and the body of the deceased found in the house where he was living. Counsel urged that to date the reason for his action has never been known.

11. I called for a Probation Report and one was filed by Ayuma Otukho. I commend the Probation Officer who prepared it. It is quite exhaustive and included interviews of the most important persons, the family of the victim, the Ugandan Consulate and family of the Applicant. I have considered the Report. I noted that the family of the victim still hurt and have grieved over the victim's death to date especially because they have been at a loss to understand why the Applicant murdered their 10 years old kin. Some appear ready to hear the Applicant seek forgiveness from them. His family is also ready to receive him and provide for him.

12. The Applicant bases his application on the **Muruatetu** case, *supra* in which the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down **section 204** of the **Penal Code** to the extent that it prescribed mandatory death sentence upon conviction for murder.

13. I need not say much about the application of the **Muruatetu case**, *supra*, to this case as it is no longer a novel point. It has been decided time and again in many superior courts that where the court passing sentence was bound by a mandatory sentence and where it went ahead to pass it, that such case can rightly be re-considered for Re-sentencing.

14. In **paragraph 69** of the **Muruatetu case**, *supra*, the Supreme Court delivered itself thus:

“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.”

15. I have considered the guiding judgment of **Muruatetu**, *supra* where the Supreme Court sets out the guidelines for re-hearing of sentence where mitigation was not considered at the trial. The guidelines are as follows:

“As a consequence of this decision, paragraph 6.4-6.7 of the guideline are no longer available. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in rehearing 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 offense 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.

The guidelines are advisory and not mandatory. They do not take away judicial discretion.”

16. I have considered that the Applicant was 22 years old or so when he committed this offence and was a first offender. He has been in custody for the last 31 years. The Probation gave a positive report about him which is contained in the Probation Report. The Prison officials said that he was a leader of the Academy at the Prison and also a spiritual leader. The motive for the murder has not been explained, even in this case. I asked the Applicant's counsels to explain the pathos, and none of them was able.

17. Having considered all the above, I find that indeed this court has jurisdiction to entertain the application based on the decision of the Supreme Court on **Muruatetu**, supra. The Applicant has given his mitigating factors. The circumstances of the case were really bad. The Applicant paid back evil to a family that had carried him in his most challenging time, as a son of the home. His action continues to baffle the family of the deceased. They are still mystified by what he did, are confounded and bamboozled. I advise him to give them deference and pay them a reconciliatory visit or visits under the supervision of the Probation Department.

18. I think that for the person of his age at the time of this offence, 31 years is long enough to pay for his sins, save of course before his maker, who will deal with him as He sees fit, and for which no man has a say.

19. In the result, the Applicant's application is allowed. I set aside the life imprisonment which was imposed against him when his death penalty was commuted to life. I order that the Applicant be set at liberty unless otherwise lawfully held. He will however be under the supervision of the Probation Office for a period of 12 months during which period they should oversee a reconciliatory meeting with the remaining members of the family of the deceased, and ensure he is fully re-integrated into society.

20. Those are my orders.

DELIVERED THROUGH TEAMS AT NAIROBI THIS 14th DAY OF JULY 2020.

LESIT, J.

JUDGE