



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION CASE NO. 24 OF 2020

LESIIIT, J

JOSEPH MWANGI MAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. The Applicant, **JOSEPH MWANGI MAINA** was charged before the High Court Nairobi Criminal Division, Criminal Case No. 60 of 2008 with one count of **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The Applicant was convicted by this court (Lesiit, Judge) on 21st April 2011, following a full trial. He was sentenced to death.

2. The Applicant filed an appeal before the Court of Appeal, being Criminal Appeal No. 81 of 2011 in which he challenged both the conviction and sentence. That appeal was heard by Nambuye, Kiage and J. Mohamed and dismissed in its entirety on 27th September 2013.

3. The Applicant has now filed a Chamber Summons application before this court dated filed on 24th June 2020. The application is brought under **Section 169 (1) of Criminal Procedure Code** as read with **Sections 216 and 329 of the Criminal Procedure Code; Articles 22 (1), 23(1), 25(a), (c), (d); 27; 50; 165(3) of the Constitution 2010 and section 296(2) of the Penal Code**. It seeks the following orders.

- 1) **That this application be certified urgent and be heard expeditiously.**
- 2) **That this court has jurisdiction to hear and determine this application.**
- 3) **That the decision of criminal case No. 60 of 2008 at the High Court at Nairobi was null and void as my mitigation (within the meaning of sections 216 and 329 of the CPC) was not considered.**
- 4) **That this matter is fit for re-sentencing in the High Court at Nairobi.**
- 5) **That the honourable court be pleased to issue any such further orders, directions and/or reliefs it may deem fit and expedient in the circumstances of this application.**

4. The Applicant cites four grounds upon which the application is premised, which are set out on the face of the chamber summons. In summary the Applicant relies on grounds:

- (1) That decision of the High Court is pending before the Court of Appeal.
- (2) That mandatory death sentence was unconstitutional in light of the Supreme Court decision in **Petition No. 15 of 2015** between **Francis Muruatetu and another versus Republic**.
- (3) That unless the rehearing on sentence takes place, his right to a factual under Article 25(c) of the Constitution and Article 50(2) (c) will be violated.
- (4) That court is in best interest for the application to be heard and determined expeditiously.

5. The only relevant ground the Applicant can rely upon is the one cited as number 3. The Applicant has set out, under ground number 2 what appears to be submissions. He relies on a Kwa Zulu Natal High Court Ruling, **S. Vs. Mchunu and another (AR 24/2011) (2012) ZAKZPHC 6** for the proposition that sentencing is the one that vests discretion on the court to determine what is fair and appropriate sentence should be.

6. The Applicant relies on a Kenyan case **Bernard Mwenga Wilson Vs. Rep. (2016)Eklr.**, where the court of appeal set aside a sentence of death and substituted it with that of 15 years imprisonment for a murder of the deceased caused by 23 stab wounds inflicted on him by the Appellant I that appeal.

7. Mr. Mutuma learned Prosecution Counsel for the State urged the court to dismiss the application for re-sentencing. Counsel urged that the Applicant stabbed the deceased on the back, piercing his lung and liver leading to massive bleeding which resulted on the deceased death. He urged that Applicant's appeal to the Court of Appeal was dismissed. Counsel urged the court to consider the circumstances of the murder and find that the 12 years the Applicant has been in custody is too short for what he did.

8. I called for a Probation Officer's Report which has been filed. In that report is a record of the Applicant's attitude to the offence. It shows that the Applicant is remorseful for causing the deceased death, blaming it on his excessive abuse of alcohol which prior to the incident caused him episodes of black outs. He expressed his wish to seek the forgiveness of the mother of the deceased. It is also show that the Applicant has undergone various courses while serving sentence.

9. There is also a record of the reaction to the application for re-sentencing of the Applicant by the mother of the deceased. To her, the deceased was her only child and the only hope she had of being taken care of in old age. She expressed her deep feelings of loose, and the manner in which it affected her, causing health issues including depression and high blood pressure which she still grapples with to date. She was opposed to the Applicant's sentence review.

10. The family of the Applicant, especially his father who has kept contact with him, the local community and the local administration were not opposed to sentence review.

11. I have taken into account all the submissions by the Applicant, both oral and written, the very comprehensive report by the Probation Officer, together with the facts and circumstances of the case.

12. The Applicant's mitigation is included in his oral submission before this court, and also in the Probation Officer's report. The Applicant stated that he was 24 years old when he committed the offence. He has been in custody for a total of 12 years now. He said that he had a wife and one child then. He said that he had undertaken various courses, and that currently he was a student of CPA, K via distant learning. He pleaded for a non- custodial sentence.

13. I have taken into account the mitigation of the Applicant. I am impressed that he is remorseful for what he did. His alcohol abuse led him to that place where he caused the death of the deceased, and only child of his mother. The pain the mother of the deceased felt then seems to still be alive in her heart. It also affected her severely, leading to serious health issues. It is a serious matter, especially because the Applicant's actions are a direct result of the choices he has made, and the path he has chosen in life, which is to abuse alcohol to the point of blacking out.

14. A period of 12 years from time he was arraigned in court is a long period. However, in order for him to learn the lessons he is now experiencing with impact, he should spend more time in jail. He should count himself lucky that the Supreme court opened a window for the re-consideration of sentence.

15. Having taken into consideration all these factors, and all the reports and materials presented before me, I find that the most appropriate sentence for the Applicant is to serve 20 years' imprisonment from the date he was arraigned before this court for the instant charge. For avoidance of doubt, he was arraigned in court on the 25th June, 2008.

16. Those are the orders of this court.

DATED, SIGNED AND DELIVERED THROUGH TEAMS THIS 9TH DAY OF NOVEMBER, 2020

LESIT, J

JUDGE

In the presence of

Mr. Kinyua.....Court Assistant

MS. Kibathi.....For the State

Applicant in person present

LESIT, J

JUDGE