REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION 80 OF 2018

BENSON WAIGANJO NGECHE.....1st APPLICANT

JAMES IRUNGU MUTHINI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. On the night of 31/01/2001, the two Applicants, James Irungu Muthini (1st Applicant) and Benson Waiganjo Ngeche (2nd Applicant) attended a Christian crusade at Kabazi Shopping Centre. The aim (for the church, at least) was to usher in the New Year – but, as happens in many such events in the village, it became a meeting place for young people in the village.

2. It was while at this meeting that the two Applicants made a fateful and dreadful decision that would shatter their lives forever and end the life of another human being. By all accounts given by the various witnesses and recorded in the Trial Court record, it was the 1st Applicant who began the altercation. It seems that he had a bone to pick with the Deceased. The 1st Applicant called the Deceased aside. The next thing the Deceased's friends knew, the Deceased was lying on the ground nursing several stab wounds and at least one blunt object injury to the skull. A few minutes later, the Deceased breathed his last. But not before disclosing to his friends who his assailants were. It was the dying declarations of the Deceased to several people that persuaded the Learned Justice Kimaru that the two Accused Persons were guilty of the offence of murder.

3. In a judgment dated 31/08/2006, Justice Kimaru delivered his verdict convicting the two Applicants of the murder of the Deceased. He also pronounced the death sentence on the two Accused Persons as the law then mandated.

4. Fortunately for the two Accused Persons, the law has now changed. The Supreme Court, in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, 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.

5. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

> *As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*
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> *I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

6. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

7. When the matter came up for hearing, the 1st Applicant pleaded with the Court to substitute the death sentence with a prison term. He confessed that he was involved in the killing of the Deceased. He was drunk, he said; his intention was not to kill but he was fueled by alcohol. He sought forgiveness. He told the Court that he has a mother and one child and that if given a second chance he will do his best to take care of them. He further told the Court that he was quite youthful when he committed the offence (he was 31 years old) and that he is now fully reformed; that he has "met" Jesus in Prison and given his life to Him. Finally, in a bid to demonstrate his capacity to live a crime-free life, the 1st Applicant produced copies of certificates showing he has attained Grade 1 in upholstery and carpentry from NITA.

8. The 2nd Applicant's supplications were much in the same vein. He also prayed for a term prison. In his words, he was "young and stupid." He was also drunk, he said. He pleaded for forgiveness. He sought to be associated with everything the 1st Applicant had said. He also produced evidence that he had attained Grade 1 upholstery and mechanics while in prison mechanics. He has a wife and 3 children and hoped that he can be given an opportunity to rejoin them.

9. Due to the circumstances in which the offence was committed and the time served in custody, I requested for Probation Reports for the two Applicants. The two Reports are quite favourable to the Applicants. Though both reports note that the family of the victim still has an acute sense of grievance – 18 years later – the Reports paint a picture of two young men who made a horrible mistake in the prime of their youth but who are otherwise capable of rehabilitation. The community is ready to re-admit them to civil society.

10. I have carefully considered the circumstances under which the offence was committed in this case. There is no doubt that the two Applicants are guilty of murder by virtue of the doctrine of joint enterprise. They both participated in the attack that resulted in the death of the victim. However, the circumstances do not show any intricate planning for the murder. Though vicious, the attack does not reflect any degree of depravity or cold-hearted cruelty towards the victim. Apart from the necessary element of murder (an intention to grievously harm the Deceased), there are no aggravating circumstances in this case.

11. On the other hand, the circumstances suggest many extenuating circumstances. They include the express remorse expressed by the Applicants which I believe is sincere; the fact that they were first offenders; the fact that they had diminished cognitive capacity due to intoxication; the fact that they have demonstrated that they have reformed while in prison; and the fact that their communities have shown an interest in re-integrating them into the society hence reducing the probability of re-offending.

12. With all these in mind, I have come to the conclusion that the eighteen (18) or so years the two Applicants have been in custody is sufficient custodial sentence. No more sentencing objective would be served by their continued incarceration in the circumstances of this case. I therefore adopt the two Probation Reports filed and follow their recommendations. The final disposition, therefore, will be the following:

> **a. The death sentence imposed on 31/08/2006 is hereby set aside. In its place, a sentence equal to the time the two Applicants have been in custody is imposed.**
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> **b. In addition, the two Applicants are further sentenced to two years of probation commencing today.**
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> **c. Consequently, the two Applicants shall be released from Prison unless otherwise lawfully held for them to start serving their probation sentence.**

13. Orders accordingly.

Dated and delivered at Nakuru this 7th day of March, 2019

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JOEL NGUGI

JUDGE