



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT MISC. APPLICATION CASE NO. 337 OF 2013

LESIT, J

RAJESH CHOTALLAH SHAH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCE

1. The Applicant **RAJESH CHOTALLAH SHAH** was convicted by this court and sentenced to suffer death on 9th December 2009.
2. The Applicant filed an appeal to the Court of Appeal. On the 31st July 2012 the appeal was dismissed and the death penalty confirmed.
3. The applicant further urged the court to exercise its discretionary powers to give a favorable sentence considering the list of mitigating factors he set out including that he was a foreigner.
4. In addition the applicant urged the court to consider the guidelines set in the Supreme Court decision of **Francis Kariko Muruatetu & another Versus Republic and Others, PETITION NO. 15 & 16**, as consolidated is binding authority to the circumstances where mitigation before sentence was never taken, or where it was taken and never considered.
5. The Supreme Court in the **Muruatetu** case, supra sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at

promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it”.

6. The situation in this case fits the analysis in **Muruatetu case**, supra. The requirement is to consider which sentence to pass after taking into consideration, inter alia:

- (a) Applicant’s mitigation.
- (b) The period the Applicant has spent in custody as prescribed under **section 333(2)** of the **Criminal Procedure Code**.
- (c) Any other information available which is relevant to the case including victim Impact Statement.

7. I considered the mitigation given by the Applicant, he also urged the court to consider that he has undergone LLB course and if released he will undertake to help others.

8. Mr. Otieno for the Responded submitted that two lives were lost and urged court to consider the **Muruatetu Case**, which is a new jurisprudence in this matter.

9. Before passing Re-sentence in this case, I called for and received a Re-Sentencing Report from Probation. Mr. Ntulele a Probation Officer filed one dated 5th February 2019. It is quite elaborate. It contains reactions from the family of the accused.

10. The Report gives Applicant’s personal history, attitude towards the offence, Rehabilitation he has gone through while in prison and his future plans

11. There is Victim Impact Statement from family members. Many years after the event the family is still apprehensive about their security in the likelihood of the applicant release. Their fear is evident to the extent they did not want to be interviewed or quoted to have provided any information to the Probation Officer. They requested that in the event of the Applicant being released from prison he should be given conditions not to interfere or go near any family member.

12. The Probation Officer interviewed the British High Commission representative and included their view in this report. They stated that they have been offering social support to the Applicant, which support enabled the Applicant acquire a Law degree. They also stated that in the event the Applicant is released from prison they will link him up with a non-government organization in the UK that focuses on re-integration of ex-prisoners, which includes provision of temporal accommodation and support to get a job.

13. I have noted that the Applicant admits having organized and to have his father and step-mother murdered. There were two deceased persons in this case. He acknowledges it was a mistake and says that he regrets his actions.

14. I have considered that the Applicant was arraigned in court on 18th July 2008. During that time bond was not considered for capital offenders. He therefore remained in custody from that time until the case was concluded on 9th December 2009. That was a period of 1 year and 4 months.

15. I have considered that the Applicant has been in prison since July 2008 to-date, a period of 10 years and 9 months. In total therefore the Applicant has been in prison for the last 10 years and 9 months.

16. Having taken all the above stated factors and circumstances of the case. I considered the Victim Impact Statements, who are Applicant’s close kin. Except the sister, the rest of the family was not convinced that the Applicant could be relied upon or believed that he had changed. They expressed fear for their life.

17. In all I find that an imprisonment term is still the appropriate sentence to impose in this case, but not for life as per the Presidential pardon in which his death penalty was commuted to life. Consequently, I order that the Applicant should now serve a period of 20 years imprisonment from the date of arraignment in court on 18th July, 2008.

18. Those are the orders of this court.

DATED AT NAIROBI THIS 7TH MARCH, 2019

LESIIT, J

JUDGE