REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 350 OF 2015

JAMES NGUGI NJOKI.....APPLICANT.
VERSUS

REPUBLIC.....RESPONDENT.

RULING

1. The Applicant, vide an application dated 4th December, 2017, moved this court under **Article 50(6)(a) of the Constitution**. The Article provides that a person who is convicted of an offence may petition the High Court for a new trial if his appeal has been dismissed by the highest and he did not appeal within the prescribed time and if there is new and compelling evidence that has since become available.

2. In the instant case, none of the scenarios obtains, as at the hearing the Applicant submitted that he was to be heard on resentencing following the decision of the Supreme Court in the case of **Francis Muruatetu and another v Republic [2017] eKLR**.. In that case, the Court declared mandatory death sentence unconstitutional as it denied a trial court to exercise its discretion in sentencing. Following this decision, majority cases that were concluded before it have reverted to the respective trial courts for rehearing on sentencing. This is one instant case.

3. The Applicant was convicted of murder contrary to **Section 203 as read with Section 204 of the Penal Code** in a judgment delivered by Honorable Ombija,J dated 3rd August, 2006. The particulars were that on 14th of September 2001 at Limuru Town in Kiambu County murdered Joan Mbaika Kithome. He was convicted and sentenced to suffer death. He exhausted avenues for his appeal as the Court of Appeal upheld his conviction. He sought for a rehearing of the sentence.

4. In an application of this nature, the Applicant is expected to offer mitigating factors that would influence the court to substitute the death sentence with a lesser sentence. In his submission, he urged the court to consider the period that he had been in custody totaling to 17 years 7 months. Further that he was remorseful and admitted that he did commit the offence. He also urged the court to observe that the community was ready and willing to receive him. In support of this he further asked the court to find that he was reformed and had gained support skills in leather works that would enable him to fend for himself.

5. The Respondent urged the court to order for a Probation Officer's Report. The report was meant to focus on the views of the victim's family. The same was prepared and filed on the 2nd of April, 2019. The report shows that the family victim was bitter with the fact that the Applicant had made no effort to reconcile with them. It also states that the family was convinced that the murder was premeditated and not a mistake as alleged. They however urge the court to give a just ruling stating that they will abide by it.

6. Before the court were two aunts of the Applicant who orally indicated their willingness to accept the Applicant back to the family and take care of him as the Applicant's mother lived and worked in the United Kingdom. They were both sisters of the Applicant's mother.

7. This is a matter for rehearing of the mitigation for the purpose of resentencing. In the case of **Francis Kariokor Muruatetu and Another V Republic [2017] eKLR** the Supreme Court highlighted factors a court should consider in an application of this nature, namely;

i. Age of the offender;

ii. The remorsefulness of the offender; and

iii. Being a first offender.

8. The Applicant is aged 46 years old. By simple calculation, it is clear that he was 28 years old when he was arrested. It is no doubt that he has spent years of his prime age in prison. The period of about 18 years spent in custody is by no stretch of imagination a long time. His age is certainly advanced in this respect.

9. The Applicant expressed his remorsefulness. He stated he regretted what he did and is determined to never have it happen again. It is certain from this that, he admitted committing the offence notwithstanding that this is no longer a consideration at this point. It is however unfortunate that the accused made no effort to reach out to the victim's family to seek forgiveness and reconciliation. It is important to note at this point that remorsefulness must be accompanied by some form of action. This action must be geared towards remedying or in the least bit dulling the effects of the Applicant's wrongs. It is unfortunate that he did not. All the same, it is certain that he has reformed having engaged in various programs while in prison towards self-development.

10. The **Muruatetu case** further empowered courts to consider any other factor that would inform its decision in resentencing. As such, I find that the limb of justice that requires restoration is important to this end. The Applicant and his family appear unwilling to seek forgiveness from the victim's family that is still reeling from the loss of their kin. It is evident that they only pray for justice. It is difficult to conclude that they have healed from the wounds of loss of a loved one. However, I find that the fact of the Applicant's lack of effort to reach out to the family victims is difficult to ignore, more so taking into account that both the deceased and the Applicant were known to be close friends.

11. Against the above backdrop, the plea for resentencing will be determined bearing the considerations in totality. There is no doubt as attested by the Probation Officer's Report that the family of the deceased is still bitter with the loss of a loved one. Indeed, the circumstances are that the Applicant claims remorsefulness because of the instant application. Hence, the finding by the probation officer that this family took issue with the long period that the Applicant took to seek reconciliation with the deceased's family. The court in reviewing the sentence cannot overlook this fact.

12. It is not merely a question that the Applicant is acceptable to his family once released but that on the other hand the court should empathize with the deceased's family who think justice should be served. It is my view that justice in the circumstances demand that the Applicant serves sufficient time in jail; a period that should be seen to be fair and a deterrence measure.

13. In the upshot, I set aside the life imprisonment and substitute it with 25 years imprisonment. The period of 17years 7 months so far spent in custody shall be considered to constitute part of the jail term. It is so ordered.

DATED and DELIVERED this 9th day of April, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant present in person.

2. Momanyi for the State/Respondent.