



**REPUBLIC OF KENYA**

**AT THE HIGH COURT IN NAIROBI**

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL 231 OF 2018**

DANIEL KALUKI GACHANA.....1<sup>ST</sup> APPLICANT

GACHO NJOROGE.....2<sup>ND</sup> APPLICANT

SIMON NG'ANG'A.....3<sup>RD</sup> APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

**Background**

1. The Applicants have approached this court seeking to be resentenced pursuant to the Supreme Court decision in the case of **Francis Kariokor Muruatetu v Republic [2017] eKLR**. They were convicted of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The brief facts of the case were that there arose a dispute regarding leadership of Kihiumwiri farm in Thika District. The registrar of companies had ordered elections and a new leadership was in place. The deceased was the then former chairperson ousted in those elections began to rally for yet another change of leadership. Proponents of the current leadership, including the Applicants attacked and lynched the deceased at a bus stop near the farm on 27<sup>th</sup> August 2000 at 9.00 am. They were each sentenced to suffer death. This was however was commuted to life imprisonment in 2009.
2. The court ordered a pre-sentencing report in respect of each of the Applicants. The officer filed the report with respect to the first Applicant on the 23<sup>rd</sup> of July 2019. The reports with respect to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant were filed on the 24<sup>th</sup> of July 2019.
3. **Daniel Kaluki Gichana** was described as being remorseful for the offence. He is age fifty-six (56) years. It was his view that the offence was committed due to the tension between rival groups seeking leadership. His family is eager to assist him back on his feet. The prison authorities touted him as being a well-behaved person who was responsible. He had also attained qualifications in tailoring in grades I-III. He submitted copies of the certificates to demonstrate the same.
4. **Gacho Njoroge** was described as a seventy-two (72) year old disabled having lost a left hand in a factory accident. He was remorseful that the offence was committed stating that it was occasioned by the leadership wrangles. The prison authorities stated that the applicant was of favorable conduct and behavior. His family, two sons and one daughter spoke well of him and were ready to participate in his reintegration back to the community. It was recommended that the Applicant be released on supervision and guidance.
5. **Simon Nganga** aged fifty (50) years. He was described as being remorseful for the offence. He regrets that it was committed. He appreciates that he has since been rehabilitated in prison. His family spoke well of him. They stated that he was brought up well. His aunt who raised him stated that should he be released, she would live with him.
6. The victim interviewed was the late Benson Ngumi's wife. Her sentiments were that she was yet to heal. It was her wish that the Applicants continue to be incarcerated. She also raised the suspicion that she suspected the Applicants had a hand in the recent and mysterious disappearance of her son.
7. The Applicants' involvement in the commission of the crime was damning. It was the testimonies of PW1 and PW3 that they all cut the deceased up with assorted weapons. The 1<sup>st</sup> Applicant, Daniel Kaluki Gichana, used a slasher to strike the deceased on the upper neck, the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant joined in the attack and cut him with pangas.

## Mitigation

8. It was the mitigation of the 1<sup>st</sup> Applicant that he was admitting to committing the offence. He submitted that he was remorseful and sought forgiveness for the same. He stated that with the qualifications he had acquired he would use them gainfully and also invest in training others. He urged this court to consider the authorities of **Nelson Mwiti and 2 other v Republic Petition no.47 of 2018, Justus Sila Kyuli v Republic Miscellaneous Criminal Application no. 41 of 2018, Rashesh Chhotalal Shah v Republic Miscellaneous Criminal Application no. 337 of 2013 and Ahmad A. Mohammed and Another v Republic Criminal Appeal no. 135 of 2016.**

9. In the case of **Nelson Mwiti and 2 other v Republic Petition no.47 of 2018** the High Court sitting at Meru resented the Applicants to each serve 25 years' imprisonment. This was guided by the fact that the murder of Stella Kinya was vicious, displayed meticulous planning and murderous intent. It was the Pathologist's report that there were multiple injuries spanning the deceased's entire body indicating a beating but the cause of death was strangulation. The sentence was balanced against the time already served.

10. In **Justus Sila Kyuli v Republic Miscellaneous Criminal Application no. 41 of 2018**, the High Court sitting at Machakos released the Applicant who had served nineteen (19) years imprisonment. The court found that the Applicant lured the deceased out for a friendly stroll only to turn around and stab him. It appeared that he had planned to commit the offence. This was balanced against the fact that he was a first offender, that he had undergone rehabilitation and the time served.

11. In **Rashesh Chhotalal Shah v Republic Miscellaneous Criminal Application no. 337 of 2013**, the High Court sitting at Nairobi resented the Applicant to twenty (20) years. The Applicant was convicted of murdering his father and step-mother. The court balanced the Applicant's remorsefulness and the community's willingness to receive him back. She also urged the Applicant to reconcile with his family.

12. It was the submission of the 2<sup>nd</sup> Applicant that he is aged having been arrested when he was aged fifty-three (53) years. Secondly, he had acquired various life skills. He attached an Alternative to Violence Project participation certificate and two (2) bible study and fellowship certificates. He also asked the court to grant him an opportunity to reunite with his family. Lastly, he urged the court to exercise its jurisdiction to mete out a lenient sentence.

13. The 3<sup>rd</sup> Applicant mitigated against a harsh sentence. It was his submission that he needed the family of the deceased and the Nation. He submitted to the court that he had reformed and had gained skills. Lastly, he asked the court to consider the period he had been incarcerated prior to conviction and sentencing. He also produced certificates to show that he had received training in first aid, carpentry and upholstery and a recommendation letter from the prison authorities indicating that he was of good behavior.

14. The Respondent was represented by learned State Counsel, Mr. Momanyi. He submitted that though there was not opposed to the application the circumstances of the offence ought to be borne in mind. He narrated the brief facts of the case. It was his view that the court be mindful that the family of the deceased is still aggrieved.

## Determination

15. The sentencing policy guidelines provide for sentencing objectives that a court ought to consider in sentencing. They are to rehabilitate, protect the community, serve the victims plea for justice, denounce the actions of the offender, punish the offender and deter the offender. They guide the court in arriving at an appropriate sentence.

16. The Supreme Court in **Muruatetu v Republic (supra)** urged that in resentencing, a court should consider:

- a. The age of the Applicant;
- b. Being a first offender;
- c. Remorsefulness;
- d. The possibility of reform and social re-adaptation of the offender; and
- e. Any other factor that the court will consider relevant.

17. In this case, the Applicants committed the murder unprovoked. There was also a clear intention to kill the deceased. The assault appears to have been repeated and only ceased once the Applicants were satisfied that they had killed him, leaving his family without a father and husband. This bitter end has neither been forgiven nor forgotten by the deceased's wife. I however note that the deceased's wife assertion that the Applicants were responsible for the disappearance of his son was unsubstantiated and cannot be a basis for determining the appropriate sentence in this application.

18. I consider that the Applicants' conduct should be denounced, that the community should be protected from such rogue elements and that the family of the victim needs to be satisfied that justice is served.

19. On the other hand, I am conscious of the Applicants' mitigation and the presentencing reports filed in respect of each individual Applicant. I find that they all plead for leniency and seem to have undergone rehabilitation. This rehabilitation is evidenced by the certificates and recommendation letters by prison authorities. I put a rider that training in skills should not be substituted for a punishment well deserved. It cannot also be assumed that since an offender has attained life support skills that can mitigate against a slide back to crime, the court should solely consider this as a factor for release. The ultimate consideration is that the objectives of a sentence should be met.

These are then weighed against the mitigation and the circumstances of the case.

20. This is a case where the killing of the deceased was motivated by narrow selfish interests. The death of the deceased on the other hand has created wounds in his family which wounds are still raw to date. It then means that if the Applicants are released right away, the victim's family will feel that justice has not been served. Weighing all these circumstances therefore, I consider a sentence of twenty five years as appropriate. The same starts to run from 10<sup>th</sup> May, 2004 when they took plea.

**Dated at Nairobi this 13<sup>th</sup> day of November, 2019.**

**HON. G.W.NGENYE-MACHARIA**

**JUDGE.**

**Delivered at Nairobi This 13<sup>th</sup> day of November, 2019.**

**HON. L. KIMARU**

**JUDGE.**

**In the presence of:**

1. 1<sup>st</sup> Applicant in person.
2. 2<sup>nd</sup> Applicant in person.
3. 3<sup>rd</sup> Applicant in person.
4. .... for the Respondent.