REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 711 OF 2018

BERNARD NJENGA MBUGUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, Bernard Njenga Mbugau, has brought an application under certificate of urgency seeking the intervention of the court in hearing the applicant on mitigation and re-sentence him pursuant to ***Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another [2017] eKLR*** (**Muruatetu case**) The prosecution raised a Preliminary Objection that this court lacks jurisdiction to handle this application because the court became ***functus officio*** upon pronouncing itself in High Court Criminal Case No. 25 of 2014 where the applicant was found guilty for murder and sentenced to death. This court dismissed the Preliminary Objection and directed that this application ought to proceed to hearing on merit.

In view of my ruling following the Preliminary Objection counsel for the applicant Mr. Michuki decided to mitigate on behalf of the applicant arguing that the ruling of the court had dealt with the issues that this application raises. To put this matter into perspective, the Supreme Court in Muruatetu case declared the mandatory nature of the death sentence prescribed under Section 204 of the Penal Code unconstitutional. The Court sent the petitioners in that case to the trial court for mitigation and re-sentencing and directed that the decision of that court only applied to the two petitioners. The Court directed that existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of their petitions. The Court directed the Attorney General to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence similar to that of the petitioners in the case before that court.

The framework is not in place. However guided by the Kisumu Court of Appeal decision ***William Okungu Kittiny v. Republic [2018] eKLR*** existing and intending petitioners can now apply before the court that heard their matter for sentence re-hearing. This opened the doors for applicants to come to court seeking similar orders as those sought in this case.

The applicant was found guilty of murder by this court in its judgment delivered on 13th December 2017. He was sentenced to death on the same date. The applicant was just one day early from benefitting from the Muruatetu decision that was delivered the following day on 14th December 2017.

Before sentencing the accused this court took into account the circumstances under which the accused committed the offence of murder. The victim was an infant aged four months. He was the father of the infant. He smashed the infant on the floor causing fatal injuries to the head. This court had considered that the differences the applicant had with his wife, the mother of the infant, should not have led to the actions of the applicant in killing an innocent infant. From the court file records, the only thing this court did not do before sentencing the applicant was to take into account his mitigation. He mitigated through his counsel at the time, Mrs. Omungála learned counsel. The reason was that at the time the court did not have discretion in sentencing the applicant because of the mandatory nature of section 204 of the Penal Code that prescribed death as the only sentence for murder. With Muruatetu decision, this court is now bequeathed with such discretion. But Muruatetu decision is not the panacea to all the applicants who have been sentenced to death. Death sentence still remains in our statutes as a penalty for certain offences including murder. The Supreme Court decision of Muruetetu gave applicants a chance to mitigate and have their mitigation considered by the court before sentencing. Death sentence remains the maximum sentence in offences that attract it as a penalty and deserving cases depending on the circumstances still attract death sentence.

The applicant claimed that he had dropped the baby when trying to avoid a piece of timber thrown at him by Josephine an aunt to Linda the baby's mother. This court dismissed that defence as untrue going by the evidence of those who were present. The court found that the applicant had smashed the baby on the ground. The applicant's actions cannot be excused.

In his mitigation before sentencing on 13th December 2017 the applicant told the court that he was remorseful. He has repeated the same in his mitigation in the course of hearing this application. The applicant had, on 13th December 2017, informed the court that he was asthmatic and was under medication. He has repeated the same in his current mitigation. He told the court that he has reformed and has attained skills that will assist him to fend for himself if this court were to sentence him to a non-custodial sentence. I have considered his mitigation. The only new matter in his mitigation is the skills the applicant claims to have attained while serving sentence. The rest of the matter he is raising now were also raised during mitigation before sentence. I have also considered the pre-sentencing report. The family of the applicant are supportive of him but the family of Linda the mother of the deceased are still hurting. I have considered the submission by the prosecution in opposition to the application. The prosecution counsel asked this court to sentence the applicant to 50 years in jail.

I have considered the mitigation by the accused and the decision in Muruatetu. I have considered that the accused has served 2 years waiting for the sentence to be executed, it at all. I have considered the horrid manner in which the applicant acted in smashing the infant on the floor. This shows mercilessness on his part. It shows a parent who has no consideration to the life of his own infant, his own flesh and blood. How horrifying his actions were. In my view the applicant does not deserve mercy from this court. Definitely a non-custodial sentence is not appropriate given the circumstances under which the deceased infant died. I will however give the applicant some little consideration and

reprieve. In so doing I am aware that he states that he is asthmatic. His condition seems to be contained and managed well in prison. I will therefore, and do hereby, reverse the death sentence and re-sentence the applicant to a term of 20 years in jail from 13th December 2017. Orders shall issue accordingly.

Dated, signed and delivered this 9th day of December 2019.

S. N. Mutuku

Judge