REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CRIMINAL APPLICATION NO. 144 OF 2018

DANIEL MUTUKU MUTHAMA …….…… APPLICANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT

1. On 18/12/2009, the Applicant herein, Daniel Muthuku Muthama, was convicted of the murder of John Ndiritu Gakuru (Deceased). The Applicant had been charged with the same offence contrary to section 203 as read with section 204 of the Penal Code. The murder took place on the 23rd December, 2006 at Ngorika Trading Centre in Olkalau Division of Nyandarua District in the then Rift Valley Province.

2. The evidence accepted by the High Court and affirmed by the Court of Appeal, and which the Applicant now accepts as correct and accurate showed that the Applicant was a corporal in the Administration Police and was attached to Ngorika Chief's camp as the Officer in charge of the camp.

3. On 23/12/2006, the Applicant went to Kenfolt Bar in Ngorika township at around 11:00pm. He had a gun hanging on his shoulder. He beckoned the Deceased to follow him outside. The Deceased obliged. As soon as the Deceased stepped outside, the other patrons at the bar, heard gun shots outside. Pandemonium broke out. The shooting continued even inside the bar. When the shooting finally stopped, the Deceased was found lying on his back at the door of the bar. He was dead. Blood was oozing from his chest. Several other patrons were also shot on various parts of their bodies.

4. During the trial, it was established beyond reasonable doubt that the Applicant was the person who fired the shots that killed the Deceased and injured the six other people. He admits as much in his present application.

5. Though the Applicant was lawfully sentenced to death as the law stood at the time, he was given a lifeline by the 2017 decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In the ***Muruatetu Case***, the Supreme Court 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.

6. 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.

*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.*

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

8. In essence, the Applicant seeks the substitution of the death penalty he received with a prison term. To determine the merit of the Application, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicant himself.

9. In urging his Application, the Applicant sought for forgiveness. He said that he had been robbed and was told that that the robber was in that bar – but he should have known better and sent other Police Officers to the scene. He said he was ashamed of what he did and sought a second chance to go back to the society to "serve his country and family." He said that he is now fairly advanced in age, at 55 years old and that he had learnt a lot in Prison. He said that he was fully reformed. He produced a letter signed by the Officer-in-Charge, Naivasha Prison which talks about his good character in Prison. He also produced no less than ten certificates from various institutions on theological and divinity studies undertaken by correspondence.

10. Ms Nyakira, the State Prosecutor, in her submissions largely left it to the Court's discretion but pointed out that six people were injured in addition to the death of the Deceased.

11. I am called upon to consider both the both the aggravating and extenuating circumstances. The death penalty should be reserved only for the worst form and most vicious of homicides. There was no evidence here that the robbery was committed in a particularly heinous, cruel or depraved manner to attract the death sentence. I have formed the opinion that the circumstances here, then, do no call for the death penalty.

12. So what term of imprisonment is appropriate in this case? There is evidence here that the Applicant is remorseful; is a first offender; and has been rehabilitated. On the other hand, several aspects make the circumstances here are quite disturbing: First, the Applicant was a Police Officer who was charged with the responsibility to protect citizens but used the weapon given for that purpose to kill and maim instead. Second, the Applicant used a deadly weapon to commit the crime. Third, the Applicant maimed six other people in his murderous spree. Fourth, the Applicant's violent actions were completely gratuitous; there was no evidence whatsoever that anyone resisted yet he kept shooting.

13. **In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Applicant in this case. In its place, I will impose a sentence of thirty (30) years imprisonment commencing on 18/01/2007 – the date the Applicant was first arraigned in Court.**

14. Orders accordingly.

Dated and delivered at Nakuru this 5th day of December, 2019

JOEL NGUGI

JUDGE