REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO.137 OF 2018

JOHN KIMANI NGECHU .....APPLICANT

VERSUS

REPUBLIC .....STATE

JUDGMENT

1. John Kimani Ngechu (hereinafter referred to as the "Applicant"), was charged and convicted with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence state that on unknown date between the months of May and August, 2006 at Ndoroto Village in Naivasha District, within Rift Valley Province he murdered Peter Gitao Ngechu ("Deceased").

2. The prosecution relied on evidence by thirteen (13) witnesses who adduced evidence in support of the charge against the Applicant. The evidence showed that the Applicant murdered the Deceased, who was his brother, and then buried his body on a shallow bed in his house. The body remained there for more than a year as the family kept looking for the Deceased.

3. The evidence further showed that the motive for the killing was a feud over land which the siblings had inherited from their father: the Applicant wanted to sell part of the land while the Deceased objected to any such sale. Indeed, a break in the search for the Deceased occurred when the Appellant was attempting to sell land belonging to the Deceased. The mother to the Appellant learnt of this and tried to stop the sale. The Appellant threatened her with harm using a panga. The mother reported the matter to the Police and the Appellant was arrested. It was while he was in custody that an intense search for the Deceased was carried out which led to the discovery of the body in the shallow grave in the Appellant's house.

4. Based on the evidence adduced, the Learned Trial Judge convicted the Appellant and sentenced him to death. The Court of Appeal affirmed both the conviction and sentence.

5. The Applicant was given a lifeline by the recent 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.
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> 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 accepted that he committed the offence but that he killed his brother without premeditation. He submitted that he panicked and buried him after killing him accidentally. He said that he is now a changed person. He sought for redemption and a second chance. He claimed that he had changed. He said that if he gets an opportunity to go out of prison, he will dedicate his life to God and to teach people about the hazards of lying and greed for material property.

10. The Applicant also submitted that he was a first offender and is advanced in age at 65 years old. He has 3 children. He also said that he has reformed greatly in Prison. He produced a letter of recommendation from the Officer in Charge of Naivasha Prison. The recommendation letter says that the Applicant has taken full advantage of the rehabilitation programs offered by Prison and is of good conduct. He has trained and achieved Grade II in Welder-electric and Grade II in masonry. The Prison Officer feels that the Applicant has obtained skills to enable him to earn a living after release.

11. Ms Nyakira, the State Prosecutor, in her submissions told the Court to recall that because of the Appellant's actions, the family looked for the brother for up to one year. She also pointed out that from the mother's evidence, which was accepted by the Trial Court, the Appellant was a habitual and violent drunk. Ms. Nyakira thought that the Appellant was not remorseful because he did not own up to this and instead kept blaming the Deceased as the violent and drunk one.

12. 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. The circumstances here, then, do no call for the death penalty.

13. 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, the Applicant's post-offence conduct is extremely disturbing and forms as serious an aggravating circumstance as one can imagine. The Applicant's offensive conduct did not stop at the homicide of his brother. He proceeded to dig a shallow grave in his own house and buried him there. He then cheated the other family members that the Deceased had left for Eldoret. For one year, the family was looking for the Deceased. Fully aware of what had transpired, the Applicant kept silent. Each day, as he entered and exited his house, he came to face with the fact that he had killed his brother and buried his body in his house. Each night, as he slept on the bed in the room, he became aware that his brother lay in the grave beneath the bed. None of these moved the Applicant to do say something. This conduct should attracts severe opprobrium and denunciation from the society. It is deviant to the extreme. The society can only respond to it by way of severe sentence.

14. 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 27/03/2007 – the date the Applicant was first arraigned in Court.

15. Orders accordingly.

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

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JOEL NGUGI

JUDGE