IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU JJ.A.)

CRIMINAL APPEAL NO. E042 OF 2020

BETWEEN

DIANA NANJALA WESONGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Muchemi, J.) dated 20th January, 2010

in

HCCRC No. 27 of 2006)

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JUDGMENT OF THE COURT

1. The appellant Diana Nanjala Wesonga was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code in the High Court of Kenya at Bungoma in HCCR Case No 27 of 2006. It was alleged that on the 18th/19th day of July 2006 at Butunde village, Namwaja Sub-Location in Bungoma District, murdered Samuel Wafula

Wesonga.

2. She pleaded not guilty to the charge and the case proceeded to trial. In the impugned judgment dated 20th January, *2010 (F. Muchemi J.)* convicted the appellant of the charged offence and sentenced her to death.
3. She is now before this Court on appeal which is against sentence only. The main ground of appeal is that the trial court erred in failing to grant her an opportunity to mitigate and in imposing a mandatory sentence which is harsh and excessive in the circumstances.
4. At the plenary hearing, Mr. Bagada, learned counsel was present for the appellant while Ms. Mwaniki learned Assistant Director of Public prosecution counsel appeared for the respondent.
5. It was submitted for the appellant that before her sentencing, she was not given an opportunity to mitigate. That in as much as the failure to mitigate does not affect conviction it would have affected the sentence meted now that the appellant has been in custody for a period of over 18 years and at the time of arrest, she was young. Relying on the case of ***Francis Karioko Muruatetu & another vs. Republic*** ***[2017]***

eKLR, the appellant

contends that had the appellant mitigated her sentence, she could have benefited from a severe sentence.

6. In rebuttal, the respondent contended that the appellant was given an opportunity to mitigate but chose not to do so. After the defence's unsworn statement, counsel opted to file written submissions, which were duly considered during judgment and sentencing. The trial court evaluated the evidence on both actus reus and mens rea, applied the principles in Muruatetu, and exercised its discretion lawfully.
7. It is further submitted that the allegation that the court ignored the appellant's age is unfounded as an age-assessment report placed her at 25 years, and she was represented by counsel throughout the trial. The court considered all evidence, including her defence, before entering a guilty verdict and imposing a death sentence, demonstrating that relevant mitigating factors were taken into account.
8. This being a first appeal, the Court is obligated to consider the evidence presented before the trial court and arrive at its own independent conclusions. However, the Court must remain

conscious of the fact that, unlike the trial court, it did not have

the benefit of hearing and observing the witnesses testify in order to gauge their demeanor. In this regard, this Court in ***Dickson Mwangi Munene & another vs. Republic [2014] eKLR*** stated:

> ***"This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."***

9. Having carefully considered the record, the submissions by counsel, the authorities cited, and the law, the singular ground of this appeal is the severity of the sentence imposed upon the appellant and the allegations of failure to mitigate.

10. It is argued by the appellant that she was sentenced without a sentence hearing. Section 323 of the Criminal Procedure Code provides that:

> ***"If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the***

validity of the proceedings".

11. It is at this point that an accused person is allowed to mitigate. The critical role of mitigation was recognized by the Supreme Court in ***Muruatetu & Another vs. R [supra] eKLR*** where the Court expressed itself as follows:

> ***"(42) Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:***
> ***'The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.***
> ***Section 329 of the Criminal Procedure Code provides:***
> ***The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.***
> ***(43) Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."***

12. Similarly, in ***Henry Katap Kipkeu vs. Republic [2009]***

KECA 294 (KLR) 29 May 2009 the Court held that;

"Before we conclude this judgment we must say something about the manner the learned Judge dealt with the sentence. We note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person before sentencing him/her. This obtains even in the cases where death penalty is mandatory and the reasons for this requirement are clear. Some of the reasons are first that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as that of manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing the sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for consideration of clemency. Thirdly, matters such as age, pregnancy in cases of women convicts, may well affect the sentence. It is thus necessary that mitigating factors be recorded even in capital offences. In John Muoki Mbatha v R. – Criminal Appeal No. 72 of 2007 (unreported) this Court stated:-"As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the

main judgment. Sentencing should be reserved and be pronounced only after the Court

receives mitigating circumstances if any are offered.' "In conclusion, we are of the view that apart from the error in sentencing the appellant in the main judgment we decipher no other error on the part of the learned Judge. He was right in convicting the appellant since, as we have already stated, the appellant's conviction was inevitable as it was based on very sound evidence. We agree with Mr. Omuletema that this appeal ought to be dismissed."

13. In the instant appeal, it is evident that the appellant was not given a chance to mitigate before she was sentenced. As the Supreme Court stated in the above case, mitigation should be taken as it does inform or affect the sentence. Further, the trial court should receive the mitigation from the accused person.

14. In this appeal, the judgment dated 20th January 2010 includes the sentence. Sentencing occurs after a conviction, and when there is a formal judgment on record, sentencing must follow. An accused person has the right to be heard in mitigation, even in cases with mandatory minimum sentences or the death penalty. In this appeal, the appellant should have been allowed to mitigate before the sentence was pronounced, which was an error on the part of the trial Court.

15. Finally, the appellants challenged the mandatory death

sentence imposed on them by the trial court. In the case of ***Francis***

***Karioko Muruatetu & Another vs. Republic* (*supra*)**, the Supreme Court held that the mandatory nature of the death sentence under Section 204 of the Penal Code was unconstitutional as it deprives the court of discretion in sentencing. This opened the way for the trial courts to exercise judicial discretion to impose any other appropriate sentence apart from death. Would this shift the ground and warrant sending the appellant back to the trial court for resentencing? We think not, for two reasons; the death sentence is still a legal sentence; and given the effluxion of time and the heavy workload in the High Court, such a move in this instance will only result in further delay; and cause injustice to the appellant.

16. Indeed, death still remains the ultimate sentence in appropriate cases such as where the crime is premeditated and extremely heinous. By the appellant strangling and killing her 7-year-old stepson in a brutal and premeditated manner and throwing his body in a sugar plantation qualifies as an extreme case warranting the harshest possible sentence. In light of the circumstances of this case, the nature of the

crime, and the aggravating factors, and considering the decisions of this Court

post the **Muruatetu** case, the majority of which have imposed definite prison terms in murder cases, a prison term of 20 years will be adequate punishment. This sentence will be served with effect from 19th July 2006, which was the date of arrest. To that extent the appeal partially succeeds on sentence.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR