



**Nyambura & 3 others v Republic (Criminal Appeal 98 of 2021)  
[2024] KECA 595 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 595 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 98 OF 2021  
A ALI-ARONI, PO KIAGE & LA ACHODE, JJA  
MAY 24, 2024**

**BETWEEN**

**ELLENAH NYAMBURA ..... 1<sup>ST</sup> APPELLANT  
PERIS NJERI BUNDI ..... 2<sup>ND</sup> APPELLANT  
GEOFFREY NJUGUNA ..... 3<sup>RD</sup> APPELLANT  
KENNETH MURIITHI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the Judgment of the High Court of Kenya at Nairobi  
(F. Ochieng, J.) dated 28th January 2016 in HCCR. No. 84 of 2009)*

**JUDGMENT**

1. The four appellants, Ellenah Nyambura, Peris Njeri Bundi, Geoffrey Njuguna, and Kenneth Muriithi were charged before the High Court with the offence of murder contrary to Section 203 as read with 204 of the *Penal Code*.
2. The four were accused of having murdered Sheila Wanjiku, a 1-year 8-month-old infant, on the 2<sup>nd</sup> of August, 2009 at Civil Servants Estate, in Kariobangi. The appellants all entered a plea of not guilty and the matter proceeded to hearing where the prosecution called a total of 14 witnesses. At the close of the prosecution case, the appellants were found to have a case to answer and placed on their defence. In the end, the trial judge found all four appellants guilty of the offence, convicted them, and sentenced them to suffer death. On the 20<sup>th</sup> of October, 2016 the President of the Republic of Kenya, commuted the death sentence to a life sentence for each of the appellants.



3. The facts of the case briefly are that the 1<sup>st</sup> appellant and Eunice Nyambura, PW3, the deceased mother, are both married to Peter Kamau Kabati PW2. The 1<sup>st</sup> appellant was not happy with the relationship between PW2 and PW3, as PW3 was initially an employee at a bakery business the 1<sup>st</sup> appellant and PW2 were running. The 1<sup>st</sup> appellant also felt that the PW2 did not love the son they had together as much as he loved the deceased, the child of PW2's union with PW3. This led the 1<sup>st</sup> appellant to hatch a plan to kill Sheila to avenge the suffering and pain she was undergoing. She confided in her friend the 2<sup>nd</sup> appellant, who in turn reached out to the 1<sup>st</sup> appellant's brother; the 3<sup>rd</sup> appellant to help look for assassins. The 3<sup>rd</sup> appellant obliged to the request and roped in the 4<sup>th</sup> appellant and one more person not in court. Indeed, on the fateful day, the 3<sup>rd</sup> appellant traveled with 2 assassins from the village to Nairobi. The three met with the 2<sup>nd</sup> appellant who took them to PW3's house where they brutally butchered the innocent child and stabbed PW1; the house help.
4. In their defence the appellants denied killing the deceased. The 1<sup>st</sup> appellant denied the charge and having written the confession. It was her testimony that though she was not happy that PW2 married, she was on good terms with PW2. The 2<sup>nd</sup> appellant on her part, informed the court that she was PW2's good friend, she denied the offence and denied knowing her co-accused, further, she testified that she was tortured into signing the confession. On his part, the 3<sup>rd</sup> appellant denied the charge and equally stated that he was forced to sign a statement. The 4<sup>th</sup> appellant denied the charge and having given a confession.
5. In arriving at its determination the trial court relied on the evidence of PW1 and PW4, a neighbor, who identified the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> appellants. PW1 identified the 2<sup>nd</sup> appellant as the woman who spoke to her through the window at 9 a.m. on the fateful day pretending to look for PW3, and that 10 minutes before the assassins entered the house. PW1, further testified that she was able to identify the assassins, one of whom had claimed to be PW3's brother as they had stayed in the house for about 20 minutes claiming that PW3 was on the way home, before they turned against her, stabbing her and later stabbing the child. PW4 on the other hand was attracted by the presence of the 2<sup>nd</sup> appellant standing with some people outside PW3's house for some time. It was PW4's evidence that she was able to recognize the appellants as she had observed them for about 10 minutes.
6. As fate would have it all four appellants separately made their confessions, which they were later to retract, which necessitated the trial court to conduct a trial within a trial, where the Court formed the opinion that the confessions were properly taken; the confessions were detailed and the content therein were similar in all material aspects, though separately written. Further, the said confessions corroborated the evidence PW1, PW2, PW3 & PW4 to a large extent, thus admitting them in evidence. Additionally, the trial court found the evidence placed the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> appellants at the scene of crime.
7. The trial court further found as a matter of fact that the 1<sup>st</sup> appellant conceived the idea of eliminating the deceased, enlisted the 3<sup>rd</sup> appellant who is her brother, whose role was to recruit the killers, and that the 2<sup>nd</sup> appellant was to point out the house to the killers.
8. In their memorandum of appeal dated 14<sup>th</sup> March 2016 the appellants sought to challenge both conviction and sentence.

However, in a supplementary memorandum of appeal filed by learned counsel for the appellants, only 2 grounds touching on the sentence were raised namely; that the imposition of a mandatory death sentence upon the appellants was arbitrary and unconstitutional; and that the learned judge erred in law and in fact in failing to exercise his discretion in sentencing. Indeed, at the hearing learned



- counsel Mr. Ashitiba appearing for the appellants informed the Court that he would confine himself to challenging only the sentence.
9. The Court brought to counsel's attention that the death sentence meted out to the appellants had been commuted to life sentence, as he did not seem to know.
  10. Learned counsel for the appellants went ahead to submit that the crime facing the appellants was a crime of passion; that at the time of sentencing, the appellants had been in custody for seven (7) years, that the sentence meted out to the appellants including the life sentence were premised on the notion of the death penalty being a mandatory sentence for the offence of murder. He submitted further, that the appellants ought to be given a definite sentence since life imprisonment equally violates their rights. Counsel contended that all the appellants demonstrated remorse during mitigation; that the 1<sup>st</sup> appellant prayed for a second chance indicating that she had transformed through counseling and was now a counselor to other prisoners.
  11. Mr. Kimanthi learned counsel for the State appeared to have dropped the position in his submissions that this Court cannot entertain an application for resentencing and also seemed not to oppose the proposition of a definite sentence. He proposed that each of the appellants be resentenced to 40 years in prison.
  12. The appeal before us was preferred against both conviction and sentence. It appears that wise counsel prevailed upon the appellants and they conceded to the conviction. What is left is the issue of the sentence which they submit is harsh and excessive in the face of the emerging jurisprudence since the case of *Francis Karioko Muruatetu & Another vs. Republic* [2021] eKLR.
  13. Whether a sentence is legal or not is within our mandate to deal with, this being a first appeal and more so, in our considered view, in the face of the emerging jurisprudence.
  14. In the Muruatetu case(supra) the Supreme Court took the view that the imposition of a mandatory death sentence denied an accused person an opportunity to mitigate yet in other lesser offences an accused person gets an opportunity to mitigate and seek for leniency.
  15. The exact words of the Supreme Court are replicated herein below:
    - “47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
    48. Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”
  16. What it means is that there is value in an accused person being accorded an opportunity to mitigate for purposes of consideration at the point of sentencing and as stated by the Supreme Court in the *Muruatetu Case* (supra) this right is absolute; non-derogable.



17. The above-quoted sentiments of the Supreme Court hold so true in this case. The trial judge (Ochieng, J.) felt handicapped by the provision of the law. Though he appreciated the mitigation and the reform each of the appellants had undergone, nonetheless as he stated he had to comply with the law, which he understood did not allow him to exercise discretion. In his own words, the trial judge expressed himself thus:

“Each of the 4 accused persons has put forth very moving mitigation. Each one prays for a 2<sup>nd</sup> chance in life. I believe them when they say about the major charges which they have undergone when they have been in prison remand. The re-connection they have each had with Theology has definitely made them better persons. It is commendable that they did not spend their time in remain only pitying themselves. They have each learnt useful things. If this court had a discretion in determining the nature and scope of the punishment to be handed down, I would most certainly have given each of the accused person a second chance in life.

..... the law makers have prescribed one and only one sentence for person convicted of the offence of murder. When the court hands down the sentence it is not because they either enjoys it or believes that it is most appropriate, it is only because the law says that that is to be done...”

18. The appellants have called upon this Court in the face of the emerging jurisprudence, to consider their mitigation and though the death sentence was commuted to life, they contend that the life sentence is equally harsh and unjust and urge that we consider a determinate sentence.

19. The Supreme Court at paragraph 50 of the *Muruatetu Case* (supra) stated:

“50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all person enjoy the right to dignity. Failing to allow a Judge discretion to take into consideration the convicts’ mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.”

20. The Supreme Court went further to state that differential culpability can be addressed by allowing discretion on whether to impose a death penalty or not.

21. This Court sitting in Malindi in *Manyeso vs. Republic* [2023] KECA 827 (KLR) held that an indeterminate sentence such as the life imprisonment herein is inhuman treatment and violates the right to dignity under Article 28 of the Constitution.

Similarly, this Court in *Ezekiel Wakhwa Nandwa & Another vs. Republic* [2019] eKLR stated:

“The last issue in this appeal is on sentence, which the respondent concedes. The learned judge sentenced the appellants to death, noting that the death sentence was the only prescribed sentence for the offence of murder. Since then, the Supreme Court has held in *Francis Karioko Muruatetu & Another v. Republic & 4 Others* (supra) that sentencing is a matter for the courts and that a uniform mandatory sentence imposed upon conviction for an offence irrespective of the peculiar circumstances of each case is unconstitutional. Although the appellants presented their mitigation statements, contrary to what their counsel submitted, the learned judge did not consider them because of what she understood



to be the mandatory nature of the sentence. The record shows that the appellants were first offenders with no previous criminal record and that they were remorseful. Taking into account all the circumstances of this case, we dismiss the appeal against conviction in its entirety. We, however, allow the appeal against the sentence and set aside the sentence of death meted out by the trial court. In lieu thereof, we substitute a sentence of 30 years imprisonment with effect from the date of the appellant's arrest..."

22. Consequently, guided by the words of the Supreme Court, and noting the various decisions of this Court, the appeal on sentence succeeds. We set aside the death sentence imposed by the trial court and later commuted to life imprisonment. Taking into account the circumstances of this case, including the time the appellants spent in custody, and the mitigation by the appellants, we substitute the death sentence which was later commuted to life thereof with 30 years' imprisonment from the date of conviction.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

