Andala v Republic (Criminal Appeal 154 of 2016)
[2022] KECA 1036 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1036 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 154 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 23, 2022

BETWEEN

PATRICK SOSIO ANDALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the sentence of the High Court of Kenya at Kakamega (R. N Sitati J) on 26th January 2016 in HCCR No. 12 of 2011))

JUDGMENT

1. In his single ground of appeal set out in the memorandum of appeal dated 18th October 2019, the appellant, Patrick Sosio Andala, asks this Court to review the sentence imposed on him and consider mitigating factors in accordance with the decision of the Supreme Court in *Francis Karioko Muruatetu v Republic* [2017eKLR (Muruatetu 1) in which the Supreme Court declared the mandatory nature of the death sentence for the offence of murder unconstitutional.

2. The appellant was tried and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information against him stated that on the 15th day of December 2010 at around 19.00 hours at Buteheri village, Shiswa sub location, Murhanda location in Kakamega County within Western Province he murdered Antony Musindayi Andala.

3. At the plenary hearing of the appeal, Ms. Namusubo, learned Counsel for the appellant, relied on her written submissions dated 20th November 2019. She confirmed that the appellant was raising only the issue of sentence and submitted that since the mandatory death penalty had been declared unconstitutional, the appellant should be re-sentenced and his mitigation considered. She further submitted that at the time of sentencing, the appellant was not given an opportunity to mitigate. He had been in custody since 2011, was remorseful and has reconciled with the victim's family, which is also his family.

4. Further, he has undergone training as a pastoral leader that would assist him re-enter the society, and had also undertaken a Diploma in Bible Study, Diploma in Bible Correspondence and a Certificate in Resource Oriented Development Initiatives. All this had assisted him to be spiritually rehabilitated and he was focused on bettering his life. He asks this Court to exercise its discretion, review and set aside the death sentence and instead give a term sentence to take effect from the time of arrest in 2010.

5. Learned Counsel for the State, Ms. Mogoa, relied on the respondent's submissions dated 10th March, 2022 in which the respondent supports the conviction, its case being that the conviction was sound as the prosecution proved all the ingredients of murder beyond reasonable doubt. Regarding sentence, Ms. Mogoa submitted that the State was not opposed to the matter being taken back to the High Court for re-sentencing. She noted that the sentence in this matter had been passed before the Supreme Court decision in *Muruatetu 1*.

6. The State submitted, however, that in considering re-sentencing, the Court should bear in mind that even though the appellant has supplied documents to show that he is reformed, he had taken away an innocent life, that of his brother, at the age of 33 years; the intention to kill or cause grievous harm had been established, and the Court should be alive also to the suffering that his family has gone through.

7. We have considered the appellant's appeal, the record of the trial court, and the submissions of Counsel for the parties. We note that upon the conclusion of the trial and the conviction of the appellant on 26th January 2016, his learned Counsel, Mr. Akwala, made a statement in mitigation on his behalf. He informed the trial court that the appellant was 30 years old and a first offender. He was the sole bread winner of his family and was praying for leniency. The trial court considered the mitigation but noted that the appellant had caused a needless death in the family. The court proceeded to sentence him to death, noting that the only penalty provided in law for the offence of murder was the death sentence.

8. We note that in its decision in Muruatetu 1, the Supreme Court found the mandatory nature of the death sentence for the offence of murder to be unconstitutional. It gave guidelines on the exercise of judicial discretion in sentencing for the offence. Among the considerations prescribed by the Supreme Court was the mitigation offered by the accused.

9. In this case, the appellant's Counsel did mitigate on his behalf. The trial court noted the mitigation but found that it had no discretion to mete out a penalty other than the death sentence prescribed under section 204 of the Penal Code. The Supreme Court in *Muruatetu 1* thereafter held that courts have the discretion to consider a different sentence, stating at paragraph 59 of the judgment that:

> "(59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of *the Constitution*."

10. The question, however, is whether the statement made in mitigation by the appellant's Counsel before the trial court is, by and of itself, sufficient to enable us re-sentence the appellant. We believe it is not. This is because the offence was committed by the appellant against a member of his family. The evidence before the trial court shows that the appellant not only fatally attacked the deceased, but he had also, prior to the attack on the deceased, assaulted his sisters and father. At paragraph 71 of its decision in Muruatetu 1, the Supreme Court included among the factors to be considered in re-sentencing the following:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender; ...

(Emphasis added).

11. We believe that in the circumstances of this case, the High Court is best suited to carrying out a re-sentencing hearing in respect of the appellant, such re-sentencing to be informed by, among others, a social inquiry report on the appellant and the views and feelings of his family, the primary victims of his offence.

12. In the circumstances, we hereby remit the matter to the High Court for a re-sentencing hearing. The matter shall be mentioned before the High Court in Kakamega within Fourteen (14) days of today for the purpose of taking directions on re-sentencing.

13. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR