



REPUBLIC OF KENYA



KENYA LAW
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**Komurkony v Republic (Criminal Appeal 137 of 2018)
[2021] KECA 341 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 341 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 137 OF 2018
PO KIAGE, J MOHAMMED & M NGUGI, JJA
DECEMBER 17, 2021**

BETWEEN

SIMON KOMURKONY APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kapenguria
(Githinji, J) dated 31st October 2017 in High Court Criminal Case No. 26 of 2016)*

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 10th of May 2016 at Mokoyon village in Pokot South Sub County, within West Pokot County, he murdered Barnabas Limareng⁷. He was tried before the High Court sitting in Kapenguria, convicted of the offence charged, and sentenced to death.

2. The appellant was dissatisfied with both his conviction and sentence. He filed the notice of appeal dated 17th November, 2017 and an undated Memorandum of Appeal in which he raised four grounds of appeal.

However, at the hearing of the matter before us on 6th October, 2021, Learned Counsel for the appellant, Mr. Ogeto, indicated that the appellant would only be relying on the supplementary record of appeal dated 14th October 2020 in which he appeals against his sentence only, his single ground of appeal being that “The learned judge erred in law by sentencing the appellant to a mandatory sentence contrary to the law.”

3. Learned Counsel submitted that the High Court erred in sentencing him to a mandatory death sentence. He referred the Court to Article 50 of the *Constitution* and the Supreme Court decision in



Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (hereafter ‘the Muruatetu case’). His submission was that there is a danger when judicial officers say they are bound by the mandatory death sentence. The appellant had stated his mitigation before the trial court; that he had eight children and a wife who were chased from home, but his mitigation was disregarded by the trial court.

4. It was submitted on behalf of the appellant that the deceased was his blood brother and the Court should recognise this and adopt a reconciliatory approach. Further, that Article 50(2) of the Constitution provides that an accused person had the right to benefit from the least severe of the prescribed punishments for an offence. Learned Counsel relied on the Muruatetu case to submit that courts have discretion on sentencing convicted persons for capital offences and were not constrained by mandatory sentencing. Further, that the death sentence was imposed on the appellant on 31st October, 2017 in the tenure of the new Constitution which is liberal in sentencing as provided under Article 50(2)(p) of the Constitution. His submission therefore was that a lesser sentence ought to be considered and imposed in order for the appellant to benefit from the law.
5. The appellant submitted that he was remorseful; that he had changed and had studied theology; he had filed in Court on 6th October 2021 certificates showing that he had been rehabilitated. He was a first offender and was praying for clemency.
6. Learned Counsel for the State, Ms. Gachau, relied on the respondent’s written submissions in which it had addressed the appellant’s initial grounds of appeal. With respect to the single ground of appeal addressed by the appellant, Ms. Gachau submitted that as established in the Muruatetu case, the Court has the discretion to pass a sentence other than death. However, the circumstances of this case were heinous as the appellant stabbed his brother, the deceased, in the presence of the deceased’s wife and other brother.

Learned Counsel referred the Court to paragraph 71 of the Muruatetu case in which the Supreme Court set out the factors to be considered in sentencing. The respondent submitted that the trial court had considered the circumstances of the case in passing its sentence and urged this court to uphold the sentence imposed by the trial court.

7. We have considered the submissions of the parties and noted that while the appellant had appealed against his conviction and sentence, he had abandoned his appeal against conviction and had confined his appeal to the sentence imposed by the trial court. The appellant relies on the decision of the Supreme Court in the Muruatetu case in his plea for clemency.
8. The Supreme Court decision in the Muruatetu case addressed the question of the constitutionality of the mandatory nature of the death penalty provided for the offence of murder under section 204 of the Penal Code. While holding that the death penalty is constitutional, the court held that the mandatory nature of the penalty was unconstitutional; that it violates Article 50 (2) (q) of the Constitution “as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only.” No opportunity was afforded to a higher court to consider “whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender.” The court concluded 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.”



9. The Supreme Court issued guidelines on re-sentencing following convictions for murder. The guidelines required the court to consider, inter alia, the age of the offender; whether the offender was a first offender; whether he pleaded guilty; the character and record of the offender, and the remorsefulness of the offender. The Supreme Court was emphatic in its decision that the above guidelines did not in any way replace judicial discretion; that they were advisory, not mandatory.
10. In asking this Court to interfere with the sentence imposed on him by the trial court, the appellant says he is remorseful. He is a first offender. He is a husband and a father of eight. His mitigation was not considered by the trial court. He has studied and has certificates in theology from Bible League International issued on 22nd August 2019, The Prisoner's Journey issued by Prison Fellowship International, and Kenya Giselle Foundation, and he is rehabilitated.
11. We note from the record of the trial court that upon his conviction of the offence of murder, the appellant's Counsel, Ms. Chebet, stated in mitigation on his behalf that the appellant is a father of eight and his wife had been chased away from the matrimonial home; that he was a first offender, was remorseful and was praying for leniency. The trial court observed that it had considered the circumstances under which the offence was committed, the appellant's mitigation and the provisions of section 204 of the Penal Code, and it proceeded to sentence him to death 'as the law provides'.
12. It would appear therefore that the trial court, in sentencing the appellant to death, did not consider his mitigation against the circumstances of the case as the court felt itself bound to impose the death penalty mandated under section 204 of the Penal Code. However, in light of the Muruatetu decision, the court had the discretion to consider the appellant's mitigation and if the circumstances so warranted, impose a sentence other than death. We believe that the appellant's appeal on sentence therefore has merit.
13. In considering an appropriate sentence in this matter, we take into consideration the circumstances of the case as they appear from the evidence presented by the prosecution. This evidence emerges from the testimony of PW1-PW6.
14. The evidence of PW1, Julius Chepchowoi Kodoreng, was that on the material day while he was at his house at around 8.00 a.m., a woman called him from outside and informed him that the deceased, Barnabas Limareng and David Kamzee Limareng had quarreled. PW1 then saw the appellant chasing the deceased. When he moved closer, he found that the appellant had stabbed the deceased 7 times. He testified that the deceased had a wound on the head, neck and three others on the belly. It was his evidence further that there had been constant quarrels between the deceased and the appellant, with the appellant accused of having an affair with the deceased's wife. The matter had been deliberated on and the appellant had agreed to leave the deceased's wife.
15. PW2 Chemuso Barnabas Sambul, the deceased's wife, testified that on the material day at around 8:00 a.m., the deceased had gone to David Kamzee's place to discuss a path which their children used when going to school but which Kamzee had closed. Suddenly, she saw the appellant hit the deceased with a club and when the deceased ran towards their home, the appellant followed him and stabbed him with a knife. The appellant then went to look for PW2 and when he came back, he stabbed the deceased again and stepped on his chest until he died.
16. David Kamzee Limareng, PW3, was also a brother of the deceased and the appellant. He was at home on the material day when the deceased went to his home as he wanted them to deliberate about a path. The appellant passed by and asked who was there, referring to where the deceased and PW3 were.



PW3 told him to go on his way, but he returned later with a club and hit the deceased on the head. The deceased fell, then got up and ran away, but the appellant followed him, caught up with him and stabbed him with a knife which he was carrying in his left hand.

17. The events of that morning were also witnessed by PW4, Limareng Loriwon, the father of the appellant and the deceased, who corroborated the evidence of the other witnesses, as well as PW5, Susan Chepchowoi Limareng. The post mortem report produced by PW6, Dr. Thiongo John Waiganjo, showed that the deceased had 3 stab wounds on the right shoulder, right between the 8th and 9th ribs and the 10th and 11th ribs. The cause of death was severe acute hemorrhage secondary to puncture of the right ventricle of the heart.
18. The evidence shows that the attack by the appellant on his brother was completely unprovoked. The deceased was discussing a path with his other brother. The appellant was not involved in any way, and had no reason to involve himself in the discussion between the two brothers. The deceased tried to run away after the appellant first attacked him with a club, but the appellant, intent on doing him harm, followed him with a knife and stabbed him three times. The appellant then went underground and was only arrested on 19th August 2016, more than three months after the murder of his brother. The trial court concluded, and we believe that this was a reasonable conclusion to come to, that the appellant killed his brother, with malice aforethought, as a result of past conflict and grudge, given the evidence before the trial court that the appellant had had an affair with the deceased's wife.
19. The appellant says in his mitigation that he is a father of eight, that he has reformed; that he has earned certificates in theology and is rehabilitated. Perhaps. He however murdered his brother, a father and husband also, in cold blood. While he was indeed a first offender and this should have been taken into account in his sentencing, we are satisfied that in the circumstances of this case, he merits a lengthy custodial sentence.
20. We accordingly allow his appeal against the death penalty imposed on him by the trial court and substitute therefor a term of imprisonment for 35 years, the same to run from the date he was first sentenced.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

