



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 84 OF 2019

LESIIT, J.

YUSUF RASHID WANASOLO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for Re-sentencing pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR from the decision of Bosire, J in High Court Criminal Case No. 30 of 1995 delivered on 13th December, 1995)

RULING ON RE-SENTENCING

1. The Applicant, Yusuf Rashid Wanasolo, was charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Applicant was found guilty as charged and was convicted by this court. He was sentenced to death. His appeal to the Court of Appeal was dismissed. His death sentence was later commuted to life imprisonment.
2. The Applicant has filed an application before this court seeking re-sentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. Through his counsel, the Applicant submitted that he has been in custody for twenty six years since his arraignment before this court on 10th August, 1994. Counsel urged that at the time of his arrest, the Applicant was approximately 23 years old. Counsel urged that the Applicant was lured into a gang where he was promised a hefty pay from sale of stolen items. Counsel submitted that his involvement in the robbery that led to the death of the victim was purely to sell stolen items, and that he was not involved in killing the deceased. He averred that the Applicant was a first time offender. Counsel urged that in his view, the death sentence meted by the trial court was harsh and excessive in the circumstances.
3. The Applicant's advocate further averred that the Applicant has reformed during his incarceration, and that the time he has spent in prison is sufficient punishment. He stated that the Applicant has undertaken various courses while in custody and has developed skills that will help him fend for himself if he is given a chance to reintegrate into society. Counsel urged that the Applicant has atoned for his actions and has devoted himself to rehabilitative measures. He urged that the Applicant has maintained good character while in prison and attached a letter of recommendation from the Officer in Charge, Kamiti Maximum Security Prison dated 1st November, 2018. He stated that the Applicant's family is ready to accept and live with him. He urged this court to consider a non-custodial sentence due to the outbreak of COVID-19 pandemic. He stated that the Applicant is no longer a threat to society as he is in a position to seek gainful employment from the skills he has acquired in prison. He stated that the Applicant was remorseful and pleaded with this court to allow the Applicant's application.
4. The application was opposed. Ms. Kibathi for the State submitted that the aggravating circumstances of the offence outweigh the Applicant's mitigating circumstances. She stated that the gang attack was planned. The gang consisting of the Applicant committed offences of robbery, gang rape and murder. She submitted that the violence inflicted upon the victims was extreme. She stated that the deceased, who was a foreigner aged 30 years old, was bludgeoned to death. She suffered multiple fractures to the head and body, in addition to the rape ordeal. Learned State Counsel further submitted that the Applicant failed to plead guilty to the offence. She averred that he refused to disclose the full details of the other assailants involved in the murder in a bid to protect them from prosecution. In the premises, she urged this court to dismiss the Applicant's application.
5. The Applicant bases his application on the Supreme Court decision in **Francis Karioko Muruatetu** (*supra*), in which 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 a mandatory death sentence upon conviction for murder. In the premises the Applicant is deserving of a consideration of the sentence.
6. The Supreme Court in **Francis Karioko Muruatetu** (*supra*) further gave the following guidelines with regard to mitigating factors applicable in a re-hearing sentence for the conviction of a murder charge thus:

[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (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;*
- (h) any other factor that the Court considers relevant.*

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

7. Having considered the above, I find that indeed this court has jurisdiction to entertain the application based on the decision of the Supreme Court in **Muruatetu** (*supra*). The Applicant has given his mitigation which I will consider alongside the circumstances of the case.

8. This court has taken into account the submissions by the Applicant’s counsel on his behalf as well as the Respondent’s counsel. The court has also taken into account the Applicant’s mitigating circumstances. The Applicant was a first offender. Through his counsel, the Applicant has stated that he is remorseful for his actions and that he has used the time he has spent in custody to reform himself. He stated that he has acquired skills that will assist him search for gainful employment in the event of his release. Through his counsel, the Applicant has also averred that his family is ready and willing to take him back and reintegrate him back to the community.

9. According to the facts of the case, the Applicant was part of a gang of about five to six men, who raided the residence of Mr. and Mrs. Winter, where they committed the offences of murder, rape and robbery. On the material day, Mrs. Winter (the deceased) was alone in the house with their young daughter. Mr. Winter came back home at 1.00 pm. He found the gang of men ransacking his house. The men ordered him to lie down and started raining kicks and blows on him. They battered him until he pretended to be unconscious. They took various household items and left. After the gang left, Mr. Winter went to look for his wife. He found her in the bedroom lying on the floor in a pool of blood. She was naked waist down.

10. The postmortem report indicated that the deceased had bruises on her face, neck and hands, deep cut wound on the right side of her head, four cut wounds on the left side of her head, wounds on her forehead and back of her head, internal bruises in her neck muscles and private parts, a depressed fracture on her right occipital region which ran down to the base of her skull among other fractures. Her cause of death was asphyxia, due to manual strangulation, massive intracranial haemorrhage, laceration of the brain and depressed fracture of skull caused by a blunt object.

11. The gang attack on the Winters at their residence was meticulously planned. The deceased suffered a painful death. She was bludgeoned to death after being raped. She had a young daughter who lost her mother. The gang also battered the deceased’s husband in the course of the robbery. The Applicant was part of this gang. The attack was executed in such a vicious and brutal manner.

12. I find that the offence was aggravated. The gang committed a vicious rape of the deceased before bludgeoning her to death. They also committed robbery of the couple’s property. As if that was not enough, there was an attempt to snuff life out of the deceased’s husband. And all these took place in the full view of the couple’s young daughter. That action must have traumatized the young child and there is no telling whether she will ever recover from it.

13. Having taken all these factors into consideration, I find that the Applicant’s commuted sentence of life imprisonment should not be disturbed.

14. In the premises, his application is hereby dismissed.

DATED AT NAIROBI THIS 20TH DAY OF APRIL, 2021.

LESIT, J.

JUDGE

DELIVERED THROUGH TEAMS THIS 20th DAY OF APRIL, 2021.

LESIT, J.

JUDGE