REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.233 OF 2019

JOHN KIVUVA MBUVI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Kivuva Mbuvi was convicted for the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The prosecution was able to establish that on the nights of 16th and 17th September 1992 at Pangani Estate in Nairobi, the Applicant, jointly with others not before court, murdered Mohamed Omar Rajput. The trial court sentenced the Applicant to death. The sentence was meted out on 25th April 2002. The Applicant's appeal to the Court of Appeal was dismissed. The Court of Appeal upheld the conviction and sentence of the Applicant. The Applicant's death sentence was later commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened by the Supreme Court's decision of **Francis Muruatetu –vs- Republic [2017] eKLR**. This decision opened the way for those who had been convicted and sentenced to serve the then mandatory death sentence. The Court held such sentences unconstitutional. The Applicant was therefore given an opportunity to mitigate his sentence before the High Court with a view to appropriate resentencing.

In his application for resentencing, the Applicant stated that he had learnt his lesson during the period of his incarceration. He was a first offender. He regretted the act that led to his conviction. During his incarcerations, one of his children had died. While in prison he had undertaken various courses that had improved him as a person that he will be a useful member of the society if the court was minded to release him. He stated that he had been in prison, both as a remandee and a convict for a period of twenty-five (25) years. He was now aged sixty-six (66) years and was unlikely to commit another offence. He was remorseful and was ready to be re-integrated back to the society. He urged the court to favourably consider his application and reduce his custodial sentence to the period served. The Applicant reiterated these grounds in his oral submission made before court. Ms. Akunja for the State was not opposed to the Applicant's application for resentencing in light of the period that the Applicant has been in prison.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

> ***"[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.""

In the present application, it was clear to this court that indeed the Applicant has made a case for appropriate resentencing. The Applicant has been in prison both as a remandee and as a convict since his arrest in 1994. The Applicant has been in prison for over twenty-five (25) years. This court is persuaded that during the period of his incarceration, the Applicant has learnt his lesson. He has reformed. He has aged and became wiser. He is unlikely to commit another offence if released. Although the offence that he committed was heinous, this court noted that there were no adverse reports concerning the Applicant's character by the prison authorities. In the premises therefore, this court formed the view that the Applicant has been sufficiently punished. He has paid his just debts to the society.

The Applicant's application for resentencing therefore succeeds. The sentence of life imprisonment that the Applicant is serving is set aside and substituted by a sentence of this court commuting the custodial sentence of the Applicant to the period served. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2020

L. KIMARU

JUDGE