REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.124 OF 2018

ABDULLAHI OSMAN MOHAMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Abdullahi Osman Mohamed was convicted of the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 26th June 2003 at Sundu Telephone Bureau in Mandera County, the Appellant murdered Shire Goni Dahir. He was sentenced to death. This was on 20th August 2007. His appeal to the Court of Appeal was dismissed on 9th December 2011. The death sentence imposed on the Appellant has been commuted to life imprisonment. That would have been the end of the matter but for the window opened by the Supreme Court in the decision of **Francis Muruatetu -vs- Republic [2017] eKLR.**

In his application before court, the Applicant pleads with the court to favourably consider his application for resentencing. He states that at the time of his arrest, he was twenty-two (22) years old. He has been in prison for about fifteen (15) years. During his time in prison, he had reformed. He had memorized the entire Holy Koran and attended many rehabilitation courses such as the Imam Certificate Course and the National Tailoring Courses Grades 2 and 3. He pleads with the court to exercise leniency on him because he was deeply remorseful and regrets the action that led to his incarceration. Prof. Nandwa for the Applicant told the court that the Applicant was a first offender. The victim was a European working for MSF. He stated that it was an attempted robbery that went awry. The Applicant was a victim of peer pressure at the time. He was a misguided youth. He has learnt his lesson during the period of incarceration. He has been a model prisoner while in prison. He urged the court to resentence him to serve a custodial sentence taking into account that he has been in lawful custody.

Ms. Sigei for the State opposed the application for resentencing. She submitted that the Applicant was convicted of a serious offence. His action led to the death of one person. Others were seriously injured. The Applicant was found in possession of a loaded pistol with fourteen (14) rounds of ammunition. The Applicant killed the deceased by throwing a grenade at him. She was of the view that the Applicant would pose a serious security threat if he is released back to the community. The sentence that was imposed on him is appropriate.

This court has carefully considered the facts of this case and the mitigation of the Applicant. 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, the facts of the case are not in doubt. The Court of Appeal in its judgment stated thus in Page 11:

"The above piece of evidence demonstrates that the deceased suffered grievous bodily harm, proof of which, is one of the ingredients of malice aforethought as defined in Section 206 of the Penal Code. Indeed, an evaluation of the evidence above, inevitably leads to the conclusion that the Appellant had an intention of killing the deceased using all means possible in that after using the pistol to shoot the deceased, when he did not achieve what he wanted to achieve, he threw a hand grenade inorder to accomplice his evil mission."

The facts clearly showed that the Applicant set out to kill the deceased, a man of European decent who was then working as a doctor with MSF, an international governmental organization. The deceased was not known to the Appellant nor were they acquainted. The Applicant killed the deceased out of hate motivated by ideology. Infact, it can be surmised that the deceased's death was as a result of a terror attack. The claim by the Applicant that the deceased met his death as a result of an attempted robbery that went awry is not supported by evidence. Indeed, the prosecution witnesses testified that the Appellant chased the deceased while shooting at him, and when he sought shelter at the telephone bureau, he threw a hand grenade in the bureau killing the deceased and injuring others who had sought telephone services at the bureau.

The Applicant states that he has learnt his lesson. He states that he was a misguided youth at the time who was influenced by his peers to commit the offence that he did. Although he is a first offender and has undertaken several courses in prison with a view to improving his rehabilitation, this court is not convinced that the Applicant is sufficiently reformed as not to pose a danger to society if he is released or have his custodial sentence revised on resentencing. It was apparent to the court that the Applicant will pose a danger to society if his sentence is reviewed. This is one case where this court is of the opinion that the Applicant should serve the life imprisonment that was imposed upon him when the death sentence was commuted.

The application for resentencing lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF JULY 2019

L. KIMARU

JUDGE