



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT MISC. CRIMINAL APPLICATION NO. 61 OF 2018**

**JOHN KIOKO MULEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being Misc. Criminal Application for Re-Sentencing from a Judgment*

*Delivered on 27<sup>th</sup> day of July, 2016 in HC.CR. 17 of 2015,*

*by Hon. L.N. Mutende-Judge)*

**R U L I N G**

1. **JOHN KIOKO MULEI** the Applicant herein 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 are that on the **4<sup>th</sup> April, 2009** at Kamusiliu Sub-Location, Ukasi Location, Mwingi sub-county within Kitui County, he murdered one **Rhoda Kakua Musangu** (the deceased).

2. The Applicant was found guilty after trial and sentence to suffer death which is the penultimate sanction prescribed by law (**Section 204 of the Penal Code**).

3. The Applicant felt aggrieved and filed a notice of appeal which he later withdrew on **13<sup>th</sup> March, 2020** opting instead to pursue this application for re-sentencing following the Supreme Court's decision in the case of **Francis Karioko Muruatetu (2017) eKLR**.

4. The Applicant states in his application, that his death penalty was committed to life sentence through a presidential decree made in 2016.

5. He has asked this court to re-sentence him, on grounds that he has now spent a total of 12 years in prison, which period he believes, has changed and transformed him. He further claims that, the elders from both his side and that of the deceased have agreed though he had no evidence to prove that fact. He further claims that his parents are now very old and he desires to be around them in their twilight years.

6. The Respondent through the office of Director of Public Prosecution, has opposed this application. Mrs. Kabaale learned counsel for the Office of Director of Public Prosecution opposed this application on three grounds namely: -

*(i) That the Applicant has not exhausted his options in appeal because he has not appealed against the sentence meted out against him.*

*(ii) That a social inquiry report filed, revealed that the victim's family are opposed to any leniency to the Applicant and have expressed fear and that the Applicant may cause more mayhem if released. The State opines that, the integration of the Applicant back to the society is further compounded by the adverse report from the local administration.*

*(iii) That the manner in which the deceased, an elderly person was slashed to death caused trauma to the husband who died later as a result.*

*(iv) That the Applicant is not remorseful because when he was given a chance to mitigate, he opted to remain silent, and that his attitude has not subsequently changed.*

The State urges this court, to find that the sentence imposed was commensurate with the offence committed. They rely on the decision in the

case of *Josiah Mutua Mutunga & Another –versus- Republic (2019) eKLR*.

7. This Court has considered this application and the response from the State/Respondent. It is true that, pursuant to the Supreme Court's decision in *Francis Muruatetu*, the mandatory nature of death sentence as prescribed by any statute was found to be unconstitutional as it was found to take away the trial court's discretion which is a key element in the administration of justice. However, death sentence per se was not found to be unconstitutional.

8. This court has gone through the decision made by Hon. Justice Mutende, who was the trial Judge in this matter and find that the trial Judge did not state that she was imposing the death sentence because her hands were tied. It is true that, when the Applicant was granted a chance to mitigate before sentence, he chose to remain silent and given the seriousness of the offence and the manner in which it was executed, the Hon. Judge perhaps felt inclined to pass the maximum sentence.

9. This court notes that, the Applicant indeed has not exhausted the options open to him, because if he felt aggrieved by the sentence as he says here, he ought to pursue appeal on that because the provisions of **Section 364(5) of the Criminal Procedure Code** prevents this court from revising a sentence meted out on a ground that is appealable.

10. I also agree with the Respondent that the social inquiry report reveals that the victim impact assessment is averse to this application. The cause of the killing is said to be unresolved land dispute between the deceased family and the Accused and that is why perhaps the deceased family, local administration and the local community are against the Applicant being accorded some leniency.

11. Going by the 2016 Judiciary of Kenya sentencing Policy Guidelines, this court finds that the recommended objectives have not been met to warrant this court to reconsider the sentence (even if legal basis existed which I have found do not obtain here). The objectives of sentencing policy are; -

- (i) Deterrence
- (ii) Rehabilitation
- (iii) Restorative justice
- (iv) Community protection

This court finds that the sentence meted out by this court was deterrent enough to pass a message and discourage others and deter the offender from committing a similar offence. I also find that the Applicant showed no remorseful at all upon conviction and even when he appeared before me, he exhibited none whatsoever. His desire was simply to be released because he has spent 12 years in prison. This court finds that to address his attitude and conduct he needs more time in prison which is now a correctional facility. He says that his death sentence has been commuted to life imprisonment which in my view gives him the opportunity to either rehabilitate or pursue his appeal to the end.

In the premise, this court finds no merit in the application dated 26<sup>th</sup> September, 2018. The same is disallowed for now.

**Dated, Signed and Delivered at Kitui this 3<sup>rd</sup> day of May, 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**