REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.132 OF 2011

(An Appeal arising out of the conviction and sentence of Hon .Mr. Bidali (PM)

delivered on 18th May 2011 in Kibera Criminal Case No.1488 of 2008)

JOHN MUSHILA MUSUNGU.....1ST APPELLANT

DICKSON LIKHANGA LIVONDO.....2NDAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, John Mushila Musungu and Dickson Likhanga Livondo were charged with another with the offence of **robbery with violence** contrary to S**ection 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 8th and 9th September 2008 along Nandi Road, Karen in Nairobi County, the Appellants, jointly with others not before court, while armed with offensive weapons robbed Yvone Blanche Murton of 674 US dollars and a golden chain and at or immediately before the time of such robbery used actual violence which caused the death of the said Yvone Blanche Murton. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were found guilty as charged. They were sentenced to death. The Appellants were aggrieved by their conviction and sentence. The sentence was later commuted to life imprisonment by Presidential decree.

They filed their respective appeals being **Nairobi HC. Criminal Appeal No.130 of 2011** and **Nairobi HC. Criminal Appeal No.137 of 2011**. The respective appeals of the Appellants were consolidated and heard by Mbaru and Rika, JJ. Their appeals were dismissed. However, following the Supreme Court decision of **Republic vs Karisa Chengo & 2 Others [2017] eKLR** which declared Judges of courts of equal status under **Article 162(2)** of the **Constitution** lacked jurisdiction to hear Criminal Appeals, the Appellants' appeals were consequently listed afresh for retrial after the above decision was nullified.

When the Appellants appeared before this court, they requested the court to consolidate their respective appeals with **Nairobi HC Miscellaneous Criminal Applications No.22 & 23 of 2019** in which the Applicants urged the court to resentence them in accordance with the directions issued by the Supreme Court in the case of **Francis Karioko Muruatetu -vs- Republic [2017] eKLR**. Having opted to pursue this path, it was clear that the Appellants had abandoned their respective appeals against conviction. They instead pleaded with the court to consider their respective mitigations with a view to appropriately resentencing them.

The 1st Appellant, John Musungu Mushila told the court that he was arrested on 9th September 2008. He was convicted on 18th May 2011. Since then, he had been in lawful custody. He urged the court to consider this period while resentencing him. During the period of his incarceration, he had undertaken various courses in football coaching to the extent that he had been issued with a basic and advanced coaching certificate. A letter of recommendation from prison confirms the above fact. The Applicant pleaded with the court to consider the period that he has been incarcerated to be sufficient punishment.

On his part, the 2nd Appellant, Dickson Likhanga Livondo pleaded with the court to exercise leniency on him. He had been in lawful custody for the same period as the 1st Appellant. He pleads for forgiveness from the court and the family of the deceased victim. He told the court that he worked for the deceased prior to the fateful day. He regretted the deed. He stated that he had a family which had disintegrated during the period that he has been in prison. His children were now being taken care of by their grandmother. He did not waste his time while in prison. He had undertaken several courses that have made him a better person. He presented to court certificates which showed that he had undertaken National Trade tests and had qualified as an Upholster Grade III. He had also undertaken other courses which had built him spiritually and enabled him to be a better person. He had learnt that crime does not pay. In his written submission, he urged the court to take into consideration that he was a young impressionable person when he committed the offence. He was now old and wiser and had learnt that

crime does not pay. He pleaded with the court to take into consideration the period that he has been in lawful custody and rule that he had been sufficiently punished.

Ms. Nyauncho for the State opposed the application for resentence. She observed that the Appellants were convicted of the offence of **robbery with violence** where the victim sustained fatal injuries during the course of the robbery. The prosecution adduced overwhelming evidence which established to the required standard of proof that indeed the Appellants were the perpetrators of the criminal act. She submitted that from the heinous nature of the criminal act, the court should not have mercy at all on the Appellants. It should let the sentence of life imprisonment remain undisturbed.

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 appeal, it was clear to this court that the two issues that will influence the court in determining the sentence to be meted out on the Appellants is the circumstances in which the offence was committed and the Appellants' mitigating circumstances. This court agrees with Ms. Nyauncho that in a crime that results in the death of the victim, this court should be circumspect when considering the Appellants' plea for reduction of sentence. This is because the family of the deceased lost a loved one as a result of the Appellants' criminal conduct. Whereas the Appellants are pleading to be given a second chance at life, the victim's life was cut short. It can never be retrieved. The family of the deceased were left with a yawning gap in their lives which cannot be filled. They have been left to bear the consequences of the Appellants' criminal conduct.

The Appellants told the court that they had reformed during the period of their incarceration. They have been in prison for approximately twelve (12) years. They were of the view that this period is sufficient punishment. They had undertaken courses which had made them better persons. They were unlikely to return to a life of crime if they are released from prison. This court does not agree with the Appellants that this period is sufficient punishment. Twelve (12) years is not sufficient for the crime that the Appellants committed. This court is of the view that a longer period in prison will serve the interest of justice.

In the premises therefore, this court holds that the Appellants made a case for this court to set aside the sentence of life imprisonment that they are currently serving. Instead, the Appellants are sentenced to serve thirty (30) years imprisonment. The Appellants shall serve the sentence with effect from 22nd September 2008 when they were arraigned before the court and remanded in custody. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MARCH 2020

L. KIMARU

JUDGE