REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION CASE NO.497 OF 2019

GEORGE OCHIENG OMONDI..........APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

The Applicant, George Ochieng' Omondi, was convicted of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal**. The trial court (Rawal J. as she then was) held that the prosecution had established, to the required standard of proof, that the Applicant did on 16th March 2003, within the precinct of St. Peter's Church, Legio Maria of Africa Church Mission, Dandora, in Nairobi County murder Joseph Okoth (the deceased). At the material part of her judgment, the learned Judge held that:

> ***"…I find and accept as credible and true the evidence leading to the death of the deceased which occurred as a result of 1st Accused (Applicant) hitting him with a wooden piece of cross. Furthermore, I do not have doubt that the two factions of the Church and the three Accused persons were members of the Splinter group, who entered the Church to cause disturbances in the Church. The 1st Accused was in the centre of the mayhem and was heard saying "leave me father, I want to kill them". These words clearly prove malice aforethought in the mind of the 1st Accused. He put his words in action. When not finding the father, killed the first one who came in sight, which unfortunately was the deceased, a young man."***

The Applicant was sentenced to suffer death as then provided by the law. Aggrieved by his conviction and sentence, the Applicant filed an appeal to the Court of Appeal. Whilst dismissing his appeal, the Court of Appeal upheld the verdict of the trial court in **Criminal Appeal No.241 of 2006 George Ochieng' Omondi vs. Republic (unreported).** At the material part of the judgment, the court stated that:

> ***"From the evidence on record, the circumstances that led to the death of the deceased are clear. The evidence reveals that the deceased was assaulted by the appellant. The deceased had not provoked the appellant at all. The deceased was an altar boy and was busy and peacefully performing his duties in the Church until the appellant and his two accomplices entered in search of the father in charge. When they missed him, the appellant vented his anger on the helpless young man."***

That would have been the end of the matter but for the window open by the Supreme Court's decision of **Francis Karioko Muruatetu & Others vs. Republic [2017] eKLR** which declared mandatory death sentences unconstitutional. The Supreme Court directed the High Court to consider the mitigations of those affected by such sentences and accordingly re-sentence them. It was in that regard that the Applicant filed the present application seeking to be resentenced.

The Applicant told the court that he was remorseful. He was seeking forgiveness both from the court and from the family of the deceased. He regrets committing the offence. He has been in lawful custody for the past 17 years. He was of the view that he had learnt a lot during the period of his incarceration. He is a model prisoner. He pleaded with the court to give him a second chance at life. His family has suffered during the period of his confinement.

Mr. Momanyi for the State was not opposed to the application. However, he noted that the Applicant killed the deceased in Church. This was heinous crime. He was of the view that the Applicant should serve a further period of five (5) years in prison. This would serve as sufficient punishment.

The court in **Elizabeth Mwiyaithi Syengo vs. Republic [2019] eKLR** held that:

> ***"The said Supreme Court case considered that in resentencing in a case of murder, the following mitigation factors would be applicable as a guide namely: -***

(a) Age of the offender

(b) Being a first offender

(c) Whether offender pleaded guilty

(d) Character and record of the offender

(e) Commission of the offence in relation to gender-based violence

(f) Remorsefulness of the offender.

(g) The possibility of reform of the offender

(h) Any other factor that the court considers relevant."

In the present application, the death sentence meted on the Applicant was commuted to life imprisonment by **President Decree**. By its very nature, life imprisonment in Kenya means life imprisonment. The court has considered the rival submissions made by the parties to the application. It was clear to the court that the application by the Applicant for reconsideration of the custodial sentence is merited. As a matter of principle, the State does not oppose the Applicant's application. The Applicant had been in lawful custody for a period of seventeen (17) years. During the period of his incarceration, he has acquired several skills which will serve him well upon completion of his sentence. He has become a model prisoner. He is remorseful. He has learned the folly of his way. He told the court that he had reformed and was ready and willing to return back to the society. This court agrees with the Applicant that the period that he has served in prison is sufficient punishment. If he was serving a fixed term imprisonment, he would have served twenty five (25) years imprisonment, if remission is taken into account.

The Applicant was a young, hot headed and impressionable man when he committed the offence. He is now older and wiser. Age has mellowed and blunted the aggression and recklessness that was part of his character.

In the premises therefore, this court is of the view that the Applicant has been sufficiently punished. The life imprisonment sentence that he is current 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.

DATER AT NAIROBI THIS 7TH DAY OF OCTOBER 2020.

HON. L. KIMARU

JUDGE