**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.386 OF 2018**

**FDT.....APPLICANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, FDT was charged and convicted of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 2nd November 2003 at Komarock [particulars withheld] in Nairobi, the Applicant murdered DNK (the deceased). The Applicant was sentenced to death. His appeal to the Court of Appeal was dismissed. That would have been the end of the matter but for the window opened by the Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR.**

The Applicant applied to this court for re-sentencing pursuant to this decision. He told the court that he was arrested on 2 nd November 2003. He was a police officer serving under the command of the DCIO Pangani Flying Squad. Prior to his arrest, he had served the society diligently for fifteen (15) years. He was a first offender. He was remorseful that a life was lost. The victim succumbed to her injuries while being taken to hospital. He pleaded for the leniency of the court so that he can have a second chance at life. He was sick having been recently diagnosed with prostate cancer. He underwent an operation. He was on medication. He told the court that he had been rehabilitated. He was a teacher at the prison's academy. He had reformed and was ready to rejoin the society. Ms. Atina for the State was not opposed to the application. She noted that even though a life was lost, the Applicant deserved a second chance at life. She urged the court to exercise its discretion in the Applicant's favour.

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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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.""***

Prior to the hearing of the re-sentencing application, the court ordered for a probation report to be prepared. The report is positive. However, the victim's family's views were not obtained because they could not be traced. This court has considered the Applicant's mitigation. He has been a model prisoner. He is suffering from an illness that could potentially be terminal. He has however been treated while at prison and is on the way to recovery.

The Applicant's mitigation must be considered in light of the circumstances that the crime was committed. It was the conclusion of both the High Court and the Court of Appeal that there was irrefutable evidence that the Applicant shot the deceased eight (8) times in a fit of jealous lover's rage. The Applicant and the deceased had spent the evening of the fateful day that the deceased met her death together. They had drinks. The deceased was with her friend. Later that evening, the deceased and the Applicant walked out of the bar. Gunshots rent the air. The police rushed to the scene. They found the Applicant. He gave a story that was not believed by the police and later by the court which was to the effect that he and the deceased were victims of a robbery attempt that went awry.

Even in his statement to the probation officer, the Applicant maintained this discredited story. It was clear to this court that he was not remorseful and was not willing to admit to the offence that he had committed. The ballistics report clearly showed that the fatal injuries sustained by the deceased were caused by bullets discharged from the pistol that was recovered from the Applicant. It was adduced in evidence that the Applicant, being off duty at the time, was not entitled to carry a firearm. There was therefore an element of premeditation in the subsequent event that led to the death of the deceased. In the circumstances of this case, the Applicant's mitigation notwithstanding, this court is not prepared to overlook the circumstances that led to the Applicant fatally shooting the deceased.

In the premises therefore, this court will partially allow the Applicant's application. The sentence of life imprisonment that he is serving is set aside and substituted by a sentence of this court. The Applicant shall serve five (5) years imprisonment with effect from today's date. It is so ordered.

**DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2019**

**L. KIMARU**

**JUDGE**