



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.394 OF 2018

JOSEPH MUTUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Joseph Mutuma 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 21st October 2001 at Nduru Village, Naathi Location in Meru District, the Applicant, jointly with others not before court, murdered Peter Kaliunga M'birithia. The Applicant was sentenced to death. His appeal to the Court of Appeal was dismissed. The death sentence was commuted to life imprisonment. 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 1st November 2001. He was convicted in 2007. He was in remand custody for six (6) years prior to his conviction. He pleads with the court for forgiveness. He told the court that he was drunk at the time. He urged the court to give him a second chance at life. He became a diabetic while in prison. He had undertaken bible studies and was a reformed person. He was sixty (60) years old and was of the view that he had been sufficiently punished. Ms. Atina for the State was not opposed to the application. She told the court that the Applicant's family and that of the deceased had been reconciled. She therefore had no objection to the court considering a non-custodial sentence in the circumstances.

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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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. This is observation that was made by the Probation Officer in respect of the views of the relatives of the deceased:

“The relatives to the deceased person said that they have since reconciled with the family members of the petitioner person which has healed the wounds. Both families are now living peacefully as neighbours. They were thus not opposed to his possible release on non-custodial sentence upon review of his sentence.”

This court also has taken into account the age of the Applicant and the fact that he suffers from diabetes and hypertension. Reports also indicated that he is HIV positive. There is no negative report from prison relating to the Applicant’s conduct while serving his sentence. He had acquired skills that will enable him be a useful member of the society. The Applicant’s mitigation must be considered in the context of the offence that he committed.

According to the facts of the case, the deceased was killed by the Applicant after a drinking spree when a disagreement arose in regard to payment of the drinks that they had taken. The quarrel escalated to an extent that the Applicant, with others, chased the deceased, cut him with a panga and fatally injured him. The circumstance, in which the crime was committed, clearly showed that the Applicant wanted to cause the deceased serious injury. His death did not therefore come as a surprise. The Applicant claims that he was intoxicated at the time. This is an issue that he is raising for the first time. It is clear to this court that it is an afterthought. The facts of the case clearly reveal that the Applicant, with his accomplices, deliberately set out to attack the deceased. The action was premeditated. In the circumstances of this application, the Applicant’s mitigation notwithstanding, this court formed the view that the period that the Applicant has been in prison is not sufficient in light of the gravity of the offence that he had committed.

In the premises therefore, this court while finding favour with the Applicant’s application for re-sentencing, will set aside the life imprisonment that was imposed upon him and substitute it with a sentence of five (5) years imprisonment with effect from today’s date. Upon completion of this sentence, this court is of the view that the Applicant will have paid his just dues to the society. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE