



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.276 OF 2018**

ISMAEL KALAMSHO KABIRU.....1<sup>ST</sup> APPLICANT

MOHAMMED KAMBICHA GAMO.....2<sup>ND</sup> APPLICANT

MOHAMMED ALANGO DURBU.....3<sup>RD</sup> APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**RULING**

Ismael Kalamsho Kabiru (1<sup>st</sup> Applicant), Mohammed Kambicha Gamo (2<sup>nd</sup> Applicant) and Mohammed Alango Durbu (3<sup>rd</sup> Applicant) were charged with Abdi Godana Jara who died while in prison on 27<sup>th</sup> November 2018, with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that the Applicants, jointly with others, on 28<sup>th</sup> October 2007 at Bagale Training Centre within Tana River County, murdered Adow Dakane Dhidow. The Applicants pleaded not guilty to the charge. After full trial (before Lesiit J), the Applicants were convicted as charged. They were sentenced to death. Aggrieved by their conviction and sentence, they appealed to the Court of Appeal in **Criminal Appeal No.79 of 2015**. The Court of Appeal, after considering the grounds of appeal put forward by the Appellants, dismissed the appeal. At the material part of its judgment, the Court of Appeal stated thus:

*“[29] We have no doubt in our minds that the learned Judge had the right rule in mind. The appellants and their partners in crime attacked the deceased using swords, bow and arrows. As we have already observed, Habiba and Dayib saw Kambicha stab the deceased on the neck with Somali swords. Dayib in addition also saw Kalamsho cut the deceased around the kidney with a Somali sword. Lella saw Kambicha and Kalamsho cut the deceased with Somali swords. All the appellants were armed either Somali swords or bows and arrows or all the other weapons. Dr. Boniface observed seven (7) deep stab wounds “on the back extending to the bone”. He also found arrow heads embedded into the thoracic, spine and in the face.*

*[30] In our view, the testimonies of the eye witnesses and that of Dr. Boniface proved beyond reasonable doubt, that the appellants and their partners in crime plainly intended to inflict grievous harm to the deceased or cause his death and did, in fact, caused grievous harm leading to his death. They inflicted serious injuries to the deceased’s vital body parts: the neck, the thorax and around the kidneys. We must agree with the learned Judge of the High Court that malice aforethought was proved beyond reasonable doubt by the prosecution.”*

The Court of Appeal upheld the conviction and the sentence of the Appellants.

That would have been the end of the matter but for the recent Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. The decision declared mandatory death sentence to be unconstitutional. The trial court is now mandated to consider the mitigation of those convicted of capital offences and determine whether the death sentence or any lesser sentence should be imposed.

In their application, the Applicants have stated that they are remorseful and regret the decision that led to the death of the deceased. They have been in prison for ten (10) years. The 1<sup>st</sup> Applicant is sixty-six (66) years old. He is asthmatic and has continued to suffer health problems while in prison. The 2<sup>nd</sup> Applicant is sixty-seven (67) years old. He suffers from arthritis. The 3<sup>rd</sup> Applicant is seventy-one (71) years old. He has ulcers. The Applicants urge the court to consider their age in determining the appropriate sentence to impose on them. They were of the view that they should be given time to spend their last days with their families.

Mr. Momanyi for the State though not opposing the application for re-sentencing urged the court to take into account the heinous nature in which the crime was committed. The Applicants, with others attacked the deceased and inflicted on him stab wounds that proved fatal. The

attack was deliberate and was meant to cause the death of the deceased. Learned State Counsel urged the court not to lose sight of the fact that a human life was needlessly lost.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be guided by when 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.”***

This court has considered the Applicants' mitigation on re-sentencing. The court has noted that the Applicants are elderly. The court has also noted that the Applicants are suffering from various ailments which are not uncommon for people of their age. The Applicants have not complained that their medical conditions are not being managed or catered for while in prison. Indeed, it was clear from their submission that the medical conditions are being properly managed. They told the court that they were remorseful and regret their action. These are persuasive mitigation.

However, this court has not lost sight of the fact that a human life was needlessly lost. From the facts of the case, it was clear that the Applicants attacked the deceased with sole intention of causing his death. The death of the deceased was a natural consequence of their action. The Applicants were of old age when they attacked the deceased. They cannot therefore use their age as an overriding mitigating factor to persuade this court to re-sentence them to a lesser term in prison.

Taking into consideration the recent sentencing trends and the above directions by the Supreme Court, this court partially finds merit with the Applicants' mitigation as a result of which the sentence of life imprisonment which their death sentence was commuted to is hereby set aside and substituted by a sentence of ten (10) years imprisonment with effect from today's date. This court has taken into consideration that the Applicants have been in lawful custody both in pre-trial and post-trial for a period of twelve (12) years. This court is of the view that upon serving the sentence, the Applicants will have repaid their just debts to the society. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY 2019**

**L. KIMARU**

**JUDGE**