REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.50 OF 2002

JULIUS MUTEI MUTHAMA *alias* BONNY.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Julius Mutei Muthama *alias* Bonny was charged and convicted of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code.** He was sentenced to death by this court on 19th June 2014. His appeal against conviction was dismissed by the Court of Appeal on 18th May 2018 in **Court of Appeal Criminal Appeal No.189 of 2016 Julius Mutei Muthama v Republic**. On sentence, the Court of Appeal held thus:

> **"25. We are well aware that the judgment by the trial court was delivered long before the Supreme Court pronounced itself on the constitutionality of death sentence in Francis Karioko Muruatetu & Anor v Republic [2017] eKLR. In that matter, the Supreme Court held, inter alia:**
>
> **"The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26(3) of the Constitution."**
>
> **26. The Supreme Court further held that in a murder trial the mitigating submissions of an accused person must be taken into consideration before sentence is pronounced. The court, having found that the appellant had not been given an opportunity by the trial court to make mitigating submissions, remitted the matter to the High Court for re-hearing on sentence only."**

It was on the basis of this directive by the Court of Appeal that the Applicant is mitigating his sentence before this court. He told the court that he was remorseful. He regretted what he did. He pleads for the leniency of the court and from the family of the deceased. The offence occurred when he was drunk. At the time, he associated with bad company who were using drugs. He pleaded with the court to forgive him. He urged the court to take into consideration that he committed the offence when he was a misguided youth. He was now in middle age and had learnt his lesson. He has been in prison for eighteen (18) years. He had been sufficiently punished. He asked the court to give him a second chance at life so that he can return back to his family. He had lost his parents and siblings while in prison. He urged the court to look at his plea with sympathy. Mr. Momanyi for the State did not oppose the application but asked the court to look at the entire circumstances of the case before re-sentencing the Applicant.

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 application, whereas this court considers with sympathy the Applicant's mitigation, it cannot overlook the fact that a human life was lost. The Applicant shot the deceased in drunken rage. The Applicant had no legal authority to hold a firearm at the time. He was not licenced to possess a firearm. It was obvious that he had the firearm in circumstances that suggested that he using it for criminal activity. The shooting to death of the deceased was needless as it was tragic. The Applicant tells the court that he is remorseful; that he has learnt his lesson; that he should be given a second chance at life. He urged the court to take into consideration the period of eighteen (18) years that he has been in lawful custody. This court takes account of the Applicant's plea for reduction of sentence. However, this court is of the view that the circumstance in which the offence occurred calls for a longer sentence than the eighteen (18) years that the Applicant has been in prison.

In the premises therefore, this court sentences the Applicant to serve ten (10) years imprisonment with effect from today's date. This court is of the view that if the Applicant serves twenty-five (25) years in prison (remission being taken into account), he will have repaid his just debt to the society. The period that he has been in prison has been taken into account in assessing this term of imprisonment. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF MAY 2019

L. KIMARU

JUDGE