



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.410 OF 2018**

**MATIPEI KOSHAI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Matipei Koshoi brought the present application pursuant to the window opened by the Supreme Court in the Case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. He prays that the death sentence that was imposed on him (and which was later commuted to life imprisonment) be relooked. The Applicant was convicted of murder. The particulars of the charge were that on 24<sup>th</sup> September 2004 at Kumpa Masai Reserve in Kajiado County, the Applicant murdered Leteiyo Nkurruna. The Applicant was convicted and sentenced on 11<sup>th</sup> February 2010 by Muga Apondi J. His conviction and sentence was confirmed by the Court of Appeal on 25<sup>th</sup> October 2013. In its considered judgment, the Court of Appeal held that the Applicant had deliberately killed the deceased. At page 12 of its judgment, the Court held thus:

***“We have reviewed and re-evaluated the evidence. There is no doubt that the Appellant and the deceased were well known to each other. There is the evidence of PW3 and PW4 who were in the company of the deceased and the Appellant that the two had quarrelled following a claim by the deceased that the Appellant had defaulted in payment of dowry and an assertion by the deceased that he was not in a position to circumcise his children. There is also the evidence that the disagreement at the bar and after the deceased left the bar, the Appellant vowed not leave the deceased alone and indeed pursued him to his home, stopping first at the deceased’s second wife, PW2 before proceeding to the deceased’s house with his first wife PW1 where the Appellant then attacked the deceased. In our view, the finding by the trial judge that the killing was premeditated is well founded.”***

In his application before this court, the Applicant pleads for leniency before this court. He admits that he fought the deceased when he was drunk. Drunkenness worsened the feeling of anger that he had against the deceased. He was seventy (70) years old. He had been in prison since 24<sup>th</sup> July 2006 when he was arrested. He told the court that in the period that he had been in prison he had reformed. He presented to court a letter of recommendation by the officer in-charge at the prison where he is currently serving his sentence indicating that the Applicant has been of good behaviour, was disciplined and had a clean record. The Applicant told the court that since his incarceration, he had become sick. He was epileptic and arthritic. He was currently undergoing medical treatment in hospital. He attached his medical treatment which indeed showed that his epileptic seizures were being managed by a daily dose of controlling drugs. He also had osteoarthritis on his left knee. He had problems with his vision. The Appellant told the court that he was remorseful and was pleading to be released to go back to his family.

Ms. Sigei for the State opposed the application. She submitted that the circumstances in which the Applicant killed the deceased showed that the Applicant indeed planned to kill the deceased. He followed the deceased to his home where he inflicted fatal injuries on him. He later escaped to Tanzania where he stayed for two years before he returned to Kenya. He was arrested upon his return. Learned Counsel submitted that the circumstances in which the crime occurred precludes this court from treating the Applicant with leniency. She further submitted that any medical condition that the Applicant may be suffering from can be treated and indeed it has been treated while the Applicant has been in prison. She urged the court to maintain the sentence that was imposed on 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, it was clear that in considering the Applicant’s plea for re-sentencing, this court must take into account the nature of the offence that he committed. The court has noted that the Applicant is seventy (70) years old and is ailing. He has been a model prisoner as attested by the recommendation written by prison authorities. However, this court notes that the Applicant killed his brother-in-law. The court also observes that the Applicant has anger issues which may or may not have dissipated while in prison. The victim’s family feelings must also be taken into account. The family lost their breadwinner, husband and father. The attack that caused the death of the deceased was premeditated and was executed in a particularly vicious and brutal manner. This court is of the view that the thirteen (13) years that the Applicant has been in prison is not sufficient punishment.

Taking into account the age of the Applicant, this court re-sentences the Applicant to serve ten (10) years imprisonment with effect from today’s date. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2019**

**L. KIMARU**

**JUDGE**