REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.475 OF 2018

ROBERT KOGI MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Robert Kogi Mwangi was charged, with another, with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 6th October 2011 at Huruma Ngei II Estate in Nairobi County, the Applicant murdered Dennis Mwenda Wepukhulu. When the Applicant was arraigned before the trial court (F. Muchemi, J), the Applicant pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to death. Aggrieved by the conviction and sentence, he filed an appeal to the Court of Appeal in **Court of Appeal Criminal Appeal No.68 of 2016**. After considering the appeal, the Court of Appeal dismissed the appeal. At the material part of its judgment, the Court had this to say:

> ***"(20) As earlier stated, the key witness and the only eye witness who testified was Jeff Ojiambo Kizito, PW2. The witness narrated in great details how the deceased was assaulted by the appellants. PW2 knew the deceased and the appellants. PW2 said that one Mohammed tried in vain to stop the appellants from attacking the deceased. After the attack Mohammed ran downstairs following the assailants. No reason was advanced for the prosecution's failure to avail Mohammed as a witness.***
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> ***(21) That notwithstanding, the trial court was satisfied that the evidence of PW2 was "credible, reliable and sufficient". The court cited this court's decision in OGETO v REPUBLIC [2004] 2 KLR 14 where it was held:***
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> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care and identification evidence of such a witness, especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be mistaken."***
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> ***(22). Although the trial court did not specifically warn itself of the danger of relying on the evidence of a single identifying witness as we held in CHARLES MAITANYI v REPUBLIC (supra), the court carefully considered the identification evidence and noted that there were favourable circumstances for positive recognition. The offence was committed in broad daylight and the appellants were well known to the material witness.***
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> ***(23) On our part, having carefully re-evaluated evidence of PW2, we are satisfied that his evidence was watertight and sufficient to found a conviction against the appellants."***

The Applicant's conviction and sentence was upheld. That would have been the end of the matter but for the window opened by the Supreme Court in the decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR.** The decision declared the 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 the present application, the Applicant has pleaded with the court to consider his mitigation so that he may be sentenced to serve a lesser custodial sentence. Ms. Odembo for the Applicant submitted that the Applicant had been in prison since 2011. He had been rehabilitated. He had annexed copies of documents showing the courses that he had undertaken while in prison. Those courses include: a Certificate in Alternatives to Violence, Project Kenya, a Certificate from Discover Bible School, he was a certified Newlife Behaviour Instructor, he had Diplomas in Biblical Studies and Theological Education by Extensions, he had obtained an Advanced Diploma in Bible Correspondence. He had four certificates from Mizizi, Bible League, Prison Fellowship International and Men of Honour. He attached all the certificates to the affidavit in support of his application. The Officer in-charge Kamiti Prison noted that the Applicant was "***well behaved, has a clean prison record and disciplined prisoner whose general conduct is worth emulating by fellow inmates".***

Ms. Odembo submitted that the Applicant was a pastor in prison. He had also undertaken technical training. He was remorseful in regard to the circumstances that led to the death of the deceased. At the time of the incident, he was the sole breadwinner of his family. The Applicant was ready to return to the society. She pleaded with the court to review the Applicant's sentence. Mr. Momanyi for the State was not opposed to the application but urged the court to look into the circumstances that the offence was committed. He submitted that the Applicant had been in prison for eight (8) years.

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:***
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> > ***(a) age of the offender;***
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> > ***(b) being a first offender;***
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> > ***(c) whether the offender pleaded guilty;***
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> > ***(d) character and record of the offender;***
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> > ***(e) commission of the offence in response to gender-based violence;***
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> > ***(f) remorsefulness of the offender;***
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> > ***(g) the possibility of reform and social re-adaptation of the offender;***
> >
> > ***(h) any other factor that the Court considers relevant.***
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> ***[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:***
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> ***"25. GUIDELINE JUDGMENTS***
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> ***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 Applicant's mitigation and the fact that he has been in prison for a period of eight (8) years. It was clear from his submission that the Applicant has indeed turned his life for the better during the period of his incarceration. He has become a model prisoner. He has improved himself by undertaking courses while in prison. Indeed, he is now a pastor in prison. The Applicant says that he is ready to return back to the society. He regrets the decision that led to the death of the deceased. He has come to terms that it was his conduct that led to the death of the deceased. This court has also taken into account the circumstances in which the deceased met his death. He was attacked by the Applicant and his accomplices for no apparent reason. His death was needless and unnecessary. A human life was lost. It is only just and fair that the Applicant pays for his crime.

In the premises therefore, this court agrees with the Applicant that the sentence that was imposed upon him, taking into consideration the entire circumstances of the case was not called for. The same is set aside and substituted by a sentence of this court. The Applicant is sentenced to serve seven (7) years imprisonment with effect from today's date. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2019

L. KIMARU

JUDGE