REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.337 OF 2018

JOSIAH MWAI MUYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Josiah Mwai Muya was convicted of **murder**. The offence is provided for in **Section 203** as read with **Section 204** of the **Penal Code.** The trial court found that the Applicant had on the night of 23rd and 24th October 2002 in Githunguri Village in Kiambu County, murdered his wife Rose Wanjiru Mwai. Although the Applicant denied the charge, the prosecution called fourteen (14) witnesses who established the case against the Appellant. It should be noted that the main prosecution witnesses were the Applicant's children and siblings. The Applicant was sentenced to death on 31st August 2006. His appeal to the Court of Appeal was dismissed on 8th April 2011. The conviction and the sentence meted on the Applicant was confirmed. The death sentence was later commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened by the Supreme Court in **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**. In this decision, the Supreme Court held that mandatory death sentences were unconstitutional. It further held that those who were so convicted should be given a chance to give their respective mitigations before the appropriate court so that they can be resentenced.

In his application before court, the Applicant pleaded with the court to take into consideration that he had been in lawful custody since his arrest on 24th October 2002. He was 83 years old and of ill-health. He was remorseful and urged the court to take into consideration that he had learnt his lesson in the period that he had been in prison. He was of the view that he should be released despite the negative probation report, he was willing to reside in Nakuru County where he had another property and leave the plot at Githunguri to the children of the deceased. Mr. Momanyi for the State left the issue of the Applicant's sentence to the discretion of the court. He however noted that the Applicant's age ought to be considered as a factor.

Prior to the hearing of the resentencing application, this court directed the probation to prepare a resentencing report. The two reports which were presented to court show the impact that the Applicant's criminal act had on his family. Whereas the children of the his first wife (who is deceased) welcomed his application to be released, the children of the second wife, who was the victim in this case, are adamant that the Applicant should remain in prison for the rest of his life because they were of the view that he was not remorseful and would likely retaliate against his children who testified against him in the case.

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, this court has anxiously considered the facts of this case. The mitigating circumstances that work in favour of the Applicant are the fact that he has been in lawful custody for the past seventeen (17) years. He is 83 years old. He is ailing. He pleads with the court to give him a chance to spend his last days on earth with his family. He told the court that he was remorseful and regretted the act that led to his incarceration. He had learnt his lesson in the period of his incarceration. The aggravating circumstances are that the children of the deceased are still bitter and have not forgiven the Applicant. The Applicant's other children by his first wife have however forgiven him and are willing to accept him back.

From the probation report, part of the bitterness appears to be related to a land dispute. So as to secure his freedom, the Applicant is willing to give a wide berth to the parcel of land where the children of the deceased resides. Even if this court were to accept the Applicant's suggestion, there is no mechanism to monitor whether he would abide by such direction if this court were to issue the same. Another mitigating circumstance that this court has taken into account is the fact that there is no adverse report from the prison authorities concerning the Applicant's conduct while in prison. It appears that he had been a model prisoner.

Taking into consideration the mitigating circumstances as compared with the aggravating circumstances, this court formed the view that the factors placed before this court in mitigation, outweigh any negative report that was apparent from the probation report. The issues that appear in the report are resolvable if the Applicant is minded to promote reconciliation with members of his family. The main issue appears to be property related. In the premises therefore, this court holds that the Applicant has made a case for this court to favourably consider his application for resentencing. This court formed the view that the period that the Applicant has been in prison is sufficient punishment as a consequence of which the custodial sentence imposed upon him is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE