REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.197 OF 2019

JOSEPH KIRIANKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Joseph Kirianki was convicted of the charged of the offence of **murder** contrary to **Section 203** as read **Section 204** of the **Penal Code**. The trial court found that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Applicant, on 13th October 2000 at Bula Pesa Estate in Isiolo County, murdered Peter Mbiro Karatho. He was sentenced to death. His appeal to the Court of Appeal was dismissed. The sentence imposed on the Applicant was subsequently thereafter 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's decision of **Francis Karioko Muruatetu v Republic [2017] eKLR** which declared mandatory death sentences unconstitutional. It further gave opportunity for those who were so convicted to mitigate their sentences during resentencing hearings before the High Court.

It is on the basis of this revision that the Applicant applied to this court for resentencing. In his application before court, the Applicant told the court that he was arrested on 13th November 2000. He has been in lawful custody since then. He admits committing the offence and pleads for the leniency of the court. He regrets what he did. Since his incarceration, he had become a better person having been reformed. He is currently teaching at the prison's academy. He pleaded with the court to give him a second chance at life. He was ready to return back to society having paid his just debts. The Applicant annexed a copy of a letter of recommendation written by the officer in-charge, Kamiti Prison. The recommendation notes that the Applicant has been a model prisoner and was helping other prisoners to be rehabilitated. He had not had any disciplinary issues in the past fourteen (14) years of his incarceration.

Mr. Momanyi for the State submitted that the Applicant killed the deceased, a friend whom they used to live together with. He noted that in the period of about twenty (20) years that the Applicant has been in prison, he appears to have been rehabilitated. He was not averse to the Applicant's application being favourably considered taking into account the period that he has been in lawful custody.

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 is the Applicant's plea that he has been sufficiently punished for the offence that he committed. He urged the court to take into account the period that he has been in lawful custody. This court has taken note of the circumstances in which the Applicant killed the deceased. From the evidence adduced, it was apparent that he killed the deceased in the course of robbing him. The motive was robbery. He was convicted on the basis of circumstantial evidence and the fact that he was wearing the deceased's clothes and had the deceased's identity card and bank pass book.

From the evidence, the Applicant appears to have been some sort of helper for the deceased who was paralyzed. Considering the period that the Applicant has been in lawful custody and the fact that he appears reformed, this court formed the view that the period that the Applicant has been in prison is sufficient punishment. There exist no aggravating circumstances that would persuade this court not to determine the resentencing application in the Applicant's favour.

In the premises therefore, the Applicant's custodial sentence. (*i.e*. life imprisonment) is commuted to the period served. The Applicant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE