



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 125 OF 2018

JOSEPH KITHINJI MWITHIMBU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **JOSEPH KITHINJI MWITHIMBU (“the applicant”)** was charged with the offence of murder contrary to *section 203 as read with section 204 of the Penal Code*. The particulars of the offence were that; on 15th day of March 2000, at Kithirune Market in Meru Central District within the then eastern Province, he murdered **Stephen Kaaria Kirimania** on the first count, **Nicholas Muriungi Kaaria** on the second count and **Florence Mwari** on the third count.

2. The applicant was convicted on the three counts of murder. He was sentenced to death in respect to Count I and the other two counts were held in abeyance. His appeal to the Court of Appeal (**Criminal Appeal No. 40 of 2009**) was dismissed on 28th November 2013.

3. The record reveals that, on 15th March 2000, the applicant went to the local market called Kithirune to thank the people who had helped him with the burial of his brother. At about 7.30 p.m, he shot dead the three deceased’s then surrendered the gun to the authorities.

4. In light of the Supreme Court decision in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**, the applicant has now applied for re-sentencing. He submitted that he has been incarcerated for the last twenty (20) years within which time he has rehabilitated through undergoing various rehabilitation programmes including Shoe making grade I, II, III, tailoring grade III, certificate in computer skills, certificate in drug substance abuse prevention by Rodi - Kenya and Cheti cha Masomo ya bibilia ya lamp and and light.

5. He prayed for this Court to consider the time he has been in custody and that he suffers from high blood pressure. He promised to contribute to national development and be a law abiding citizen.

6. A recommendation from the state department for correctional services dated 24/07/2019 supported the averment by the applicant and stated that he has fully embraced the correctional core value of reformation and rehabilitation hence considered a person who can integrate well with the outside world.

7. The respondent opposed the application and submitted that the death sentence be maintained or if set aside the applicant be sentenced to twenty five (25) years.

8. In the **Francis Karioko Muruatetu Case**, the Supreme Court gave the following guidelines when considering sentencing:-

“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.

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:

GUIDELINE JUDGMENTS

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.”

9. I have considered the record and familiarised myself with the provisions of the *Muruatetu case*. From the record, it is clear that the applicant engaged in murder most foul. His actions were not only vicious but were perpetuated by revenge. In the words of the trial court, he wanted to revenge on Joseph (PW4) for having been behind his brother’s death. I have considered the applicant’s age, remorsefulness, his social re-adaptation and the seriousness of the offence.

10. Taking into account the mitigating and aggravating factors, I do not think that any lesser sentence commends itself to this Court. The death sentence would be the most appropriate in the circumstances. Let the applicant serve the commuted sentence that meted was out to him.

11. In the premises, the application dated 11th June, 2018 is hereby dismissed.

DATED and DELIVERED at Meru this 7th day of November, 2019.

A. MABEYA

JUDGE