REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.208 OF 2018

IRENE NEKESA PETER...APPLICANT

VERSUS

REPUBLIC...RESPONDENT

RULING

The Applicant, Irene Nekesa Peter was convicted of the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 18th March 2008 at Ngei II Estate in Nairobi County, the Applicant murdered Scovia Nandudu. The Applicant was sentenced to death by the trial court. His appeal to the Court of Appeal was unsuccessful. The conviction and sentence of the Applicant was confirmed on 25th July 2014. That would have been the end of the matter but for the window opened by the Supreme Court in the case of **Francis Muruatetu –vs- Republic [2017] eKLR**. This decision declared mandatory death sentence to be unconstitutional. It further called for any convicted person to be given an opportunity to mitigate before being sentenced.

The Applicant filed the present application in which she pleads for her mitigation to be considered by this court. She states that she is a first offender. She is remorseful and regrets the events of the particular day. She notes that in the period of eleven (11) years that she has been in prison, she had learnt her lesson and realized that two wrongs do not make a right. She urged the court to take into consideration of the fact that during the period of her incarceration, her children had lost motherly love. She urged the court to consider her circumstances and the fact that she had reformed and reached the appropriate determination by varying her sentence. The Applicant attached several certificates to her application which indicates that during her incarceration, she had undertaken various courses both spiritual and vocational that will make her a better person upon her release. There is also a letter of recommendation from the Officer in-charge of Langata Women Maximum Prison which notes that the Applicant has been a model prisoner since her admission into the facility.

During the hearing of the application, the Applicant reiterated the contents of the application. She urged the court to exercise leniency on her and favourably consider her application. Ms. Nyauncho for the State opposed the application. She submitted that the aggravating circumstances were such that the court cannot have mercy on the Applicant. She explained that the Applicant had stabbed the deceased after they had had an altercation. There was no justification for the Applicant to stab the deceased. In the premises, she urged the court to disallow the Applicant's application.

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, both the High Court and the Court of Appeal reached concurrent finding that the Applicant had killed the deceased with malice aforethought. In its judgment, the Court of Appeal stated thus:

"(39). It is clear from the evidence that the Appellant was armed with a knife. This is evidence that she intended to use the knife and this constitutes premeditation. Further the action of the Appellant of removing the knife and stabbing the deceased in the neck is a clear indication that she intended to cause the death of, or at the very minimum, grievous harm, to the deceased. As there was malice aforethought present, the Appellant's action constitutes the offence of murder."

The Applicant pleads with the court to consider her mitigating circumstances and reach an appropriate determination varying her sentence of death which has since been commuted by the President to life imprisonment. The State is opposed to the Applicant's application. Taking into consideration the Applicant's mitigation and the circumstances in which the offence occurred, this court agrees with the prosecution that the aggravating circumstances are such that this court is of the view that an appropriate custodial sentence is deserved. This court has taken into consideration the fact that the Applicant has been in prison for eleven (11) years. It was clear from the report by the prison authorities that the Applicant has reformed. She has undertaken courses both spiritual and vocational that have made her a better person. Her mitigation clearly shows that she regrets her action that led to the death of the deceased. That being the case, this court agrees with the Applicant that the sentence of life imprisonment, in light of the transformation to her life, is uncalled for in the circumstances.

In the premises therefore, this court sets aside the sentence of life imprisonment that the Applicant is serving and substitutes it with a sentence of twenty (20) years imprisonment. The sentence shall take effect from 25th February 2011 when the Applicant was sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 26TH SEPTEMBER 2019

L. KIMARU

JUDGE