REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.539 OF 2018

JANET KARAMANA GITUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Janet Karamana Gituma, with others, was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 23rd October 2009 at Garden Estate in Nairobi, they murdered Moses Mbaabu Gituma. When the Applicant was arraigned before the trial court (N.R.O. Ombija, J), she pleaded not guilty to the charge. After full trial, she was convicted as charged and sentenced to serve thirty (30) years imprisonment. Aggrieved by her conviction and sentence, the Applicant filed an appeal to the Court of Appeal in **Court of Appeal Criminal Appeal No.88 of 2014**. Her appeal against conviction was however dismissed. On sentence, the thirty (30) years imprisonment that was imposed on her by the High Court was set aside and was substituted by the death sentence.

That would have been the end of the matter but for the recent window opened by the Supreme Court in the decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR.** The decision declared 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 her mitigation, the Applicant states that she has been reformed in the period that she has been in prison. She has been in prison for nine (9) years. During her incarceration, her children have suffered. One child was in rehabilitation while recovering from alcoholism while the education of the other child had been disrupted. She was extremely remorseful and sorry for the action that led to the death of the deceased. She had become a mentor of others while in prison. She was ready to return back to society. During her period of incarceration, she had undertaken several courses that have made her a better person. She craves for the court to give her a second chance at life. Prior to the hearing of the application, the court ordered for a re-sentencing report to be prepared. This is what the report states:

> **"The inmate (Applicant) has been in prison for the last 10 at Langata Womens Prison. She had undertaken several courses which include, Advanced Diploma in Theology from Kikuyu Campus, Paralegal training, trauma healing All by International School of Deliverance. She has also been trained in computer packages, making detergents, crocheting and bead work. According to report from the prison authorities, she is said to be well behaved, a representative of the other inmates and has (been) recommended for the position of a trustee. The inmate suffers from Hyperthyroid (Goiter) and is currently on medication."**

The relatives of the Applicant, including the family of the deceased were interviewed. They indicated to the court that they have forgiven the Applicant. Mr. Momanyi for the State was not opposed to the Applicant being re-sentenced but urged the court to consider the circumstances which the offence was committed.

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:**

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.""

This court has considered the Applicant's mitigation on re-sentencing. It was clear to this court that while in Prison, the Applicant has changed her life for the better. She has undertaken courses which will definitely enrich her life when she will be released from prison. Her relatives have come to terms with what she did. They have indicated to the court that they had forgiven her.

However, this court must take into account the circumstances in which the offence was committed. The Applicant planned and carried the execution of her husband, the victim of the crime. The plan was elaborate and well thought. She had accomplices. After inflicting injuries to the deceased which later proved fatal, the Applicant put in place an intricate hoax to put off the investigators from her trail. Unfortunately for her, her ruse came unstuck. The reason she gave for committing this heinous crime beggars belief. She indicated in the re-sentence report that she intended to scare her husband from his infidelity. This court noted that at the time the Applicant and the deceased had been married for eighteen (18) years. Much as this court considers the Applicant's positive change in behaviour, it will not overlook the heinous nature of the crime that the Applicant committed.

This court notes that the Applicant has already been in lawful custody for a period of ten (10) years. This court is of the view that that period is not sufficient punishment. However, the death sentence that was imposed on the Applicant is not called for in the circumstances. In the premises therefore, the death sentence is set aside and substituted by a sentence of this court of ten (10) years imprisonment with effect from today's date. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2019

L. KIMARU

JUDGE