



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mwangemi & 2 others (Criminal Case 40 of 2014)
[2023] KEHC 3551 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 40 OF 2014
DO CHEPKWONY, J
MARCH 29, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MZUNGU SHUME MWANGEMI 1ST ACCUSED

SHUME WASHE BAYA 2ND ACCUSED

TOMMIC RONGOMA BAYA 3RD ACCUSED

RULING

1. The accused persons Mzungu Shume Mwangemi, Shume Washe Baya and Tommic Rongoma Baya are charged with the offence of Murder contrary to section 203 as read with section 204 of the [Penal Code](#), whereby they were tried, found guilty and convicted for the murder of Benson Beja.
2. Having found the accused persons guilty and convicted them for the offence of Murder, the next duty by this Court is to pass sentence against them. But before doing this, this Court referred the matter to the Probation Services Department for a Social Inquiry to be conducted on each accused person and reports thereof filed in court for consideration on what sentence to mete out against each accused person.
3. The Pre-sentence Reports on each accused person were filed on March 3, 2022 and I have read through each of them.
4. For most offences, courts have the discretion to impose any sentence up to the statutory maximum, depending on the nature of crime, records (character) of the accused, social and economic background of the accused person, public interest, victim impact and many other factors.
5. The offence of Murder is among the few offences that carry a mandatory death sentence as a penalty. However, there has been a departure from this by the courts' in this jurisdiction, arising out of the



Supreme Court's decision in the case of *Francis Muruatetu & another v Republic* [2017]eKLR to which recognized court sentence to be imposed for the offence of Murder should be appropriate. In this case, the Supreme Court found that the mandatory nature of the penalty of death as provided for under section 204 of the *Penal Code* was unconstitutional in the sense that whether or not a convict is heard. However, the Supreme Court felt that a person facing the death sentence deserves to be heard in mitigation because of the finality of the sentence, as an important cogment element of fair trial. The Supreme Court then proceeded to state:-

“We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of section 204 of the *Penal Code*. We do this by determining that any court dealing with the offence of Murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise, will render a trial with the resulting sentence under section 204 of the *Penal Code* unfair thereby conflicting with articles 25(c), 28, 48 and 50(1) and (2) of the *Constitution*.”

6. It is in compliance with this that this court called for a Pre-sentence Report on the accused persons, which has been presented to court. From the report, Probation Officer has given their view of each on the circumstances of the offence, the accused persons' social and economic status and the victim impact statement and community.
7. According to the counsel for the State, M/S Valerie, they had not received any records on either of the accused persons and so she urged that they be treated as first offenders. In mitigation, M/S Ochieng submitted on behalf of all the accused persons as follows:-
 - a. For the 1st accused, M/S Ochieng told court that he was seeking leniency of the court and for the period he had served in custody to be considered. She also stated that he was his family's sole breadwinner and adopted the family details as given in the Pre-sentence Report.
 - b. For the 2nd accused, M/S Ochieng submitted that he was also a family man with a wife and 4 children. She went on to state that he was the family's sole breadwinner and requested that he be considered for a non-custodial sentence in view of his remorse and period of incarceration in custody.
 - c. With regard to the 3rd accused it was mitigated that he was a family man with a wife and children. He was said to be the sole breadwinner for his young family, parents and siblings. He was also said to be remorseful and non-custodial sentence was requested in view of the period he had been in custody.
8. Counsel further urged that with the pendency of the case, a sword has been hanging over the accused persons' heads in view of the nature of offence they are facing and the punishment prescribed for it. The sentiments in mitigation are a reflection of what has been captured in the Pre-sentence Reports on each accused person, except for the victim (s) and community members sentiments. The two groups have been presented as having no issues or feeling threatened by the punishment that will be meted against the accused persons.
9. I have taken into account that the accused persons and deceased are siblings and their respective families are reported to have come to terms with what happened even though they do not interact or communicate.
10. I have also taken note of the manner in which the deceased was killed – it was a cold-blooded incident, and without any clear reasons. Further, I have taken into consideration the recommendations by the



Probation Officer that the accused person be considered for a lenient sentence in view of their age (more particularly, 3rd accused person) and family obligations. It is my considered view that a sentence that achieves retribution, deterrence and rehabilitation be meted out.

11. I therefore proceed to sentence 1st and 2nd Accused persons to serve three (3) years imprisonment.
12. As for the 3rd accused person, Tommic Baya, he is placed on probation for a period of 3 years.
13. The 1st and 2nd accused persons to be supervised by the Probation Officer for a period of one (1) year upon release.
14. The accused persons have a right of appeal on both the conviction and sentence while the state has a right of appeal on the sentence.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Valerie counsel for the State*

M/S Ochieng holding brief for Mr. Gicheha for 1st accused and appearing for 2nd and 3rd accused persons

Accused present except for

Court Assistant – Mwenda/Hamisi

