



**Republic v Mwachizia & another (Criminal Case 31 of 2014)
[2023] KEHC 24981 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 24981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 31 OF 2014
DO CHEPKWONY, J
APRIL 27, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

HUSSEIN MWERO MWACHIZIA 1ST ACCUSED

DZOMBO JABU MWERO 2ND ACCUSED

RULING

1. The accused persons 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 Chrispine Punga Mwangoni.
2. Upon convicting the accused persons, the court referred the matter to the Probation and after care services office for a social inquiry to be conducted and for pre-sentence reports to be preferred and filed in respect of each accused person's social economic status alongside their relationship with family and community. This is pursuant to the punishment that the offence of murder attracts.
3. The offence of murder is among the few offences in Kenya that carry a mandatory death sentence as a penalty. However, there has been a departure from this by the court in its jurisdiction arising out of the supreme Court's decision in the case of *Francis Muruatetu And another vs Republic* [2017]eKLR, which recognised that sentences to be imposed for the offence of murder should be appropriate, depending on various particulars.
4. In the Muruatete case, the Supreme Court found that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code was unconstitutional in the sense that whether or not one is convicted, they should be heard in mitigation. The Supreme Court felt that even if a person



is facing the death sentence, he/she deserves to be heard in mitigation as an important element of fair trial because of the finality of the said sentence. 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*.”

5. The presentence reports on the accused persons all dated 19th April, 2023 were presented to court for consideration together with the accused person's records and mitigation statements by courts in meting out an appropriate sentence and I have read them. The presentence report on Hussein Mwero Mwachizia indicates that the 1st accused as an old man who is polygamous with a large family that depends on him for survival, and economic welfare and a pillar of advise and mentorship for the large family. He was said to be remorseful of the offence and full of regret for having committing the offence. That he is pleading for mercy and a noncustodial sentence. The probation officer recommended that the 1st accused person be considered for a noncustodial sentence since he is a low risk offender with minimal changes of recidivism and only requires minimum supervision due to the advanced age.
6. Dzombo Jambu Mwero, the 2nd accused person has been shown to be a responsible family man with a wife and full four children who was committed to providing for and raising his family. He has been said to be a peace loving and hardworking person, who the family and community are ready to receive back. The probation officer has recommended that the 2nd accused person be considered for a noncustodial sentence since he is a 1st offender and a law risk who requires minimum supervision.
7. M/S Ongeti, counsel for the state has told court that the accused persons' have no previous criminal record and may be treated as first offenders.
8. Their counsel, M/S Odhiang, in mitigating on their behalf stated that she was going by the findings and recommendation as presented in the respective presentence reports on each of the accused person. She urged that the court considers the same as the accused persons were remorseful and were seeking leniency of the court. She also urged that the period they had stayed in custody be considered.
9. It is worth noting that whether or not to impose a custodial or noncustodial sentence, the following factors ought to be taken into account by the court:-
 - a. Gravity of the offence.
 - b. Criminal history of the offender.
 - c. Character of the offender.
 - d. Protection of the community.
 - e. Offender's responsibility to the third parties,
 - f. Children in conflict with the law.
10. In the *Francis Muruatetu* case, the guidelines were amended to include:-
 - 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 offender in response to gender-based violence.
 - f. The possibility of reform and social re-adaptation of the offender.
 - g. Any other factor that the court considers relevant.
11. It will be appreciated that for more of the offences, the courts have the discretion to impose any sentence upto 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 among others factors.
12. Having read through the presentence reports on each accused persons and considered the recommendation therein alongside the past records and mitigation statement of their counsel, the court has also taken note of the fact that the victim's family was not reached for their sentiments to be registered. It is worth noting that life is sacred and terminating one's life cannot be taken for granted, or trivialized.
13. It is this court's new that for reconciliation to be achieved in such cases, a sentence that achieves deterrence and retribution be meted out against accused persons. A sentence of ten (10) years and above would have been appropriate. However, in view of the period the accused persons' have been in custody has been taken into consideration.
14. The accused persons are therefore sentenced to serve a period of three (3) years imprisonment. Thereafter, each accused person to remain under supervision of the Probation Officer for a period of one (1) year.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF APRIL, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of;

M/S Valerie counsel for the State

M/S Odhiang counsel for accused

