Republic v Wamalwa (Criminal Case E022 of 2023)
[2023] KEHC 22879 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL CASE E022 OF 2023

DK KEMEI, J

SEPTEMBER 29, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MARK SIKUKU WAMALWA ..... ACCUSED

RULING

1. The accused herein Mark Sikuku Wamalwa has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Vide a judgement dated 28/7/2023, he was found guilty over the murder of Pascal Nyongesa and convicted accordingly.

2. During the sentence hearing conducted on the 14/9/2023, Mr Wanjala for the accused, relied on the pre- sentence report and sought for leniency on the grounds that the accuses is remorseful and the sole breadwinner for his two young children. Learned Counsel submitted that the accused is a first offender and that he had assisted the deceased to hospital by assigning his wife to attend to the deceased in hospital. Learned counsel sought for a non- custodial sentence to be imposed against the accused.

3. Miss Mwaniki for the prosecution submitted that a deterrent sentence is called for since the accuses is not remorseful and that he has no respect for authority since he had attacked the deceased in the presence of the area Assistant Chief. It was finally submitted that the accused is not deserving a non-custodial sentence since he took the law into his hands.

    a. A pre- sentence report was filed by the County Probation Officer Bungoma. It is dated 7/9/2023. It indicates that the accused enjoys community acceptance and that community rehabilitation is unlikely to offend the public. It also indicates that the accused and deceased are first cousins and that their respective families have conducted various rituals and reparation measures and that the same has eased some tension with them thereby guaranteeing the offenders safety within the community. The report also confirms that the accused had taken the

deceased to hospital and instructed his wife to look after him in hospital before he succumbed to the injuries. The report further indicates that the accused had not been involved in criminal activities and that at the time of his arrest, he was a member of Generation Church in Mahanga village.

4. I have given due consideration to the sentiments of learned counsels for defence and prosecution. The accused has already been convicted for the offence of murder and that pursuant to section 204 of the *Penal Code*, the punishment provided for is a sentence of death. However, following the decision of the Supreme Court in the case of *Francis Karioko Muruatetu & Another -vs- R* (20177) eKLR, the mandatory nature of the death penalty was declared to be unconstitutional in the following terms: -

> "(48) Section 204 of the Penal Code deprives the court of the use of Judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless, to impose a sentence, the sentence imposed fails to confirm to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right".

5. The Judiciary Sentencing Policy Guidelines provide that courts ought to consider several factors before passing sentences and which include; age of the offender, whether the convict is a first offender, whether the offender pleads guilty, commission of the offence in response to gender based violence, character and record of the offender, remorsefulness of the offender, the possibility of reform and social adaptation of the offender etc.

   It is noted that a probation officer's report has already been filed. However, the same is not binding to the court but persuasive as the same has not been subjected to cross examination by the parties in court. Justice Odunga (as he then was) in *R -vs- Antony Mwema Mutisya* (2020) eKLR had this to say: -

> "..... In undertaking a resentencing, the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore, important that not only should a report be availed to the court concerning the position of the victim's family and the offender's family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. It is therefore my view that where a resentencing is directed, the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate sentence. However, the failure to do so is not necessarily fatal to the sentence".

6. In sentencing the accused , i have to take into consideration several factors/reasons such as the case of *Francis Karioko Muruatetu & Another V R* [2017]eKLR, all mitigating factors submitted by both counsels for prosecution and defence, the Judiciary Sentencing Policy Guidelines particularly paragraph 23.7, the convict has been convicted of murder, the deceased had a right to life that was taken away from him, there are no previous records of the convict, the convict has been in remand since June 23, 2021 to date which period has to be taken into consideration.

7. The Judiciary Sentencing Policy Guidelines paragraph 4.1 provides that a balanced sentence strives to attain reformative preventive, deterrent, denunciative, community protection and retributive objectives of punishment. These factors may not have equal weight in the difficult search for an appropriate and balances sentence, but the weight assigned to each factor must be appropriate and that the court must then determine whether the convict can be adequately sentenced with a non-

custodial sentence, payment of fine, or forgiveness based on a balance of all the factors in mitigation and aggravation.

In the case of *Charo Ngumbao Gugudu -vs Republic* [2011] eklr the Court of Appeal held as follows:

> "Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise for the court to fail to look at the facts and circumstances of the case in the entirety before settling for any given sentence. See Ambani V R [1990] eKLR".

8. From the post mortem report produced by Dr Brian Kenyali (PW3), the deceases suffered a skull fracture extending from the right frontal bone to the left parietal bone and that there was a massive right sided epidermal hematoma. The said doctor formed the opinion that the cause of death was massive epidermal hematoma secondary to head injury as a result of assault with a heavy object. He further formed the opinion that the injuries must have been inflicted by both sharp and heavy object. It transpired from the evidence that upon learning that his clothes had been stolen, the accused confronted the deceased and whom he attacked and that they both went to the home of the assistant chief who advised the accused to stop assaulting the deceased and directed them to appear before him the following day. It seems the accused was not done yet with the deceased and disregarded the assistant chief's orders and then brutally injured the deceased. The feeble claim by the accused that he had helped raise some small monies for the deceased's hospitalization did not in any way ameliorate the deceased's situation who eventually succumbed to the injuries. Even though the deceased was reported to have been a habitual thief in the area, he did not deserve to die in the manner he did since the accused ought to have resorted to lawful channels to pursue his grievances, if any, but not to take the law into his hands. In any event, there is no evidence that the accused got the deceased red handed stealing his clothes. The accused relied on the claims by his wife regarding the theft of the clothes. Had the accused headed the advice of the Assistant chief, the deceased could be alive today.

9. It is noted that the family of the accused attempted to engage in some reparations to the family of the deceased by helping to built for them a semi-permanent structure besides footing the burial expenses. The pre – sentence report indicates that the family of the deceased are still not satisfied with the said token and still seek for more compensation. The accused's temper appears to be one which is ungovernable as demonstrated by the fact that he defied the assistant chief's assurance that the matter would be resolved the following day by brutally attacking the deceased. I find the circumstances herein require custodial rehabilitation.

10. It is noted that the accused has been in custody since June 23, 2021 to date. This period will be taken into consideration. The custodial rehabilitation will benefit the accused even though he still has a young family. The custodial rehabilitation will help to mould him into a better person before being released back to the community.

11. In the result, I order the accused herein Mark Sikuku Wamalwa to serve a sentence of twenty (20) years imprisonment. The same shall commence from the date of arrest namely June 23, 2021

    Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF SEPTEMBER 2023

D.KEMEI

JUDGE

In the presence of :

Mark Sikuku Wamalwa Accused

Sabwani For Wanjala for Accused

Miss Mwaniki for Prosecution

Kizito Court Assistant