



**Republic v Chirchir (Criminal Case 31 of 2017)
[2023] KEHC 24243 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 31 OF 2017
RB NGETICH, J
OCTOBER 26, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ERICK KIPKOECH CHIRCHIR ACCUSED

RULING

1. The Accused Erick Kipkoech Chirchir was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on the accused on the 11th day of August, 2015, at Ossien Location in Baringo North Sub- County within Baringo County the accused murdered Jeremiah Kendele Chepkwony.
2. By judgment delivered on 20th July 2023, the accused was found guilty of the offence herein and convicted according.
3. The starting point is the Supreme Court decision in *Francis Muruatetu & Another v Republic* [2017] eKLR in which the Supreme Court of Kenya while retaining the death sentence found that its mandatory nature was unconstitutional and for the purposes of this sentence had this to say: -

“45. To our minds what Section 204 of the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.



46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the Constitution are not exhaustive.”

The court therefore proceeded to pronounce itself thus:

- “ 58. 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 article 25(c), 28, 48 and 50(1) and (2) (g) of the Constitution.
4. No previous convictions of accused were availed by the prosecution. I therefore treat the accused as a first offender. The court called for pre-sentencing to assist in understanding the sentiments of the victim’s family local administration and accused’s background together with his attitude towards the offence.

Pre-sentencing Report

5. The report indicate that the convict herein is aged 60 years, is a first offender and prays for community rehabilitation to enable him continue helping his children and family at large. From the report, he never intended to kill the deceased but he was defending himself after the deceased hit him with a stick. The accused’s family urges the court to admit the convict into community rehabilitation so that he can assist them with family duties that are currently done by the accused’s wife with little assistance from the elder son.
6. The deceased’s family are still very bitter over the incident. They are opposed to the accused being given community rehabilitation and they prefer a death sentence or life imprisonment. Their reasons for custodial sentence are that reconciliation has not taken place, they are still in pain/bitter with accused for the offence leading to demise of their kin which has made the wife and the children suffer more emotionally, psychologically, financially and health wise. They also indicated that if the convict is released, they will revenge by killing him and say he should serve custodial sentence to serve as a lesson to other potential criminals who could be planning to commit similar offence towards the local administration within the community.
7. The local administration’s view is for the convict to serve custodial sentence on the ground that the community is still hostile towards the offender as the matter is still fresh in their minds.
8. The probation officer states that social inquiry reveals that the community at large is still bitter with the offender for the offence he committed and the deceased’s family may revenge if the convict is released non-custodial sentence.

Mitigation

9. The defence counsel Mr. Mwaita mitigated on his behalf. He submitted that the accused is remorseful, he regrets the occurrence of the incident especially for using excessive force. He submitted that the



accused continues to seek forgiveness, he is also a first offender and as of now, he is 60 years old married with a wife and blessed with 10 children two of the children still in primary school a boy in class 8 and a girl in class 5.

10. Mr Mwaita informed the court that the accused is anemic and allergic to cold; has been in custody for the last 8 years having been arrested on 11th August, 2015 and seeks court's leniency and for the period he has been in custody to be considered. Counsel added that the accused has been willing to seek forgiveness from the family of the victim and in his defence he asked for forgiveness from the court and from the deceased's family and it is not correct for the probation officer to so say that the convict and his family are not willing to pursue reconciliation and it is also not correct to say that the convict's family have been issuing threats to the victim's family and if it was true, it could have been reported.
11. Counsel further urged the court to consider the age of the accused who is 60 years and cited the case of Julius Kitsao Manyeso Vs Republic CA Malindi Criminal Case No. 12 of 2021 where in paragraph 26, the court rendered life sentence unconstitutional and submitted that the accused is seeking another chance so that he can guide his children and grandchildren.
12. The state counsel Ms. Ratemo submitted that the probation officer can only report information collected from the ground and the report is quite detailed as to the sentiments of the victim's family and the community and the report is aimed at assisting the court arrive at a just determination on the sentence.
13. She submitted that the deceased was a family man aged 57 years and had 9 children, was the sole provider of his family and through the accused's actions, his life was cut short and his family was left without a person to provide for them. She further submitted that the community is also at a loss having lost their chief who was tasked at maintaining law and order at his level but unfortunately met his death while conducting. She submitted that the offence of murder is serious and appropriate punishment should be meted out and prayed for deterrent sentence. Counsel submitted that even though defence counsel submitted that the accused is ailing, he has not produced any treatment documents. She proposed 40 years sentence guided by the decision in Republic vs George Morara where the accused who indicated that he had terminal illness was sentenced to 40 years from the date of sentence.

Determination

14. I have considered the fact that accused is a first offender. I have also considered accused's mitigation through defence counsel and views expressed in presentence report. It is important to consider the sentencing objectives in Kenya captured in the Judiciary Sentencing Policy Guidelines at page 15 as follows: -
 - 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - 5) Community protection: to protect the community by incapacitating the offender.
 - 6) Denunciation: to communicate the community's condemnation of the criminal conduct.



15. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - c) Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - d) Protection of the community:- where the offender is likely to pose a threat to the community.
 - e) Offender's responsibility to third parties:- where there are people depending on the offender.
 - f) Children in conflict with the law:- non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
16. The Supreme court in the *Francis Muruatetu case* at paragraph 71 expanded factors to be considered in respect of re-hearing sentence for the conviction of murder charge 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 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.
17. In view of the above, I take note of the fact that the convict herein attacked the deceased with a knife in his house while the deceased was on duty with his team conducting a crackdown on illegal brew. Evidence adduced and admitted by accused is that he was known for brewing and sale of illicit brew. The local administration community and family of the deceased are still saddened by the act of the deceased. There was no justification for the accused to attack the area chief who was on routine duty in his area of operation. In my view, the convict deserves deterrent sentence.
18. Local administration and family of deceased propose death or life sentence while the state counsel proposed 40 years imprisonment. However, mandatory nature of death sentence was declared unconstitutional by Supreme Court decision in *Francis Muruatetu & Another v Republic* [2017] eKLR. In respect to life imprisonment, in the case of Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic the court of appeal declared the sentence of life imprisonment to be unconstitutional; Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die. This therefore rules out the sentence of life imprisonment. The accused being 60 years old, 40 years imprisonment as proposed by the state counsel will amount to life imprisonment.



19. In view of the above, I take note of the fact that the accused is 60 years old, and hereby impose sentence of 20 years imprisonment.
20. Final Orders: -
 1. Accused is sentenced to 20 years imprisonment.
 2. Period served in remand to be reduced from sentence above.
 3. Right of appeal 14 days.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 26TH DAY OF OCTOBER 2023.

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Mwaita for Accused.

Ms Ratemo for State.

