



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO. 9 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

EVERLYNE MARTHA OPICHO.....ACCUSED

SENTENCE

1. The accused herein **Everlyne Martha Opicho** was found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convicted accordingly pursuant to the judgement of this court dated 28.10.2020.
2. Pursuant to the above provisions of the law, the accused is automatically subject to be sentenced to the mandatory death sentence. However, I am alive to the fact that pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Anor v R (2017) eKLR**, which found that the mandatory death penalty regime was unconstitutional meaning therefore that this court would have to align itself with the findings in the said case.
3. Learned counsels for the parties ably presented their oral submissions for mitigation and sentencing on 25.11.2020. On record is also a probation officers report dated 23.11.2020.
4. Mr. Kituku for the accused submitted that the accused is a 21-year-old first offender who is remorseful. It was pointed out that the accused had been in prison for three years and ten months and is now a form three student. It was submitted that the accused attained certificates and sought a chance to rejoin the society. Counsel urged the court to be lenient and give the accused a lenient sentence.
5. Mr. Mwangera for the prosecution submitted that the court ought to consider that the deceased was the child of the accused. The court was urged to give an appropriate sentence.
6. A perusal of the probation officers report indicated the convict is a 22-year-old who attended school up to class 8 but did not proceed to secondary level due to financial constraints. It was reported that the convict gave birth to the deceased in 2014 and that she cohabited with the father of the deceased till 2016 when she cohabited with a second lover John Karani Olale. It was reported that the circumstances of the offence were that the convict started relating with her previous lover and this did not go well with her mother hence a disagreement ensued. It was reported that her mother informed her then current lover of the affair and a disagreement ensued which prompted the convict to lace an egg with poison so as to kill the deceased and that she watched him die. It was reported that the accused packed the body of the deceased in a carton and dumped it in the compost pit then set it ablaze. The report indicates that the convict was tricked into meeting her then current lover but however she was arrested. Further that the offence emanated from disputes caused by love triangle affairs by the offender and her turbulent teenage. It was reported that the family believed that the convict had reformed and that there was no tension in the village. The offender's family sought for leniency. However, it was noted that the offender was at risk of getting back into cohabitation with men for survival. It was recommended that the convict be given a non-custodial sentence as she may abandon her education and return to her jumpy lifestyle; that it would be better that she sit her KCSE and get a certificate that would assist her in future.
7. The sentencing regime in Kenya is guided by the Constitution, statutes, policy guidelines and case law. While the Constitution lays down the general frame work on sentencing, the statutes, sentencing guidelines and case laws provide guidelines on sentencing.
8. The discretion of sentencing rests with the trial judge because he had the opportunity to watch the case proceeding before him or her and detect the accused and witnesses' behavior. The discretion must however be exercised judiciously. In the persuasive Nigerian case of **African Continents Bank V Nuamani [1991] NWLI 486**, it was observed that,

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

9. In sentencing the convict the following factors/reasons are considered:-

a) The case of Francis Karioko Muruatetu & Anor v R (2017) eKLR.

b) All the mitigating factors submitted by both counsels for the prosecution and the convict. Both counsels presented convincing arguments which have ably guided me to pass an appropriate sentence against the convict.

c) The Judiciary Sentencing Policy Guidelines, particularly paragraph 23.7.

10. For special emphasis, I have also considered the following factors:-

a) The convict has been convicted of murder.

b) The deceased had a right to life that was taken away from him.

c) From the facts of the case and the way the deceased was killed, the accused person was said to have poisoned the deceased and watched him die then burnt his body.

d) There are no established previous records of the convict.

e) The convict is noted to have a jumpy lifestyle and was involved in love triangles prior to the incident.

f) The convict is in form three and will be a candidate in the next year.

g) The convict has been in remand since 2017 before conviction which period I have taken into account in passing a sentence against her.

11. In the result and for the reasons given hereinabove in this ruling, the convict deserved the death sentence. However, owing to the legal authorities cited hereinabove, this court has a wide discretion in determining a sentence to pass against the convict. Paragraph 4.1 of the Judiciary Sentencing Policy Guidelines is to the effect that a balanced sentence strives to attain the reformative, preventative, deterrent, denunciative, community protection and retributive objectives of punishment. In the difficult search for an appropriate and balanced sentence, the factors may not have equal weight but the weight attached to each factor must be appropriate and then on a balance of all the factors in mitigation and aggravation, the court must determine whether the defendants can adequately be sentenced with a non-custodial sentence, payment of a fine, or forgiveness of the defendants.

12. In **Republic v Catherine Ndunge Muthoka [2019] eKLR**, the accused was in custody for eight years and was sentenced to 5 years’ probation supervision for murder of her child by drowning. It was observed that:

“27. In my view keeping the accused in custody will not only be detrimental to her but also to the welfare of her children and her ageing grandparents. Having considered the circumstances of this case, while I agree that the period that the accused has served in custody is not sufficient to have her unconditionally released, the factors of this case militate against her being kept in custody. It is neither in her interest, the interest of the society or her family that she continues being in custody.

28. In the premises together with the period that she has spent in custody, I hereby sentence her to 5 years’ probation during which period she will undergo counselling and therapy.”

13. In the South African Case of **S v Mukona 2015 JDR 2057 (SCA)** the accused, who had a previous conviction for murder, had assaulted his two children with an axe, as a result of which one of them died and the other was grievously injured. He was given a life sentence. At para 18 of the judgment, Mathopo JA stated, ‘There is no doubt that the offences were serious to the extreme. What is aggravating is the fact that the arson, murder and attempted murders were committed in the sanctity of the complainants’ homes. The children had looked to the appellant for protection and guidance. Instead he abused his position of trust, and killed and injured them. This must have been emotional, traumatic and devastating for the young defenseless children to have had to suffer at the hands of their father. As a result of the assault, Mulanda has been semi-paralyzed and been left mentally impaired. She is probably fortunate to have survived but will forever live with the fact that her condition was caused by her father. The appellant showed no remorse for his actions and persisted on his innocence and did not testify or adduce evidence aimed at demonstrating his remorse or contrition’.

14. In another South African Case of **S v Montsho 2014 JDR 0743 (GNP)** a sentence of life imprisonment was imposed for the murder by a 27 year old man of a young boy aged three years who had been playing outside his house when the accused enticed him to accompany him. Thulane AJ remarked at para 56 ‘The right to life is sacred, basic to humanity itself and enjoying Constitutional protection. Children in this country are entitled to play in the streets, especially just in front of their parental home. They have a legitimate claim to play peacefully on the streets, to enjoy their youth, to run around and enjoy the peace and tranquility of their homes and neighbourhood without the fear, the apprehension and the insecurity which constantly diminishes the quality of their lives’. Accordingly, therefore, I make a finding that the convict in this case deserves an appropriate sentence that is deterrent. I would be cautious not to be too lenient on the convict so as to propel

a view that murder of an innocent child and living a jumpy lifestyle is fashionable. It is noted that the accused deliberately got rid of her own child so as to pave way for her to continue her love life. If she didn't want the child, then she could have left him with her mother or given up the child to an adoption society or even a children home for that matter and that she could thereafter continue pursuing her lovers instead of brutally killing him. That child did not deserve to die. Thus, taking into account the time that the convict spent in remand before conviction, I would have sentenced the convict to 30 (thirty) years imprisonment, but I have deducted the said period spent in remand before conviction.

15. Therefore, I sentence the accused to 27 years' imprisonment from the date of conviction.

It is so ordered.

Dated and delivered at Machakos this 21st day of January, 2021.

D. K. Kemei

Judge