



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 113 OF 2015

REPUBLIC.....RESPONDENT

VERSUS

DAVID MWANGI GITHAMBU.....APPLICANT

RULING ON SENTENCE

1. The accused herein **DAVID MWANGI GITHAMBU** was convicted of 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 night of 29<sup>th</sup> October, 2013 and 30<sup>th</sup> October, 2013 at Kinoo in Dagoretti in Nairobi County murdered his father **ERICK GITHAMBU MWANGI**.

2. The court is now called upon to pass out an appropriate sentence herein taking into account the Supreme Court decision in the case of **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.”*

3. 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.”*

MITIGATION

4. With this Supreme Court decision in mind, the court called upon the accused to mitigate and further called for and received a pre-sentencing report, from the probation department for consideration, for purposes of sentencing. In mitigation, the accused through his Advocate on record, Ms Ajiambo, stated that he was very remorseful of what had happened that fateful night. He stated that he was now a reformed person who should be accorded a second chance having during the period in custody, went through several courses in particular and had obtained a Diploma in Bible Correspondence courses and certificate from EMAUS BIBLE SCHOOL.

5. It was submitted further that he had been the sole bread winner for his family of a wife and a five (5) year old daughter, who were now living and depending upon his mother. He therefore sought non-custodial sentence to enable him support his young family. He stated further that he had been in custody for a period of five (5) years, which in addition to his young age of 30 years, should be taken into account. He stated that save for minor traffic offences, he had before the commission of this offence been a law abiding citizen.

6. In support of a non-custodial sentence, the accused wife addressed the court and stated that since his arrest their life had been very difficult. She pleaded with the court on his behalf for non-custodial sentence, to enable him go back to the society to assist her in bringing up their child.

7. On behalf of the State, Mr. Okeyo submitted that the convict had no major previous record save that there was a pending report at the Kabete Police Station made by his step mother (PW1), that the accused had threatened to and attempted to kill her. He submitted that the report was supported by the evidence on record and that in attempting to cause harm to the second person, having killed the deceased these should be considered as aggravating circumstances by the court while passing appropriate sentence. He submitted that any sentence passed should perform the two objectives of reforming the accused and also acting as deterrence.

### **PRE-SENTENCING REPORT.**

8. It was stated therein that the convict was the third born child in a family of four siblings, his parents had separated while he was in class one and had been brought up during his formative years by his paternal grandparents. He studied up to standard Eight (8) where he scored 260 out of 500 marks. He thereafter became a matatu conductor on Kijabe- Nairobi route, before venturing into bodaboda business at the time of the offence.

9. On the circumstances of the offence, it was indicated that the deceased sold a piece of land which he had been given by the accused grandparents without his consent, which infuriated him. It was indicated that the offender was contrite and regretted the occurrence, leading to the demise of his father, whom he had never intended to kill.

10. On the home front, it was indicating that the family was willing to take him back and assist him to rebuild his life, being the only son of the family. The family believed that he had gone through a lot following his incarceration and had learnt his lesson and that they had forgiven him.

### **DETERMINATION**

11. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -

- 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.***

12. 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.
- b) Criminal history of the offender.
- c) Character of the offender.
- d) Protection of the community.
- e) Offenders responsibility to third parties.

13. In this cause, the offender killed his father, a death which was not called for. The reason given by the convict that his father sold a piece of land which had been given to him by his grandparents, cannot take away the blame worthiness on his part. I have further noted that the pre-sentencing report only took into account the views from one side of the accused family (from his mother's side) and did not take into account from his paternal side and was therefore not balanced taking into account the evidence tendered at the trial.

14. Whereas the accused has pleaded for non-custodial sentence, from the evidence tendered at the trial, it is clear to me that his motive in killing his father was akin to that of his prodigal son. He wanted to enjoy his father's wealth by no means. It is this that led him to plan, design and execute the act with assistance of those who are at large. He thereafter took over his father's earthly possessions and started to enjoy the same until according to his "confession" to the police, his father came calling from the dead.

15. His actions were uncalled for and as a warning to children to work hard and get their own property without waiting for or causing their parents death so as to take over the property, a deterrence sentence is called for since filicide is in the increase in Kenya.

16. In sentencing the accused, I have looked at comparative cases and the following are guidelines to this court.

a) **REPUBLIC v WILLY SANGA (2020) eKLR** which was a resentencing matter and in which the judge sentenced the accused who killed his father for no reason to an imprisonment of 30 years.

b) **WILFRED KARIUKI GITAHI v REPUBLIC [2019] eKLR** the accused who despite warning was hell bent on killing his father was resentenced to twenty-five (25) years imprisonment.

c) **REPUBLIC v JOHANNA CHEPKOWNY KIPKORIR [2019] eKLR** the accused was sentenced to twenty (20) years imprisonment.

d) **KALAMA MWERO NGALA v DPP [2020] eKLR** the accused who killed his father using a panga was resentenced to twenty years' imprisonment with five (5) thereof being served on probation.

17. Having taken to account the circumstances under which the offence herein was committed and the fact that the accused father was strangled and further the fact that the accused also attempted to kill his step mother who was living with his father and thereafter took over all his father's earthly possession. I am of the considered opinion that a custodial sentence is the most appropriate sentence herein.

18. I therefore sentence the accused to an imprisonment term of twenty years with effect from 15/12/2015 when he first appeared in court, under the provision of Section 333 of CPC. For the benefit of the accused young family, the last three (3) years of the sentence are suspended and shall be served on probation so as to resettle the same into society. The accused is entitled to remission.

19. The accused has a right of appeal on both conviction and sentence while the State has right of appeal on sentence. It is ordered.

**Dated, Signed and Delivered virtually at Nairobi this 21<sup>st</sup> day of January, 2021.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Okeyo for the state*

*Ms Ajiambo for the accused*

*Accused present*

*Court clerk Potishoi*