



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL CASE NO 4 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD KIBET BUSIENEI *alias* CHAGICHA.....ACCUSED

RULING ON SENTENCE

1. Bernard Kibet Busienei alias Chagicha (Accused) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that he murdered one AC on 27th January 2017 in Menet Sub-location within Bomet County.

2. The Accused denied the charge and was tried by Muya J. Ongeri J took over the case at judgment stage. In her judgment dated 3rd August 2020, Ongeri J found the Accused guilty and entered a conviction against him.

3. I took over the case at sentencing stage. At the sentencing hearing on 28th October, 2020, I heard mitigation by the parties. In his brief submissions, Mr. Cheruiyot for the Accused stated that the Accused was the bread winner of his family and was remorseful. Counsel also stated that the deceased was a 3 year old girl. He submitted that the Accused's family was rendered homeless by members of public after the incident and that these circumstances had made it impossible for the family to seek reconciliation with the deceased's family.

4. In addition, the Accused addressed the court directly and tearfully submitted that he was the 1st born and his family relied on him. He pleaded for leniency stating that it was alcoholism that made him do what he did. He also stated that he had been in pre-trial custody for 3½ years. On his part Mr. Mureithi for the Prosecution submitted that the Accused was a first offender.

5. The court called for a pre-sentence probation officer's report which report was filed on 5th November 2020.

6. I have perused the trial proceedings and the Judgment in this case and considered the mitigation and the pre-sentence report. I have also paid due consideration to the sentencing guidelines and principles.

7. The purposes of sentencing as stated in **The Judiciary Policy Sentencing Guidelines (2014)** are:-

(i) Retribution: to punish the offender for his/her criminal conduct in a just manner.

(ii) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

(iii) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

(iv) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

(v) Community protection: to protect the community by incapacitating the offender.

(vi) Denunciation: to communicate the community's condemnation of the criminal conduct.

These purposes are not exclusive in themselves and their application is dependent on the unique circumstances of each case.

8. In **Republic V. Priscilla Cherono Chebet & 2 Others Nairobi Criminal Case No. 65 of 2011**, this court cited the court of Appeal decision in **Thomas Mwambu Wenyi Vs. Republic (2017) eKLR** which restated the objectives and principles of sentencing thus:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

9. In this case, the facts proved by the Prosecution gave a chilling account of how the Accused defiled a hapless defenceless 3 year old child tearing through both her genitals and anus; and crowned his heinous act by snuffing out her innocent life by strangling her. In the evidence received by the trial judge, there was no eye witness to the commission of the offence. However, the case was proved vide circumstantial and forensic evidence.

10. Dr. Ronald Kibet (PW5) carried out the post-mortem on the deceased and summarized his findings thus:-

“... Externally there were blood secretion in the nostril strangulation mark around the neck. There was fresh blood on the thighs genitalia and rectal region. Digestive system there was gaping of the anal opening with lacerations. The vagina opening was open and gaping with lacerations at the 6 o'clock. There were bloody secretions oozing out. The perineum had bruises and tears. Perineum is the region between the vagina and anus. Cause of death was strangulation....”

11. On his part Mr. Richard Kimutai, Government analyst (PW6) presented forensic evidence. In his findings, the DNA extracted from the blood stains on the Accused's trouser and shirt matched the DNA extracted from the vaginal and rectal swab from the deceased.

12. The evidence above demonstrates aggravating circumstances. Such circumstances, in the absence of any mitigating circumstances, must attract the maximum penalty.

13. I have looked at the mitigation offered by the Accused. He states that his family was dependent on him. He also blames his abuse of alcohol for his heinous act. On alcoholism, the court observes that there is no guarantee that the Accused would not lapse back into the habit and commit other crimes. I have also considered the submission by the State that the Accused was a first offender.

14. I have considered the pre-sentence Probation Officer's report. The report states that the Accused dropped out of school in class 7 and heavily abused alcohol and smoked bhang. According to the report, interviews with the Accused's family members revealed that he was an anti-social person given to criminal tendencies from a relatively young age.

15. The report further states that the incident caused a public outrage leading to the burning of several houses in the home of the Accused and eviction of his family members. That both the deceased's and the Accused's families craved a deterrent custodial sentence on the Accused as they were fearful of his release back to the community. It is not true therefore, as submitted by the Accused, that he was his family's breadwinner. In the view of the court, the report paints a picture of a person against whom the community should be protected.

16. The Accused has spent 3½ years in pre-trial custody and I have taken this period into consideration.

17. I have also borne in mind, on the authority of the Supreme Court decision in **Francis Karioko Muruatetu & Another V. Republic (2017) eKLR** that the mandatory nature of death sentence for the offence of murder was unconstitutional; and, that a trial court ought to exercise discretion after taking into consideration the circumstances of the case as well as any aggravating or mitigating circumstances before meting an appropriate sentence. I however, observe that the Supreme Court saved the validity of the death sentence by stating thus:-

“For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution...”

See also **Republic V. Ruth Wanjiku Kamande Nairobi Criminal Case No. 93 of 2015**.

18. In this case, I have considered all the factors and circumstances as *aforestated*. The circumstances in this case as borne by the evidence and the judgment were so aggravating as to attract the maximum sentence. The court in my view has the constitutional duty to apply the law to mete out proportionate punishment and to protect the community. It behoves the court to protect vulnerable children from fatal defilement and cold blooded murder. It would offend society's sense of justice if the Accused were to get any sentence other than the maximum sentence provided by law.

19. I sentence the Accused to suffer death in accordance with Section 204 of the Penal Code, and I so pronounce. The Accused has 14 days right of Appeal against both conviction and sentence.

20. Orders accordingly.

SENTENCE DELIVERED, DATED AND SIGNED AT BOMET THIS 25TH DAY OF FEBRUARY, 2021.

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R. LAGAT KORIR

JUDGE

Sentence delivered in the presence of the Accused, Defence Counsel Mr. Cheruiyot, Mr. Mureithi for the DPP, and Kiprotich (Court Assistant).