



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL CASE NO. 50 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON EVANS KANDIE.....ACCUSED**

**SENTENCE**

*The crime*

[1] On 22<sup>nd</sup> April 2016 at about 7.00pm, the accused killed his father in cold blood by cutting him with a panga severally on the head and eventually almost decapitating him. He killed his father in the presence and bare sight of his son, grandson of the deceased. The offender and his father had been in regular disagreement over the father's refusal to sell his livestock and give the offender money. The father's refusal was based on reasoning that the animals were for the education of his grandchildren, the offender's children. It was clear that all was not well with the offender as he had the previous day before the incident chased away his wife, and the children relied on milk given by their grandfather. The killing incident happened when the offender came upon the father and his grandson when they had just finished milking and the former had given to the latter some milk to take to their home. The offender refused his son to take the milk and started a quarrel with his father leading to the offender killing his father by panga blows to the head. The cause of death was documented in the Postmortem report as "*Decapitation and multiple deep head cut wounds following assault.*" The offender was certified sane by a mental assessment certificate dated 6<sup>th</sup> May 2016 making him a sane murderer of his father.

*Sentencing proceedings*

[2] At the sentencing proceedings, Mr. Mon'gare, Assistant DPP for the State submitted that the offence committed by the offender deserved punishment by the death sentence but in view of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR conceded that the court may consider a sentence of imprisonment but urged that the court imposes a sentence which was sufficiently deterrent.

[3] Mr. Ngamate, Counsel for the accused in mitigation for the offender pointed out that he was a first offender; that 'he was remorseful for what happened'; and that he had been in custody for almost five years while awaiting the conclusion of his trial. The accused himself pleaded that his children had been left without a care-giver following the death of his only brother.

*The sentencing principles*

[4] As observed in *Karioko Muruatetu*, *The Kenya Judiciary Sentencing Policy Guidelines, 2016*, sets out the objectives of sentencing 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 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. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.***

***5. Community protection: To protect the community by incapacitating the offender.***

**6. Denunciation: To communicate the community's condemnation of the criminal conduct.”**

[5] This court must, therefore, consider the sentence most suited for the circumstances of the case in view of the stated objectives of sentencing.

**The death sentence**

[6] The first murder as chronicled in the Bible is that by Cain of his brother, Abel. In Book of **Genesis 4: 9-16** (KJV), it is written that God sentenced Cain to a life of wandering and prohibited his killing, as follows:

<sup>9</sup> *And the Lord said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother's keeper?*

<sup>10</sup> *And he said, What hast thou done? the voice of thy brother's blood crieth unto me from the ground.*

<sup>11</sup> **And now art thou cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand;**

<sup>12</sup> **When thou tillest the ground, it shall not henceforth yield unto thee her strength; a fugitive and a vagabond shalt thou be in the earth.**

<sup>13</sup> *And Cain said unto the Lord, My punishment is greater than I can bear.*

<sup>14</sup> *Behold, thou hast driven me out this day from the face of the earth; and from thy face shall I be hid; and I shall be a fugitive and a vagabond in the earth; and it shall come to pass, that every one that findeth me shall slay me.*

<sup>15</sup> **And the Lord said unto him, Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold. And the Lord set a mark upon Cain, lest any finding him should kill him.**

<sup>16</sup> *And Cain went out from the presence of the Lord, and dwelt in the land of Nod, on the east of Eden.”*

That God Himself did not exact a death revenge on Cain should guide us when considering how to treat our murderers. Indeed, God put a mark on Cain so that he may not be killed. Following this lead, the court should not meet the savagery of the accused's killing of his father with the savagery of the death sentence.

[7] Article 6 of the **International Covenant on Civil and Political Rights** (ICCPR), which part of the law of Kenya by virtue of Article 2 (6) of the Constitution provides as follows-

**“Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

**2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.**

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

**6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”**

[8] Although Article 6 of ICCPR does not outlaw the death sentence, it is clearly the direction that the community of Nations consider justice should follow as **“countries which have not abolished the death penalty”** are the exception, and with the saving at sub-Article 6 that its recognition in the Article shall be not be invoked **“to delay or to prevent the abolition of capital punishment by any State Party”**. It is, in my view, obnoxious that among civilised society a justice system would set out on revenge mission visiting death on its citizens, those who commit robbery with violence and even those who commit murder, rather than striving to convert and mould them into a responsible, helpful and productive force of its nation, for the sake of the Nation, the sake of the whole World and not least for their own sakes. We should not be driven by **the punitive obsession** (read Giles Playfair's Book with the same name) to exact revengeful death penalty for murder; let us be

led by a **conviction by enduring faith in humanity's capability for reform and rehabilitation**, and the expected joy of achievement of such change for the better character for our people.

### ***Death sentence not mandatory***

[9] **The Supreme Court of Kenya has clarified that the death sentence prescribed for the offence of murder under section 204 of the CPC is not mandatory and the court may consider mitigating factors. In *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the court lay down the law in Kenya relating to the death sentence as follows:**

*[59] We now lay to rest the quagmire that has plagued the courts 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 Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.*

[10] As regards the sentence of imprisonment, the Supreme Court yearned for the adoption of the principles of reformation and rehabilitation of offenders as set out in Article 10 (3) of the ICCPR, when it held in *Karioko Muruatetu* as follows:

*“[93] In addition, and in accordance with Article 2(6) of the Constitution, **“any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”**. In 1972, Kenya ratified the International Covenant on Civil and Political Rights of 1966, and for that reason, the Covenant forms part of Kenyan law. **Article 10(3) of the Covenant stipulates that— “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”**”*

### ***The Sentence***

[11] What sentence is appropriate for a son who hacks his father on the head with a panga and decapitates him for refusing to sell his goats and cattle to get money to give his son insisting instead that the animals are for the education of his grandchildren who are the son's children and are by the death denied of their benefactor who provided for their food (evidence of milk usually given to the eyewitness suffices) and planned to sell his animals for their education during his life?

[12] By his act, the accused killed his father, denied his children the benefit of dependency on their grandfather and effectively shortened his deceased father's life expectation. The offender cannot now be heard to lament that his children have been left without care following the death of his only brother as he pleaded in mitigation. His is the architect of the present situation by killing his children's benefactor.

[13] The savage act of killing the deceased by cutting him on his head was committed in the presence and sight of the eye witness grandson of the deceased with a possibility of a life long traumatic experience. Society must be revulsed by the son's brutal killing of his father and it is appropriate to express such revulsion by imposition of severe penalty for the offence for the possible deterrence against such offence by potential offenders. A dual purpose of deterrence and reformation of the offender may be achieved by a sufficiently severe sentence serving to **deter** both potential offenders and repeat offence by the offender, and also **reform** the offender into a person capable of lawful, productive living in society among other members of his community.

### ***Pre-trial detention***

[14] The court has noted that the offender has been in pre-trial detention for almost five (5) years since 22<sup>nd</sup> April 2016 and, taking account of the said period of pre-trial detention pursuant to section 333 (2) Proviso of the Criminal Procedure Code, the Court, however, considers, in view of the seriousness of the offence, that an imprisonment term of thirty (30) years from the date of this sentence, with remission being actual custody time of twenty (20) years, to meet the justice of the case. The offender who is 35 years will be 55 on completion of his sentence (with remission) and may rejoin society a reformed person capable of rehabilitation into the society, and yet he will have learnt his lesson and the justice system will have taught others by him.

### **Orders**

[15] Accordingly, for the reasons set out above, the Court having in its judgment convicted the offender for the offence of murder contrary to section 203 as read with 204 of the Penal Code now sentences the offender to **imprisonment for thirty (30) years from the date of this sentence**, having taken into account the period of his pre-trial detention pursuant to section 333 (2) Proviso of the Criminal Procedure Code.

*Order accordingly.*

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF FEBRUARY 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**Mr. Ngamate, Advocate for the Accused.**

**Mr. Mong'are, Ass. DPP with Mr. Abwajo for the Prosecution.**