



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL CASE NO. 9 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

COLLINS ROTICH MUNGUTI Alias

EMMANUEL ROTINO.....ACCUSED

JUDGEMENT ON SENTENCE

The issue before me is one of the appropriate sentence to be imposed upon the accused following his conviction on a charge of murder.

Ms Nafula, counsel for the accused mitigated on behalf of the accused. She told the court that the accused is a first offender, a father and husband of one wife and three children aged 18,12 and 4 or 5 years.

She further told the court that the accused is the sole bread winner of his family.

Furthermore, she told the court that the death penalty was declared unconstitutional in the case of *Francis Muruatetu & Another v Republic (2017) e-KLR*. She also told the court that under section 50 (2) (p) of the 2010 Constitution, the accused is entitled to a lesser severe sentence. She therefore urged the court to impose a lenient sentence.

Mr. Makori, counsel for the prosecution told the court that a life has been lost and the victims have still to come to terms with what happened. He also told the court that the provisions of article 50 (2) (p) of the 2010 Constitution do not apply to the instant case. He further told the court that the prescribed penalty is death as set out in section 204 of the Penal Code (Cap 63) Laws of Kenya; which provisions are still in force.

Counsel further submitted that *Francis Muruatetu & Another v Republic, supra*, held that the death penalty is unconstitutional and that the provisions of section 204 of the Penal Code have not been amended. Counsel further submitted that the court has a discretion to impose a death penalty or any other appropriate sentence. Additionally, he told the court that each case must be decided on its merit. He finally urged the court impose a stiff sentence to deter others from committing such an offence.

Upon the application of the accused, I allowed him to address the court. He told me that he is a regular marijuana (bhang) smoker and has been doing so for years. He further told me that he inherited this smoking from his grandparents. Furthermore, he also told the court that he cannot remember fighting with the deceased, since he was drunk and that he was insane at the time he committed the offence.

I have considered both the mitigation of the accused and the submissions of the prosecution.

I find that a life has been lost. I further find that the accused murdered the deceased after drinking chang'aa with the deceased in two homes.

I have considered the mitigation of the accused that he is a first offender and that he is a married person with three children aged between 18 and 5 years. I have also taken into account that the accused is the sole bread winner of his family. Furthermore, I have also taken into account that the accused has been in remand custody, since July 2019, which translates to now about two years.

Both counsel submitted that the Supreme Court in *Francis Muruatetu & Another v Republic, supra*, declared unconstitutional the death penalty. This is not correct in law. That decision only declared as unconstitutional the automatic imposition of the death penalty upon conviction in respect of the offence of murder. In other words, it ruled that trial courts have a discretion to impose the death penalty or any other appropriate sentence. Stated differently the death penalty is still constitutional, only that now it is not imposed automatically following the entry of a conviction for the offence of murder and offences that carry prescribed minimum mandatory sentences.

Furthermore, I find that the prosecution is not allowed to inform the court to impose a stiff sentence. Under the current law only the accused

or his counsel is allowed to urge the court to impose a lenient sentence. It is for the foregoing reason that I have ignored the prosecution submission that I impose a stiff sentence to deter potential offenders; for it is the court that has to decide whether a deterrent sentence is called for or not.

I have taken into account the mitigating and aggravating circumstances of this case. Having done so, I find that it is not appropriate to impose a death penalty; since the accused and the deceased were friends and that the accused may have been influenced by being drunk with chang'aa that they drank in two separate homes. During the pre-sentencing hearings, the accused described the bhang smoking as part of what he inherited from his grandparents. It is also possible that he may have been influenced by the of smoking bhang; since some bhang was found upon him after he was arrested.

In the premises, I find that a sentence of twenty years imprisonment is appropriate and I hereby impose it.

Judgement dated, signed and delivered in open court at Kapenguria this 21st day of April 2021.

J. M. BWONWONG'A

JUDGE

In the presence of:-

Mr Juma and Ms Hellen, court assistants

Mr Makori for the Republic

Ms Chebet holding brief for Mr. Kraido