



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 18 OF 2019 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

JOEL OGOLLA LUTTA alias "DADDY".....1ST ACCUSED

VICTOR OGOLLA LUTTA.....2ND ACCUSED

RULING ON SENTENCE

1. On 31.3.2021, the accused person herein **Joel Ogolla Lutta alias Daddy** was found guilty of the offence of **Murder contrary to Section 203 of the Penal Code**. This court then convicted him accordingly and reserved sentence until after mitigation, Victim Impact Statements and a report from the Probation Officer.
2. The accused person has now mitigated. The prosecution led by Mr. Kakoi Principal Public Prosecution Counsel states that they have no last record hence the accused can be treated as a first offender. However, the Probation Officer's Report filed in court on 20.4.2021 and the Pre-bail Assessment Report shows that the accused person is not a first offender.
3. The community describes him as a habitual offender and that previously, he was convicted of creating disturbance at Ukwala Law Courts vide Ukwala Senior Resident Magistrate's Court, Criminal Case Number 431 of 2018 and the victim was his mother. In addition, the accused is said to have been abusing drugs and alcohol.
4. Those offences are unrelated to the present case where he has been convicted of the offence of Murder. The accused denied committing the offence of Murder. The Pre-sentence Report says that he now readily admits committing the offence in defence of the Victim's Lover as the deceased had pushed her and so he intervened and hit him on the wall only to learn later that the deceased had died then he took off.
5. I have heard mitigation by the accused who is aged 28 years old and married with one child. He claims he is stressed and is asthmatic. His mother is also sick. He admits being charged before Ukwala Court saying it was because of heavy drinking. His elder brother died. His wife was operated on so she cannot perform heavy tasks and depends on him. He says he is reformed and goes to church. He seeks forgiveness from the deceased's family and regrets that his actions caused the death of the deceased.
6. The convict is, according to the Probation Report, the last born in his family that loves him very much such that his mother is said to be affected by the incarceration of the accused albeit she is glad that her other son, the 2nd accused, Victor Ogolla Lutta, was acquitted of the offence. The accused is said to regret the offence and pleads for leniency from the court.
7. The deceased's family, his wife and 4 children are said to be suffering because of losing the sole breadwinner who was a journalist. The community is sympathetic to the accused and they are said to blame the Victim's Lover who caused all this. They are also said to be happy that the Victim's Lover died during the pendency of this case. They had expected her to be charged with the murder of the deceased hence they were disappointed when she turned out to be a prosecution witness.
8. An innocent life was lost. There is no evidence of provocation by the deceased to warrant such vicious attack by the accused person who throughout the trial denied committing the offence. The deceased suffered serious head and abdominal injuries and no attempt was made to mitigate the pain by taking him to hospital. He died in painful anguish and what this court was taken through and the family of the deceased during the hearing is that he hit himself on the concrete floor and hurt his head.
9. The Post Mortem Report ruled out self-inflicted injury. No person has any right to take away the life of another except by Law provided. It is unfortunate that the community is blaming the deceased's Lover and are happy that she is dead. There is no evidence that Kerubo invited the convict 1st accused to deal with the deceased or that she was under any threat seeking protection from the convict herein against

her Lover.

10. The accused convict by hitting the deceased so viciously knew or ought to have known that the deceased would suffer grievous harm or even death. He is now crying about his mother who is sick and how his mother is stressed because he is in prison. He has only lost some liberty not life. The deceased is gone forever and behind him is a family that is mourning and agonizing forever.

11. It is not enough to say I am sorry now after unlawfully killing the deceased and had it not been for the Pre-sentence Report, this court would never have known why the deceased was killed. The accused asks for forgiveness from the family of the deceased but he has taken the prosecution through the motion of proving his guilt beyond reasonable doubt.

12. Sentencing regime in Kenya is guided by the Constitution, statutes, policy guidelines and case law. The Constitution lays down the general framework on sentencing while the statutes, sentencing guidelines and case laws provide guidelines on sentencing.

13. Sentencing is in the discretion of the trial court which had the opportunity to observe, hear and see the witnesses as they testified and the mitigations proffered by the accused person. The discretion must however be exercised judiciously. In the Nigerian case of **African Continents Bank V Nuamani [1991] NWLI 486**, it was observed thus:

“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.”

14 Generally, in sentencing the convict, the following factors are considered:

- a) ***The decision of the Supreme Court in Francis Karioko Muruatetu & Anor v Republic (2017) e KLR;***
- b) ***All the mitigating factors submitted by both counsels for the prosecution and the convict.***
- c) ***The Probation officer’s report incorporating the attitude of the offender and that of the community and the victim’s family;***
- d) ***The Judiciary Sentencing Policy Guidelines, particularly paragraph 23.7.***

15. For avoidance of doubt, this court has also taken into account the following key factors:

- a) ***The convict has been a previous convict in an unrelated offence;***
- b) ***his age is 28 years;***
- c) ***The deceased had a right to life that was taken away from him prematurely;***
- d) ***From the facts of the case and the way the deceased was killed, the accused person viciously hit him on the head which is a very delicate part of the body and the deceased died while in a lot of pain having suffered the whole night without anybody taking him to hospital as his host was so intoxicated;***
- e) ***The convict is said to be a person who is involved in criminal activities and abuses drugs and alcohol;***
- f) ***The convict has been in remand custody since 2019 before conviction which period I have taken into account in passing a sentence against him.***

16. Punishment for murder, as stipulated in section 204 of the Penal Code is death. However, taking into account the mitigations given and the circumstances under which the offence herein was committed and the present attitude of the convict, as well as the sentencing guidelines and the decision in the **Francis Muruatetu & another vs Republic [2017]e KLR**, and exercising judicial discretion, as per Paragraph 4.1 of the Judiciary Sentencing Policy Guidelines to the effect that a balanced sentence strives to attain the reformatory, preventative, deterrent, denunciative, community protection and retributive objectives of punishment, I am of the view that the convict herein deserves to be kept away from the society for a while to be fully rehabilitated and to reform. Non -Custodial sentence which he prays for is not suitable for him. He requires rehabilitation and reformation away from the society for some time.

17. Therefore, having considered all the mitigation and the presentencing report and the objects and guidelines on sentencing, and exercising judicial discretion, I hereby sentence the accused person **Joel Ogolla Lutta alias “Daddy”** to serve thirty five (35) years imprisonment to be calculated from the date of his arrest.

18. The accused has a right of appeal which is 14 days guaranteed from this date of sentencing. File is closed.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF APRIL, 2021

R.E. ABURILI

JUDGE

In the presence of:

Mr. Kakoi Principal Prosecution Counsel for the State

Mr. Ochanyo Advocate

Convict Joel Ogolla Lutta

CA: Modestar and Mboya