



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL CASE NO. 36 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

EVANS MALIACHI WIYEMA.....ACCUSED

JUDGMENT ON SENTENCING

1. The accused was convicted for Murder by this court wherein the court found at paragraph 43 of its Judgment of 22nd February, 2021 as follows:-

“Given all the foregoing circumstances and my finding, I determine and hold that the accused acted with mens rea, recklessly and in violation of the law. His actions were made all the more unacceptable by the fact that he did not report the incident but instead chose to assist in prosecuting the fishermen. His actions do not add up and do not support the defence of self-defence. Ultimately, I find the accused guilty of murder and convict him for the same.”

2. Under **Section 204** of the **Penal Code**, the mandatory prescribed sentence for Murder is death. However, pursuant to the Muruatetu Principles in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, this court has discretion to mete sentence as it thinks fit taking into account the offender’s mitigating circumstances and in light of the Judiciary Sentencing Guidelines.

3. The Offender’s mitigation hearing took a long time to take place as he changed his counsel who desired to be present to represent him at mitigation. On account of counsel’s passionate representation of the offender’s mitigation circumstances, I have replicated the same hereunder as follows:

“On 22nd February, 2021 High Court found Accused of murder. We come humbly before court since incident occurred. Accused’s regret commenced. He has tried to defend himself. He has been feeling the pain and regrets. He seeks court’s leniency.

Family of deceased has suffered. Accused does not deny. Parents have suffered. The parents depended on deceased. Therefore they are truly suffering. Accused is on bended knee and asks for forgiveness. This was an unfortunate incident. Losing a child is not an easy thing.

Wife of Deceased is a young lady with a child going to school. She is struggling to put food on the table and make ends meet. Accused is contrite. Accused says even if wife of deceased is in pain, can’t she forgive? Can’t she see he is remorseful? The pain has been there since 2014. This is why Accused is on bended knee. He asks her for forgiveness. This comes from his heart. The deceased’s child is 4 years old. If she is 4 years old she was not born at the time of the incident. If the child is there, the accused still forgiveness.

The people who were with deceased have been affected too. They have been stressed. They miss their friend. This does not stop accused from asking for forgiveness. He bows before them seeking for forgiveness. He believes this is the time to heal. Once Accused was convicted justice began being served. This is from the heart. When you start healing you start to think.

Accused is 35 years old. Still in his youth. Still able to be productive to himself, family and the Republic. Served as a Police Officer since 2007. His record is unblemished. Until this incident he was a model citizen. Family members say he has been assisting it.

At time of incident he was about 29 years old. He had youthful exuberance. Now he has matured. The act he did, it can be forgiven surely. He has gone through this process for the last 7 years. It is painful.

Accused tells me he has regretted every single hour, minute, month, year since the date of being charged. He is also affected psychologically. He is 6th born of 10 siblings. 2 have since passed on. He has 3 children aged 8 and twins aged 4 years. The 8 year old is in school. He has been a dependant on the father for everything. The other two children will soon start school. They need him.

His wife also needs him. She is now upcountry. They too have suffered psychologically. The only person who can be a role model to his children is him. He can advise them.

Is this the kind of person for custody or for probation? He can be rehabilitated. Since he was charged he has not even committed any other crime. He also seeks the court's discretion. We ask the court to feel his pain. What will custodial sentence achieve for him? Even if we use Muruatetu decision it gives the court latitude to sentence. The court can set a good precedent. True everyone has suffered. He can be given a chance to rehabilitate. We rest our mitigation. "

4. The Victim's Counsel also filed submissions through a Victim Impact Statement pursuant to **Section 4 (1), 9 (1)(a), 9(2), 9 (3)** and 12 of the **Victim Protection Act 2014**. The said statement was made by one Pamela Masakhwi of the International Justice Mission who was the Victim's Representative. It sets out the impact on the Victims as follows:

"At the time of his untimely demise, Moses Wanyoike left behind a wife, Linda Kerubo who was 4 months pregnant. This incident was highly traumatizing to the wife as Moses was the breadwinner of the family. Linda was forced to work extra hours during her pregnancy and after delivery to be able to take care of the baby. However, being alone, this was not sustainable, she accumulated rent arrears and debts that compelled her to relocate back to her mother's home in Kisii. Without her support system, she developed Generalized Anxiety Disorder (GAD) coupled with mixed emotions on how her life will unfold in present and in the future. GAD is much more than the normal anxiety people experience day to day. It is chronic and victims experience sever worry and tension, often without provocation. This disorder involves anticipating disaster, often worrying excessively about health, money, family, or work. Sometimes, though, just the thought of getting through the day brings on anxiety. On interview, Linda states that it is still extremely difficult to get and sustain a job due to exposure the case has caused and the constant reminder that she is alone in parenting the child. Her now 4-year old daughter keeps on asking her why she does not have a father and yet all her friends in school have fathers.

The parents of the deceased were equally affected by his death. Joseph Kamau Njenga and Jane Wanjiku arrived at the Lake where the incident occurred only to be told that their son's body cannot be retrieved on that day. They hired some divers the next day ad successfully retrieved his body from the lake, unfortunately, the body was in a horrific state, an image that has remained with them to date. Their once healthy and vibrant son was no more. His eyes were swollen, and worms had already started eating his flesh. Wanyoike's father states that he saw the bullet hole on his son's head, an image that shook him to the core. Since then, they both experience psychological triggers which at times leads to memory loss. This never happened before the loss of their son. Moses's parents developed a sense of hopelessness in life after learning about how their son was brutally murdered by a police officer without a justifiable reason and yet he was the breadwinner of the family. The mother suffered from Dementia which resulted in Depression. Dementia is a group of symptoms affecting memory, thinking and social abilities severely enough to interfere with daily functioning. This journey in search of justice has taken a toll on the family both emotionally and financially.

The impact of Moses Wanyoike's death went beyond the primary victims and affected his friends, Douglas Tutu and Johnson Ndichu (now deceased) who were with Moses Wanyoike when he was killed. They witnessed his lifeless body sink into the lake as the officer arrested and took them away. They begged the accused to allow them to save their friend but instead were placed in cells and charged with Stock theft. They were incarcerated at Naivasha Remand Prison. They were later acquitted by the lower court. This incident ruined their families and their reputation around their peers and the community at large. Douglas Tutu states that his life has never been the same again after witnessing his friend's body floating in water after being shot by the officer.

The victims have waited four long years for justice to be served. The journey has taken a toll on the victim's emotional, financial and psychological wellbeing. While continued therapy has helped the victims develop positive copy skills in relation to the murder of Moses Wanyoike, the case remaining in court for this long has been a constant trigger of the traumatic event. With the completion of the case and a positive outcome, the family is glad as it has provided them with a sense of closure."

5. Consequent upon these submissions, the Counsel representing the victims sought the maximum sentence under law.

6. The Probation Officer also filed a Report on 22nd April, 2021. It discloses the attitude of the community to the offence as follows:

"According to the Mirera area assistant chief, the incident took place in his community. The Community was very irate when the incident occurred in 2014. They were against the killing of the victim. He also added that there had been allegations in the community concerning the victim engaging in criminal activities. He however said that now there is no intolerance towards the offender as time has lapsed. The offender's immediate supervisor said that he does not have any history of misconduct and that this was an isolated incident. The offender's family added that he has always been very supportive to his family. His family is still young and they depend on him."

7. The Probation Officer made the following Observations and Recommendations:

"The offender is a 35 year old man who is also a first offender. His immediate supervisor confirmed that he has never had any previous misconduct while on duty. The offender has served as a security officer since the year 2007. He is currently under interdiction.

He is a father of 3 young children who are of school going age. The oldest is 8 years old while the youngest are twins aged 4 years old. His wife is a subsistence farmer and the accused is the sole breadwinner. The offender is genuinely remorseful. He says he did not intend to harm the victim. He pleads for the court's leniency.

The offender has complied with court orders and presented himself to court during the trial period. The offender has a supportive family. They are willing to support him in a rehabilitation plan and ensure he complies with court orders.

The victim's family prays for justice. They say that the death of the victim had a great impact on them as he used to support him.

A non-custodial sentence will be beneficial to the offender. An individual treatment plan will be put into place to ensure that he is rehabilitated. This will be in relation to ensuring public safety and following due process during execution of duties.

Your honour, in view of the above findings, I find the offender fit for a non-custodial sentence. I therefore recommend that he is placed on probation for a period of 3 years."

8. I must take all the foregoing views into consideration, together with the Judiciary Sentencing Guidelines. Under the Guidelines the Objects of Sentencing are set out at Paragraph 4 as follows:

"Sentences are imposed to meet the following objectives: 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. 4.2 These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality."

9. I note that the offender is a police officer. As such he has a special status in society and wields power and authority, backed by the force of arms. As such officer, he is a person to whom citizens turn for protection, safety, support and solace at any time of day or night. In the present case, the officer misused his power and authority when he fired a third bullet at the deceased who was at very close range.

10. Further, he failed to report this occurrence to his superiors and did not transparently account for it. He readily got involved in charging the deceased's companions in a criminal case. They were acquitted. It took the intervention and pressure of the victim's family and other authorities to bring the situation to the fore to the point where the prosecution was mounted. Kenyans would have expected more transparency and candidness from such an officer.

11. Taking all the facts and foregoing mitigation circumstances including the objects of sentencing into account, I now come to my determination as follows.

12. I sentence the offender to Twenty Years' (20) Imprisonment with effect from the date of conviction. The latter ten (10) years shall stand suspended should the convict comply with the following:

- a) Attend a Programme of Rehabilitation to include counselling over a period of three (3) years designed by the Probation Officer.
- b) Not get involved in any offences or matter of a criminal nature for the next five (5) years.
- c) The Court shall in the fifth (5th) year of his sentence term review the offender's conduct and sentence based on Reports of the Probation Officer and the Prison's Service.

Administrative directions

13. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

14. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

15. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 28TH DAY OF JULY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Ms Kalii holding brief for Ombeta for the Accused
3. Mr. Mbaya for the Victims
4. Accused - Evans Maliachi Wiyiema - present in Naivasha Maximum Prison
5. Court Assistant – Quinter Ogutu