



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 4 OF 2020 [MURDER]

STATE.....PROSECUTION

VERSUS

FAO.....ACCUSED

RULING ON SENTENCE

1. On 1/11/2021, this court delivered judgment in this case, found the accused person **FAO** guilty of the offence of Murder as charged and convicted him accordingly, under *Section 203 of the Penal Code*. The accused was thus found culpable of unlawfully and with malice aforethought, killing **MAW**, a minor who was a victim and complainant in a sexual offence case pending before Bondo Law Courts in **Bondo SO Case No. XXX/2019**.
2. This court was informed by the Prosecution that the accused was a first offender. The defence counsel Mr. Oduol Achar Advocate mitigated on behalf of the convict submitting that the accused is remorseful for the acts that the court had found him guilty of, he is a young man and has a family who largely depend on him.
3. The convict was also given the opportunity to mitigate personally and he stated that he wanted the court to help him since he does not know how his life will be. He thanked this court for hearing his case, that he is a young person and wants to be involved in nation building.
4. This court upon hearing the mitigations on the part of the convict who was facing down all the time as if to hide his face from this world, ordered for a presentence report.
5. This afternoon, Mr. Milton Kasera Probation Officer Siaya filed a presentence report which shows that the convict is aged 23 years old. He is the fourth born in a family of five siblings. He went to school up to Class 8 in 2016 and scored 220 marks in KCPE while in prison, he re-sat for KCPE and scored 230 marks.
6. The report reveals that the convict had a love affair with the deceased minor despite parents for both the convict and deceased intervening to stop as the deceased was a minor and as they were distant relatives.
7. The evidence in this case indeed showed that the convict herein was facing a defilement case vide **Bondo SO Case No. XXX/2019** against the deceased complainant **MAW** when the accused executed her, and in a bid to hide evidence of his wrongdoing.
8. Nothing much was forthcoming from the deceased's parents, according to the probation officer.
9. I have considered the mitigations, the presentence report and circumstances under which the offence of Murder herein was committed.
10. The charge sheet PEx13 shows that the convict was charged with defiling the deceased minor who was aged 15 years on diverse dates between 16th September to 21st September 2019 at [Particulars Withheld] Sub location in Gem Sub County within Siaya County. He also faced the alternative count of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**.
11. From the Exhibits produced in evidence by the prosecution including a letter written on 9/12/2019 by the convict, the convict had purposed to eliminate the deceased on account that he could not withstand any other man having her and he pretended that he would also kill himself so that they meet in heaven. He, in the said letter which was found on the body of the deceased, threatened to kill the deceased's mother as well "**kwa kuleta ujinga**", that is for being nasty.
12. The deceased suffered from stab wounds which severed her abdomen leaving her intestines protruding and other very serious cut wounds in the neck, scapular, rib cage severing her jugular veins.
13. This was a harrowing death suffered by a 15 year old girl who cannot be said to have deserved such painful death in the hands of a

butcherer.

14. The convict wanted to completely eliminate the deceased as a witness in the defilement case against him. This is one of those cases that bring to the fore the need to protect witnesses in such serious cases and the prosecution is implored to be sensitive in such cases so that such vulnerable witnesses are protected. The deceased was a naïve girl who believed that she was safe even after reporting her being defiled by the convict herein. She was lured to her death by her defiler who was hell bent to get away with the offence of defilement.

15. This case also brings to light the Sexual Gender Based Violence (SGBV) in our society. The convict herein eliminated the deceased after being charged with the offence of defilement and after he was released on bond pending trial. The deceased never lived to see justice. The convict indeed got away with the offence of defiling the deceased as the complainant is now dead. She was killed before she could testify against the convict. But he cannot get away with the cold blooded Murder of the deceased complainant.

16. Under section 204 of the Penal code, punishment for murder, upon conviction is death. However, the discretion in sentencing vests in the trial judge because the trial court had the opportunity to see and hear evidence from both the prosecution witnesses and the defence and therefore observe their conduct and behaviour. That discretion must however be exercised judiciously and not capriciously. In **African Continents Bank V Nuamani [1991] NWLI 486**, the Court stated that:

“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.”

17. In **S v Montsho 2014 JDR 0743 (GNP)** the Court imposed life imprisonment on a 27 year old man who was found guilty of the murder of a three year old child. Thulane AJ observed that:

“The right to life is sacred, basic to humanity itself and enjoying Constitutional protection. Children in this country are entitled to play in the streets, especially just in front of their parental home. They have a legitimate claim to play peacefully on the streets, to enjoy their youth, to run around and enjoy the peace and tranquility of their homes and neighbourhood without the fear, the apprehension and the insecurity which constantly diminishes the quality of their lives”.

18. I have considered the objects of sentencing as stated in the Judiciary Sentencing Guideline and as summarised in the **Francis Muruatetu & Anther vs Republic [2017] eKLR** decision, which guidelines and principles are relevant in so far as sentencing in murder cases is concerned. In the Francis Muruatetu case, the Supreme Court guided as follows, both in the Original Petition and in the Directions given on 6/7/2021 while providing clarity on the judgment that had applied the principle that mandatory sentences were unconstitutional in as far as they deprived the trial courts of the discretion to mete out appropriate sentences having regard to the circumstances of each case and also denied the accused persons the opportunity to mitigate.

“vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

(a) Age of the offender;

(b) Being a first offender;

(c) Whether the offender pleaded guilty;

(d) Character and record of the offender;

(e) Commission of the offence in response to gender-based violence;

(f) The manner in which the offence was committed on the victim;

(g) The physical and psychological effect of the offence on the victim’s family;

(h) Remorsefulness of the offender;

(i) The possibility of reform and social re-adaptation of the offender;

(j) Any other factor that the Court considers relevant.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu. [emphasis added]

19. In the instant case, and applying the above guidelines, the convict is 23 years old and is a first offender. The offence was committed in response to gender based violence in that the deceased was the complainant in a defilement case where the convict herein was the accused and the said case was still pending hearing at Bondo Law Courts. The convict lacerated the body of the deceased to an extent that he tore her intestines and also stabbed her several times in other parts of the body using a sharp knife. This court did not see any remorse on the part of

the convict who did not regret his actions and the consequences that followed. It follows that the possibility of the convict reforming and being rehabilitated are nil. He never asked for any leniency from the court.

20. For all the above reasons, and although the punishment for Murder, upon conviction as stipulated under section 204 of the Penal Code is death, albeit the convict showed no real remorse *for his actions and persisted that he was innocent*, I exercise discretion and impose a less severe sentence and sentence the accused/convict **FAO** to serve life imprisonment for the cold blooded murder of **MAW**.

21. Right of Appeal explained, 14 days of today.

22. This file is closed

23. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF NOVEMBER 2021

R.E.ABURILI

JUDGE