



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL CASE NO 3 OF 2017

BETWEEN:

THE REPUBLIC

AND

DOREEN KATHAMBI

SENTENCE

1. The Accused herein, DOREEN KATHAMBI, was charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code Cap 63 of the Laws of Kenya**. The Accused was found guilty as charged. The fact that the charge sheet asks the Court to read **Section 203** with **Section 204** indicates that the Prosecution is seeking the death penalty.

2. The Court has a wide discretion as to the appropriate sentence to be applied. In the High Court, that discretion is exercised by applying well established principles and taking into account all the factors that are relevant to the question of an appropriate punishment, bearing in mind where rehabilitation is possible that is a preferable option.

3. Firstly, the Court must take into consideration the nature of the crime. The Deceased was set on fire by the Convicted Person. He died as a consequence. Although he suffered third degree burns, he died as a consequence of being unable to breathe and therefore akin to suffocation. The Court heard the evidence of eye witnesses on how the Convicted Person behaved at the time. She did not react with remorse; she did not try to assist the Deceased. The Deceased was her husband and it is obvious that he must have been in excruciating pain. Instead she continued arguing with him and wished him dead. She got her wish.

4. It is clear from the evidence of several witnesses that the Convicted Person did not show any sympathy for the pain suffered by the Deceased. She even sought to blame him for his own misfortune. The Perpetrator blamed the Deceased for his own misfortune. The Court heard evidence that the Accused and the Deceased fought. It seemed that the fight was over money in the sense of household income. From that it is clear that the Perpetrator blamed the Deceased for her lack of resources. That suggests that she was attempting to enforce traditional gender stereotypes on her victim making the offence both domestic violence and gender based violence.

5. The Perpetrator only came up with the defence of accidental injury when the trial was underway. That demonstrates that at no time did she feel any remorse for what she had done. The Court heard from the family members of the Deceased and the Perpetrator and it is clear that the family was generally on good terms. However, the facts of this crime demonstrate an extremely violent streak in the Perpetrator when she is incensed. They also demonstrate a degree of vindictiveness.

6. The Perpetrator has for the first time expressed her remorse to the Probation Officer in the hope that the Court will be lenient. She says she did not intend to kill the Deceased, however, the act of throwing a burning stove at a person can only have one certain consequence and that is that the victim will be engulfed by the flames. The Perpetrator is young, intelligent and in full possession of her faculties and therefore it cannot be said that she did not understand the consequences of her actions.

7. That is demonstrated by the Social Inquiry Report. In that report the information provided is slated to obtain sympathy for the Perpetrator. She goes as far as to lie about where she was living when the offence occurred (Loitokitok not Njukini). That suggests she wanted to hamper the investigation by omitting relevant information so that the full nature of the offence would not be known.

8. In mitigation Counsel appearing for the Perpetrator urged the Court to be lenient and allow the Perpetrator to be reunited with the Children. The Children Officer in Maua was ordered to prepare a report on the best interests of the Children. What was filed instead was a social inquiry report suggesting that the state should in some way finance the maternal grandmother having custody of the Children. The Children in question were also the Children of the Deceased. They have suffered a bereavement and by all accounts were witness to the act and the suffering experienced by their father. That suffering was caused by the Perpetrator.

9. In order to decide an appropriate sentence, the Court must first consider the seriousness of the offence. In this case there can be no doubt

that the offence ranks as extremely serious. It has deprived a family of a son and two young children of a father. The Perpetrator argues that the circumstances of those children should be used to award her a non-custodial sentence. The Court directed the preparation of a pre-sentence report. The author of that report did not attend Court to explain his inquiry and justify his recommendations. In fact, the report was incorrectly dated and described as a more senior officer to be the product of an officer who did not have enough time to read the file. The Report demonstrates that what the Offender and her family wish for is her release without condition. The pre-sentence report recommends "probation order supervision". The Report does not say where the Offender will live, it does not say who will supervise the probation, it offers no guidance on recommendations on the workings of that process.

10. In addition to taking into account the seriousness of the offence, the Court must take into account the needs of the Children. This is a case where the Perpetrator has demonstrated herself to have no control over her temper irrespective of the consequences. Neither the Probation Officer nor the Author of the Social Inquiry Report have given any thought whatsoever to the fact that the Children were in the vicinity of the offence when it occurred. They would have observed what happened. In addition, they were placed at great risk of themselves being burnt alive. The Offender did not allow considerations of the safety of the Children to deflect her from what she did. In the circumstances, this Court cannot discount the fact that there is a real possibility that the Children will be at risk in her care. What happens when they become a burden like their father? She cannot be trusted.

11. Further, the information provided to the Court in relation to the Offender cannot be trusted. In the Bail/Bond Report, the family was described as having *"two pieces of land on which they have planted tea and miraa...."*. By contrast, the social inquiry report states, *"The family is of low socio-economic status and although the grandmother has a small piece of land...."*. The maternal grandmother is said to be caring for the children of Damaris Kariga who is said to be Deceased but who was alive in May 2017. In further contrast, the pre-sentence report states *"The family owns an acre piece of land which is utilized for subsistence farming and settlement."*. It is also said there is no criminal history. However, the premature death of two siblings is not explained at all.

12. The Court also directed a preparation of a victim impact assessment. In such a case the victims would be the parents, siblings and children of the Deceased. Instead the Court is presented with a report setting out ONLY the views of the Perpetrator who murdered their family member. There she claims to have lost the breadwinner for herself and her children, thereby reinforcing the gender stereotype that caused her to lose control in the first place. Further demonstrating she feels no remorse.

13. In the circumstances, the only sentence that is appropriate is a custodial sentence. Although this crime is grievous, in light of the needs of the Children, this Court does not think a capital sentence is appropriate. Hopefully, in the future the Offender will be able to and to demonstrate that she is able to care for the Children without putting them at risk. However, in the meantime, they must be given the chance to grow up without being placed in harm again.

14. Therefore, the custodial sentence that this Court deems most appropriate is that the Offender be sentenced to be imprisoned for a term of 15 years. If possible, she should be incarcerated at a place which is close to where her Children will be living, to make it easier for them to visit her should they wish to do so.

15. The Children have a right to know and form a relationship with both the maternal and paternal family. They have been prevented from doing so by the maternal family. That is in contrast to the Paternal Family who attempted to maintain a relationship with the Offender throughout. The maternal family cannot provide for their needs without assistance. The Paternal family would like to care for them. The Social inquiry report completely ignores the paternal family.

16. It is therefore ordered and directed that pending any applications to the Children's Court, the two Children of the Deceased shall reside with their Paternal Grandparents. The Paternal Grandparents are awarded parental responsibility with all the obligations that entails. The Paternal Grandparents shall also arrange regular visits between the Children and their Mother as well as with the maternal family.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED AT VOI ON THIS THE 30TH DAY OF JANUARY 2020

In the Presence of:

Court Assistant: Josephat Mavu

Prosecution: Ms Mukangu

Accused: Mr Mutinda holding brief for Ms Isika