



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 9 OF 2010

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY KILONZO MAKAU.....ACCUSED

SENTENCE

1. The accused **Geoffrey Kilonzo Makau** was charged with the offence of murder contrary to section 203 as read section 204 of the **Penal Code**. It is alleged that the accused on the 12th day of January, 2010 at Mwanga Village, Mitaboni Location in Kathiani District within Eastern Province murdered **Winfred Mwende Kiindu** (the deceased).

2. After hearing the evidence, this Court found the accused herein guilty and convicted him accordingly. In Convicting the accused this court found that:

“In this case there was evidence that the accused had visited the deceased’s home in the morning. That same day, he called the deceased’s mother informing her that he was to be away for a few days. Shortly thereafter he called to say that he was taking his life and was soon found lying unconscious foaming in his mouth. The behaviour of the accused portrayed a person who was disturbed on the day of the incident. By his behaviour, it is clear that he did all he could to lure the deceased back into his house.”

3. Before sentencing the accused this court requested the probation office to provide pre-sentencing report. This court also requested for a victim impact report of the deceased family. Both reports were provided. According to the Victim Impact Statement, though the accused and the deceased stayed together and had two children both of whom died due to unknown illness, the couple never got married officially and no dowry was paid so that when the deceased died, she was buried in her maternal home. According to the said statement the death of the deceased has caused total disagreement between the two families and the accused’s brother has been threatening the deceased’s family accusing them of being behind the accused person’s incarceration.

4. It was stated that after the death of the deceased, the accused’s family never got involved in the funeral arrangements or burial and to date none of his family members have consoled with them for the loss of their daughter. According to the deceased’s family, their hearts continue to mourn the deceased whom they dearly miss. It was the family’s feeling that it is not yet ready and willing to have the accused back as the pain is still fresh in their minds and they are apprehensive that the accused may harm them if released or he himself may be harmed since people do not welcome his release.

5. It was disclosed that the accused has been calling the deceased’s mother from remand making her fear that he might harm her once he leaves prison. The family therefore opposed any non-custodial sentence since the accused is not remorseful and is still a danger to the deceased’s family members.

6. According to the Probation Officer’s Report, the accused was described as a controversial person who has no good relationship with his family members. He is quiet and keeps to himself and has lost ties with his community members. Prior to his arrest he used to take alcohol. According to the report, the accused had some differences with his mother whom he accused of interfering with his marriage. It was reported that the family was divided as regards his fate with some pleading for leniency while others were of the view that the law should take its course. This attitude seems to have been based on the suicidal note which was obtained in the accused’s house where it was indicated that he would eliminate his mother, spouse and himself and warned anyone else of interfering with his property. According to the report most of his family members have lost contact with him as they no longer visit him in remand and are not interested in the progress of his case.

7. The community members, on the other hand knew very little of him since he never used to stay at home and rarely interacted with them. To them, the offence committed is serious and they left the matter to the court. The local community was of the view that the suicide note coupled with his relationship with his family members portrays him as a threat to the family and the community at large.

8. On behalf of the accused it was submitted in mitigation by his learned counsel **Mr Muli** that he is 38 years old, is remorseful and is ailing being asthmatic and having back problems. He has been in custody since 12th January, 2010, a period of 10 years. It was stated that he has no grudge with the victim's family and that his mother forgave him and that they have since reconciled. Though he tried to reach out to the family of the deceased, they were unwilling to reconcile. Similarly, attempts have been made by the clan which they both belong to but which have not been well received. He therefore prayed for a non-custodial sentence since he has reformed while in prison and was in charge of prisoners having learnt a lot during the time he has been in prison through training. It was submitted that the accused is willing to reintegrate into the society.

9. The prosecution, through the learned prosecution's counsel, took a dim view of the accused's sentiments. According to learned counsel, the accused is not remorseful having taken the life of his wife in a most inhumane manner in without any good reason. According to learned counsel the accused has no regard to life as he wanted to take his own life with the life of others. It was her view that if released back home, the accused might accomplish his earlier intentions hence the society ought to be protected by him being locked in custody to send warning to other people with similar intentions. It was submitted that despite the fact that the accused has been in custody from the year 2010 there is no evidence that he has been rehabilitated and is still a danger to his family and the family of the victim and the society.

10. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of **section 329** of the **Criminal Procedure Code** which provides:-

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

11. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

12. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

13. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

14. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, as a guide in sentencing held that:

“[71]...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(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) remorsefulness of the offender;

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

(h) any other factor that the Court considers relevant.

15. In this case the manner in which the death of the deceased was executed reveals a cold scheming perpetrator who is slow in forgiving and one who has poor anger management and lack of self-control. He is a person who was prepared to take his own life after taking that of the deceased.

16. As appreciated by the Supreme Court in *Muruatetu Case* (supra):

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015*; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 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.”

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

17. In my view, fairness to the accused on sentencing requires a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the appellant during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

18. In its decision the Court referred to Article 10(3) of the Covenant stipulates that— “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” In my view where the accused has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, in order to determine whether the accused has sufficiently reformed or has been adequately rehabilitated to direct that a pre-sentencing report be compiled. This is so because the circumstances of the accused in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the accused had sufficiently reformed to be released back to the society. It may well be that the conduct of the accused while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

19. Similarly cited was the decision of the Privy Council in *Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)* (unreported, 2 April 2001) where **Byron CJ** was of the view that:

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”

20. It is clear from the Probation Report despite the accused’s contention to the contrary that he is not remorseful concerning the deceased’s death. As a result, the deceased’s family is still understandably bitter with the accused and does not wish to reunite with him. As a result of the bitterness within the accused’s family regarding his previous conduct, the family is not agreed on the accused’s fate.

21. While the accused states that he has reformed while in prison and has acquired some skills, there is no such evidence from the prison authorities.

22. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. Both in the probation officer’s report and before me, the accused has not shown any tangible steps taken by himself as signs of remorse. It would seem that he is yet to reconcile with his own family members leave alone those of the deceased. Without remorse on the part of the accused and considering the bitterness that his family members and the family of the deceased understandably have against the accused, it is neither in his interest nor in the interests of the community or the society that he be released back to the society as yet.

23. In the case *R vs. Scott (2005) NSWCCA 152* **Howie, Grove** and **Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

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“... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

25. In **R Harrison (1997) 93 Crim R 314** it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

26. It is therefore my view that the accused ought to stay a little longer as the process of rehabilitating him back into the community is yet to bear fruits. I am therefore of the view that a sentence of 30 years less the 10 years the accused has served would be the appropriate sentence since it is not alleged that he is a repeat offender. He is therefore sentenced accordingly. The said sentence of 30 years will run from 12th January, 2010 pursuant to section 333(2) of the **Criminal Procedure Code**.

27. The accused has the chance of leaving the prison earlier if he can satisfy the prison authorities that he has sufficiently reformed in order to benefit from remission. It is in his own benefit to seek out his own family members and the family of the deceased and start a genuine step towards reconciliation and rehabilitation.

28. The accused has 14 days right of appeal.

29. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 9th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Muli for Mr Makundi for the Accused

Miss Mogoi for the State

CA Geoffrey