



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 24 OF 2011

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

FELIX MANENO KIAWA.....ACCUSED

SENTENCE

1. The accused, **Felix Maneno Kiawa**, was charged with the offence of murder contrary to section 203 as read section 204 of the **Penal Code**. It is alleged that on or about 9th April, 2011, at Nyaani, Machakos County, the accused unlawfully murdered one **Joshua Wambua Muli** (the deceased).
2. After hearing the evidence, this Court found the accused herein guilty and convicted him accordingly.
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, the family of the deceased is not yet willing to welcome the accused back into their midst since the death of the deceased is still fresh in their minds and they are apprehensive that due to the accused's violent character, they might be harmed by him if released. Apart from that the community members may harm him since most of them are not comfortable with his return. It was the family's desire that the accused be given a custodial sentence since he is not remorseful and is not mindful of other people including his own family.
4. According to the Probation Officer's Report, the accused was described as a nuisance who never associated with his own family and his family members were not certain that he has reformed and feared for their lives. According to the community the accused was leading an antisocial lifestyle and had been involved in various incidences of breach of peace to his family members which forced them to relocate from their home. The local administration similarly gave a negative report about him and stated that he is a threat both to his family and members of the public in general and that his security could not be guaranteed if given a non-custodial sentence.
5. On behalf of the accused it was submitted in mitigation by his learned counsel **Mr Muumbi** that he is a first offender and prayed for leniency.
6. The prosecution, through the learned prosecution's counsel, **Miss Mogoi**, took a dim view of the accused's sentiments. According to learned counsel, the accused is not a first offender but was sentenced to 6 months for creating disturbance though the case number could not be traced. The accused, it was submitted is a violent man who killed a defenceless person with whom he had no dispute to warrant the brutality meted against him. The Court was urged to impose on him a punishment that will serve as a warning to others apart from himself.
7. 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.”

8. 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.”

9. 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.”

10. 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.”

11. 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.*

12. 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.”

13. 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 accused 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.

14. 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.

15. 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.”

16. There is no evidence in this case that the period that the accused has spent in incarceration has reformed him.

17. In this case the accused committed a senseless murder against a person who had no grudge against him. There is no evidence at all that the deceased provoked him and even when the deceased declined to accompany him he dragged the deceased by force before inflicting the fatal injuries upon him. He is therefore a cold blooded person and there is no evidence that he is remorseful. 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. There is no evidence that he has taken any steps to make amends with the family of the deceased which is still bitter with him while the community is not ready to welcome him back. Even his own family is not ready to accommodate him.

18. 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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21. 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 25 years would be the appropriate sentence. The said sentence will run from 11th April, 2011 pursuant to section 333(2) of the *Criminal Procedure Code*.

22. 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.

23. The accused has 14 days right of appeal.

24. It is so ordered.

25. This Sentence is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the Accused having consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 30th day of April, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Muumbi for the Accused

Ms Njeru for the State

Accused in attendance through skype

CA Geoffrey