



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 29 OF 2017

REPUBLIC.....RESPONDENT

VERSUS

PATRICK KIMANTHI MUJIRI.....ACCUSED

SENTENCE

1. The accused was on 21/5/2020 found guilty and convicted of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. What the court is now called upon is to pass an appropriate sentence thereon.

2. The starting point is to look at Section 204, the sentencing Section of the Penal Code as looked at against the Supreme Court judgment in the case of **FRANCIS KAROKI MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** where the court outlawed the mandatory nature of death sentence where the Court stated as follows:-

“[52] We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

[54] A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law. Counsel for the petitioners and amici curiae both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under Article 50 (2) (q) of the Constitution. On this issue, we are persuaded by the decision in Edwards v The Bahamas (Report No. 48/01, 4th April 2001) which was decided by the Inter-American Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him

3. The Supreme Court then set up the following principles to guide the trial court in passing an appropriate sentence in the following terms: -

“[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, 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.*

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.

4. In compliance with the decision of the said decision the court called upon the accused to offer his mitigation and through his Advocate on record, Mr. Mwangale stated that he was a young man who was truly remorseful and regretted his action leading to the death of his friend. It was stated that he had spent four (4) years in remand custody through which he had learned a lot of lessons and that he had reformed his ways. It was contended that he had a young family of two children who he had not seen for the past four years.
5. The accused himself stated that during the time he had been in custody he underwent spiritual courses which will help him when out of prison and should therefore be given a second chance to reconnect with his family.
6. On behalf of the prosecution Ms. Gikonyo stated that the deceased was a family man who was the sole bread winner. She stated that there was a need to send out a message to the public that it is not right to kill and that there are other alternative ways of dispute resolution. She therefore submitted that death sentences would be the most appropriate.

DETERMINATION

7. It must be stated for record purposes that his sentence was passed during the period of Covid 19 pandemic and therefore the court did not have the benefit of the presentencing report as recommended by the Judiciary Sentencing Policy Guidelines and as confirmed by the Supreme Court in the case of Muruatetu (Supra)
8. I have taken into account the age of the accused person and the fact that he was a friend of the deceased and the two prosecution eye witnesses. I have further taken into account the accused persons account as to what happened between him, the deceased and one 'Mose' who is still at large against the evidence on record where the two prosecution witnesses stated that they just saw the deceased running and being followed by the accused and the said Moses and would give the accused the benefit of doubt as to what led to the death of the deceased.
9. I am therefore satisfied that this death was caused due to the youthful nature of the deceased and the accused and having taken further account that the prime suspect is still at large and has come to a conclusion that the four years the accused has been in custody is punishment enough but he shall require further rehabilitation which can best be done through supervision by the probation office.
10. I therefore sentence the accused to a term of seven years to be served as follows: -

- a) Four years imprisonment considered served.*
- b) Three years thereafter on probation for further rehabilitation and placement in society.*

11. The accused has right of appeal both on conviction and sentence while the state retains right of appeal on sentence and it is ordered.

Dated, signed and Delivered at Nairobi this 25th day of June, 2020 through Microsoft Google Teams.

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J. WAKIAGA

JUDGE

In the presence of

Ms. Okeyo for the State

Mr. Mwangale for the accused

Karwitha/Court Assistant

Accused person present