



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO 35 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EMMANUEL MWANGI LUBISA.....ACCUSED

SENTENCE

1. The accused **EMMANUEL MWANGI LUBISA** was on 28th day of May, 2020 found guilty and convicted of murder of **DIANA KATONI KINGOO** and duly convicted. The court is now called upon to pass the most appropriate, just and adequate sentence thereon as provided for under Section 204 of the Penal Code read together with the Supreme Court Decision in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR, Petition No. 15 & 16 of 2015 (consolidated)**, where the court stated:-

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

...

[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.

...

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”

2. It is of importance that a brief background of the case be stated for the purposes of this ruling on sentence. The accused was charged together with two others **DAVID MWANGI KIBUIE** who the court found had no case to answer and **AMOS GITAU MACHARIA** who was acquitted, the court having found that the prosecution did not prove the case against him beyond reasonable doubt. That therefore left the accused here to bear the sole responsibility for the death of the deceased based upon circumstantial evidence presented by the State which confirmed that he was the last person seen with the deceased who he admitted in his defence was last alive in his house and whose defence that she left the house alive on a boda boda the court dismissed

PRE-SENTENCING REPORT

3. In compliance with the Judiciary Sentencing Policy guidelines and as reinstated by the Supreme Court in the Muruatetu case, the court called for pre-sentencing report in which the following were stated: -

- a. The accused was born in 9/1/1986 the last born in a family of seven siblings. He is married to one Peris Wahu (whose name featured in the proceedings herein) with two children aged seven and five years respectively.
- b. On the circumstances of the offence; it was stated that it occurred when the convict had just returned to the city in 2013 and went for a drink at a wine and spirit establishment at Ruai stage where he met the deceased. They shared a table and eventually left with the same on a motor bike to his house where his wife felt offended that he had come with a woman to the house and disagreement ensued between the two before he gave the deceased some cash and she left with the boda boda rider. It was stated that he slept at home as corroborated by his wife and therefore could not have murdered the deceased.
- c. On his attitude towards the offence; it was stated that he was contrite and regretted the occurrence leading to the victim's demise. He stated that even though he did not commit the crime, maybe he could have escorted her home which would have averted the death and therefore pleaded for mercy.
- d. It was established that the same had no previous criminal record and therefore a first offender. On the home front, the wife Peris Wahu asserted that he was with her and therefore could not have committed the offence. She stated that he was the family's bread winner and his incarceration would lead to the family suffering.
- e. No victim impact statement was provided as the family could not be traced.
- f. It was concluded that the accused family was his greatest social support system and therefore sought non-custodial sentence since they felt that he never committed the offence and was only a victim of circumstances.

MITIGATION

4. In mitigation, Mr. Ombeta submitted that he was a first offender who had recently been employed at a hotel in Westlands. His father was 75 years old while the mother was 73 years both who depended upon him. It was submitted that if the same goes to jail, their problems will worsen. It was submitted that the same was raised in a Christian way and therefore his trial and subsequent conviction had embarrassed his family. It was submitted that the same should be given a non-custodial sentence so as to be reformed and corrected and to have a chance to take care of his family and in particular his children who need his guidance.

5. On behalf of the State, Mr. Okeyo submitted that the victim was a young girl as the accused wife who was also allegedly involved in the matter. It was submitted that the deceased did not warrant the treatment the accused subjected her to having been together with him at a club enjoying beer with no evidence of provocation on her part. He submitted that the accused was not a person who required mercy since he was not honest with the court. He stated that the victim's parents were also elderly who were still grieving the loss of a promising young girl and therefore the accused should be given an appropriate custodial sentence to act as a deterrent to young amorous boys who feel angry towards young girls.

6. The objectives of sentencing upon conviction is to meet either of the following: -

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/her 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.
5. **Community protection:** to protect the community by incapacitating the offender.
6. **Denunciation:** to communicate the community's condemnation of the criminal conduct.

ANALYSIS AND DETERMINATION

7. The Supreme Court has now given trial and appellate courts wide discretion in passing sentence to offenders. In particular, the Supreme Court has emphasized the use of mitigation as a tool which makes the court to understand some elements of the case which might not have come out clear during trial taking into account the adversarial nature of our legal system.

8. In passing a sentence, the court must take into account the voice of the victim as well as the voice of the offender. It is clear as stated by Mr. Okeyo that the victim was a young girl who still had a promising future. It is also clear that the accused was a young man who must have been a victim of misjudgment on his part, knowing very well that he had left a girl in his house, the same took the deceased with him to the said house in his words to give her fare back home and as expected the girl friend who later on became his wife was not amused and for reasons which we shall never know was neither charged nor called as a witness either for or against the accused.

9. I have taken into account the fact that the accused is a first offender, he has a young family and has been out on bond during the period of his trial without any report of having violated the terms of the bond or having committed any offence and is of the considered opinion that he is best suited for anon-custodial sentence as the probation report confirms that he has a family support system which will assist in the process of his rehabilitation. There is no evidence that the accused is violent in nature and as stated herein above must have made an error in

judgment leading to his conviction herein.

10. Having taken into account that there is no evidence that the accused is likely to re-offence and noting that the life of the victim cannot be restored, I hereby sentence the accused to a probation period of three years under the guidance of the probation office during which period of time he shall undergo rehabilitation programs designed by the office to enable him continue with his life while supporting his family and it is ordered.

11. The accused has a right of appeal on both sentence and conviction whereas the state has a right of appeal on sentence.

Dated, delivered and signed at Nairobi this 30th day of July, 2020

Through Microsoft Google Teams.

.....

J. WAKIAGA

JUDGE

In the presence of: -

Mr. Okeyo for the State

Ms Kali for the Accused

Accused present

Court Assistant - Karwitha