



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 43 OF 2016**

**REPUBLIC .....RESPONDENT**

**VERSUS**

**REGINA WAMBUI NJOROGE .....ACCUSED**

**SENTENCE**

1. The accused was on 13<sup>th</sup> February, 2020 found guilty and convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
2. The court is now called upon to decide on the most suitable appropriate and justifiable sentence thereon. Section 205 of the Penal Code provides as follows: -

***“Any person who convicts the felony of manslaughter is liable to imprisonment for life.”***

3. The term shall be liable to imprisonment for life has received Judicial pronouncement in several cases where the courts have come to conclusion that it is not mandatory and that the court may give any sentence up to life imprisonment. This was stated by Mwangi J, in the case of **PMM v REPUBLIC [2018] Eklr** in the following terms:-

***“15. From the above provision, it is clear that the sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.***

***16. The above interpretation is gleaned from the Court of Appeal decision in M K v Republic [2015] eKLR which clearly pronounced itself on this matter as follows:***

***“17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?***

***18. The first observation to note is that the phrase “not less than” has not been used in the proviso to Section 20 (1) of the Sexual Offences Act. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.***

***19. What does “shall be liable” mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:***

***“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.***

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are “shall be sentenced to death”.

20. On our part, we contrast the wordings in Section 8 (2) of the Sexual Offences Act with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

17. As stated in the *Opoya Case* (supra) cited in the above decision of MK (supra), the Court of Appeal for East Africa interpreted and clarified and gave legal meaning to the words “shall be liable” to mean as follows: “shall be liable on conviction to suffer death” means that the court has discretion “to provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment”.

4. This line of argument was further stated in the case of **NOO v REPUBLIC [2019] eKLR** where Mativo J had this to say thereon: -

“8. It seems to me beyond argument the words “shall be liable to” does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it. From the comments made by the Magistrate cited above, the learned Magistrate did not address himself to the question whether or not the said provision conferred discretion to him. Differently stated, his discretion in the matter before him remained unexercised. As a consequence, he imposed the maximum sentence. Alternatively, he misconstrued the said provision to be mandatory and imposed a life sentence, hence, the exercise of his discretion in pronouncing the sentence was unfairly influenced by the said misdirection of the law or failure to exercise his discretion properly or both.

9. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. [7] The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. [8] Also, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered. [9]”

5. Away from the Sexual Offences Act this court has in the case of **REPUBLIC v JAMES NGANGA GICHURU [2019] eKLR** stated as regards Section 205 of the Penal Code as follows: -

“2. What constitutes imprisonment for life which is the maximum sentence available under Section 205 has received judicial pronouncements around the world. This court in the case of **REPUBLIC v ELIZABETH MUGOYWA, NAIROBI CRIMINAL CASE NO. 15 OF 2015** had this to say: -

“3. The starting point in this assignment is the punishment Section of the offence Section 205 of the Penal Code which provides as follows: -

“Any person who commits a felony of manslaughter is liable to imprisonment for life.”

4. In defining what the above Section means, Muriithi J. in the case of **REPUBLIC v PHILIP MUCHANI KITHIWA** stated that the maximum sentence for manslaughter is imprisonment for life as prescribed in Section 205 of the Penal Code. This therefore means that the court can give any sentence with life imprisonment being the maximum. As to what constitutes life imprisonment the Supreme Court of Kenya in the case of **FRANCIS KARIUKI MURUATETU & ANOTHER v REPUBLIC & THREE OTHERS [2017] eKLR** had this to say:-

“[88] Unlike some of the cases mentioned above the life imprisonment sentence has not been defined under Kenyan Law (see the Kenya Judiciary Sentencing Guidelines 2016 at paragraph 23.10 page 51) It is assumed that the life sentence means the number of years of the prisoners natural life, in that it ceases upon his or her death.”

6. In compliance with the provisions of the Judiciary Sentencing Policy Guidelines, the court called for pre-sentencing report and allowed the accused to offer her mitigation. In mitigation Mrs. Kinyori submitted that the accused was aged 23 years and had been in custody since 2016. It was submitted that the father and the mother of the accused separated when she was aged seven (7) years and she was thereafter brought up by her mother.

7. It was contended that she came from a very poor background and that she had difficulties in communication. She had undergone a lot of trauma trying to assist her mother look after their family which led her to take up to the job of a house-help. It was contended that her mother was willing to take her back and enroll her into a technical institute.

8. It was stated that the accused was extremely sorry for what had happened and pleaded to be given non-custodial sentence under probation where she will be watched by the probation officer having promised to be careful when handling children in the future including her own if she gets any. It was contended that by her nature, she looked aloof, but her personality should not be used against her. On the allegation that she had attempted to poison other children, it was submitted that the said allegation had not been confirmed as she was publicly put in the newspaper on arrest and if there was any parent whose child she had attempted to poison, they would have come forward. It was submitted that the accused did not attempt to run away from the scene instead she called her sister and an aunt of the deceased who took the child to the clinic.

9. On behalf of the state, Mr. Okeyo submitted, that the probation report was negative on the accused person who is alleged to have attempted to poison three other children previously. He submitted that the victim had various injuries on the head which made the pathologist rule out the issue of the death being accidental. He further submitted that the accused had never attempted to apologize to the victim's family and was therefore still a threat to society who should be given a custodial sentence.

10. On whether the court could lawfully make an order barring the accused from being employed as a house help in the future, Mr. Okeyo submitted that the court could only make a mention of the issue of the previous conduct of the accused, while Mrs. Kinyori submitted that though the court has discretion to make an order on her conduct, the said order may not be executed and enforced.

### **PRE-SENTENCING REPORT**

11. The first report was dated 27/2/2020 in which it was stated that the accused started her schooling in Kayole and Mwiki in Nairobi before transferring to Njabini Primary School where she dropped out of school in class six and began to work as a house help. It was indicated that she gave two inconsistent details of the occurrence of the crime which pointed out that she was not truthful. It was stated that she was aloof, pathetic, not remorseful and seemed not to care about what transpired. On the home front, her mother was willing to take her back and enroll her to a technical institute to learn a trade (beauty and hair dressing) since she did not want her to go back working as a house-help.

12. On the victim impact statement, it was indicated that the family was still traumatized and had never come to terms with the death of their first child. In conclusion it was stated that there were allegations that the accused had tried to poison three children of her previous employer who could not be traced. Given the said allegations, it was stated that the accused could be a threat to another unsuspecting family that could hire her not knowing her previous records.

13. This report was objected to by Miss Chepkorir for the accused leading to the second report dated 23/6/2020 which confirmed the contents of the first report and stated that though the accused acknowledged the occurrence of the offence, she gave two versions of the same incidence which inconsistency pointed that she was mendacious and guilty of the offence. Her inconsistencies stood out during the interview pointing out that she was not remorseful. She denied having worked for another employer before but her mother confirmed that she had indeed worked before but denied that she unsuccessfully tried to poison her employer's children.

14. It must be noted that the two reports were prepared by the same officer against the court's express directions and therefore the second report is not useful for purposes of establishing the truth. The accused therefore did not benefit from a second independent report.

15. It is undeniable that a small child, the first born of her family lost her life at the hands of the accused person who had been entrusted to her care and protection. It is also undeniable that the family of the victim as expected are traumatized and would be justified in seeking justice.

16. Having taken into account the circumstances of this case, that is how the offence occurred, the submissions by the accused person in mitigation and the pre-sentencing report and in particular the unsubstantiated allegation that the accused had previously unsuccessfully attempted to poison the children of her previous employer, it is clear to my mind that the best suitable sentence herein would be one that combines deterrence and rehabilitation.

17. I have taken note of the fact that the accused has been in remand custody from 30/5/2016 a period of about four years but being in remand must not have benefited from the structured prison rehabilitation programme offered to convicts. I am therefore of the considered opinion and hold that an imprisonment term combined with probation period will be the most appropriate, just, proportional and adequate sentence herein. I am therefore satisfied that a sentence of twelve years with effect from 30/5/2016 with the last three (3) thereof to be served on probation would be the most appropriate sentence herein. It is ordered.

### **CONCLUSION**

18. The convict is hereby sentenced to a term of twelve years to be served as follows: -

a) Nine (9) years imprisonment with effect from 30/5/2016 Section 333 of CPC having been taken into account to enable her benefit from prison rehabilitation programs and to act as a deterrence to would be similar offenders.

b) Three (3) years thereafter on probation for further rehabilitation and settlement into society.

19. The accused and state are entitled to right of appeal on both conviction and sentence.

DATED, SIGNED and DELIVERED at Nairobi this 29<sup>th</sup> day of July, 2020 through Microsoft Google Teams.

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**J. WAKIAGA**

**JUDGE**

**In the presence of: -**

*Ms Ong'weno for the State*

*Ms Kinyori for the Accused*

*Accused present*

*Court Assistant - Karwitha*