



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 2 OF 2018

REPUBLICPROSECUTION

VERSUS

KAREMA MLEWA MDZOMBA ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Ms. Ruttoh for the accused person

JUDGEMENT

The offender was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63, Laws of Kenya. The charges levelled against him were that he murdered **Katana Mlewa Midzomba** on the 10th December, 2017 at Muyeye Village in Malindi Sub-county within Kilifi County. Upon taking a plea, he voluntarily pleaded guilty to a lesser offence of manslaughter vide a plea agreement made between the accused and prosecution on the 27th of February 2020.

The accused was convicted on his own plea of guilty. *In Casu*, he has come before me for purposes of sentencing. It is trite law that in matters of this kind, sentence is within sole discretion of the Judge. The accused killed the deceased in cold blood claiming that he was a witch. In his voluntary confession, he admitted having used a panga to execute the murder and proceeded to dumb the deceased's lifeless body in an open field.

The deceased's body was found lying in a pool of blood with multiple cut wounds on the head, stomach and left shoulder. An investigation of the matter led the officers to the accused's house where they found some blood on the floor, clothes and beddings. In light of the foregoing, the prosecution produced the following exhibits:

- 1. Post mortem report dated 14th December, 2017.**
- 2. Sketch map/plan.**
- 3. Exhibit memo dated 18th December 2017.**
- 4. Confession dated 13th December 2017.**

In assessing an appropriate sentence, the court has taken into consideration the totality of mitigating factors and sought to weigh them vis-a-vis the aggravating factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

Society requires protection from dangerous criminals and in fact the society looks up to the court to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system. The court shall also consider the pre-sentence time of incarceration will be taken as part of punishment already served and suffered. I shall not lose sight of the pre-trial and during trial, incarceration period.

When sentencing convicts, in as much as sentences ought to be meaningful to convicts Court's need not only focus on the convict's degree of

liability or the ghastly manner in which the offence was committed. Instead, the Court should also take into consideration amongst others the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Thus it is an accepted legal principle that sentences should befit the offender and in this respect, the Court should take into consideration mitigating factors that may avail the convict.

The felony of manslaughter is punishable by the maximum sentence of life imprisonment under Section 205 of the Penal Code Act. Nevertheless, this embodies the maximum punishment which is usually reserved for the worst of such cases. The instant case falls within ambit of the most extreme cases of manslaughter. However, for the reason I shall discuss below, I therefore discounted life imprisonment.

In assessing an appropriate sentence, the court has to take into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

“[71] 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.**

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.”

It is aggravating that the accused person perpetrated a serious crime involving loss of life which is sacrosanct. Indeed, killing was undoubtedly heinous in sense that it is morally inexcusable and deplorable. It has been said, time and again that the courts have a duty to protect the sanctity of human life.

In casu, the crime was premeditated. The accused person took his time to meticulously plan before executing it. The degree of cruelty and lack of respect for human life exhibited is shocking. The manner of execution was cold blooded, callous and cowardly. The public should be made aware of the fact that those who commit murder under the guise of a belief in witchcraft commit a very serious offence deserving a lengthy prison term. This is so because such beliefs are weird and held by irrational people. Trying to make sense out of their deeds is ignominious.

What is more disturbing in the instant matter is that the accused person killed a person who had done him no wrong. It appears the motive for the killing was premised on the delusional belief that the deceased had bewitched someone. In that regard the sentence should reflect the revulsion of the society at the readiness to resort to violence, the horror of society that human life should be made so cheap, and the need to show the accused and other potential offenders that the price they must pay dearly for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it.

In mitigation, the offender has no previous criminal record, hence I shall treat him as a first offender. He also confessed to having committed the offence which do not only goes to show that he is remorseful but also saves the court’s time and resources. In cases of this nature, the offender voluntarily admits to the commission of the offence for the sole purpose of seeking a lesser sentence. This court shall not lose sight of the same.

The Court is also alive to the fact that manslaughter comes in two forms which is; voluntary and involuntary manslaughter. Manslaughter is voluntary when it exhibits free choice, decision and voluntary action of which the offender is culpable as well as the capacity of the offender

to distinguish between right and wrong, good and evil, (insight) before committing the act. All these were present in the instant case and the same increases the moral blameworthiness of the crime committed unlike in a case of involuntary manslaughter where the killing is not contemplated. Thus, the sentence that ought to be meted out for a matter of voluntary manslaughter is much higher than that of involuntary, for the reason that the latter is not wanton killing.

Accordingly, the offender is hereby sentenced to 18 years' imprisonment with effect from 22.1.2018.

Fourteen (14) days right of appeal explained.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Gekanana holding brief for Ms. Ruttoh for the accused
2. Mr. Kirui for the State