



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO.20 OF 2016 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH OTIENO OWINO.....ACCUSED

RULING ON SENTENCE

1. The accused person Joseph Owino Otieno was found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, vide a judgment of this court delivered on 27th July 2020, the accused person **JOSEPH OTIENO OWINO** and his counsel mitigated after which this court called for a presentence report and a victim impact statement to guide in sentencing the accused.

2. In this ruling on sentence, this court is now called upon to pass an appropriate sentence thereon taking into account the mitigations, presentence report filed on 1/9/2020 by the Siaya Sub County Probation Officer Mr. Ochieng Ogolla, the sentencing guidelines and the Supreme Court's decision in **FRANCIS KAROKO MURUATETU & ANOTHER VS REPUBLIC [2017] eKLR** wherein the court declared unconstitutional the mandatory nature of the death sentence.

3. Therefore, complying with the decision of the Supreme Court, I did accord the appellant and his counsel Mr. Ariho an opportunity to mitigate and in mitigation, counsel for the convict and the convict did submit that the accused is a first offender and is very remorseful as follows:

4. In the pre-sentencing report called for by this court, the probation officer Mr. Ochieng Ogolla describes the accused convict as a reserved loving person and that he earned the heart of the deceased's (wife's) family whom he supported fully by doing everything possible to ensure that they were comfortable and this drew him away from his own family. That he is on anti-retroviral drugs to manage AIDS and does not abuse any drugs or alcohol. That the home environment is not hostile. He was a husband to the deceased who had left him for her home and despite his efforts to get her back, she refused and this frustrated him to an extent that he felt he could not survive without her so he eliminated her. Their relationship is survived by one child. He is 26 years old and used to repair bicycles. The deceased's family are devastated and the daughter is affected by her mother's death. They pray for justice for the deceased. He requires intensive counseling and supervision to avoid repeating the offence and that family conferencing would be necessary to reconcile the two families.

DETERMINATION

5. 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.

6. In this case, the undisputed facts are that the accused and the deceased were in romantic relationship for some time before she left him for her home after disagreements from time to time and that he kept calling her, on her mother's mobile telephone number, using an unregistered mobile telephone number, meeting with her ostensibly with a view to reconciling their differences but the deceased was not willing to return to him, which did not go down well with him. From the evidence on record, the accused kept going to the place near the deceased's home, calling her and she used to go and meet him, as he tried his luck to get back her love but to no avail, and the last time he decided that she would not remain alive hence the killing of the deceased who had gone to meet him as was the routine. There was no evidence that he involved his or her family members to try and assist in reconciling them.

7. In my humble view, the accused was on a revenge mission on the material evening when he killed the deceased simply because she had refused to return to him after a disagreement.

8. In **Republic v Peter Mukuha Mbai [2020] e KLR** Wakiaga J stated as follows in sentence:

“9. From the judicial decisions, the following factors must be taken into consideration as sentencing principles:- The sentence must be no more severe than is necessary to meet the purposes of sentencing. The overall punishment must be proportionate to the gravity of the offending behavior, similar offences committed by offenders in similar circumstances must attract similar sentence and the overall sentence must be just and appropriate in light of the overall offending behavior.

10. While weighing on the nature of gravity of the offence, the court must take into account the intension of the offender, the consequences of the offence, the nature of the weapon used and the offender's history of the offending.”

9. In **Republic v Cornelius Thuku Mbulika [2020]eKLR** the court held:

“10) The Convention on Preventing and Combating Violence Against Women and Domestic Violence:- defines domestic violence as ‘all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit between former or current spouse or partners whether or not the perpetrator shares or has shared the same residence with the victim. Article 3.b.

11. The sentence meted out to the convict must therefore be commensurate with the gravity of the crime committed worth the purpose of the punishment being:

a. Exerting a preventive influence on individual not to commit criminal offences

b. Preventing the perpetrators from committing additional offences and encouraging his/her rehabilitation and expressing the community's condemnation of the criminal offence and reaffirming the value of the law.

12. This court has said and shall continue to say “that all married persons but women in particular have a right to choose their own destiny and until this message is spread and applied consistently at all levels of the justice system, more women will continue to die in the confines of their homes, where they expect love and comfort and the perpetrators will continue to thumb their nose at the law by evading appropriate sentence and the right to equal treatment guaranteed in our constitution will be but a mirage.”

10. In **Republic v Ruth Wanjiku Kamande [2018] eKLR** Lesiit J stated:

“30. I want young people to know that it is not cool to kill your boy or girl friend. Even where you feel disappointed or frustrated don't do it. Instead it is cool to walk away and thereafter forgive.”

11. In **Gerald Mwangi Mutahi v Republic [2009] eKLR** the Court of Appeal-stated:

“It is not clear to us that the superior court appreciated that the center of the quarrel between the appellant and the deceased was Shiro whom the appellant regarded as his wife. That, however, is of no moment since the learned Judge correctly surmised that “the accused killed the deceased in a fit of jealousy”. It was inexcusable whatever provocation the appellant may plead. If all jilted lovers and husbands had the license to eliminate their supplanters, it would make a mockery of civilized society and the law. Nor do we think drunkenness, deliberately induced to provide “dutch courage” for commission of an offence is a mitigating factor. It would only become a relevant factor if it fell under section 13 of the Penal Code.”

12. Okwany J stated as follows in **Republic v Benard Ondigi Riaga [2015] eKLR**

“ I also note that the accused acted in a very cruel and vicious manner against his own wife who he was supposed to protect from any harm. The actions of the accused clearly demonstrate his lack of respect not only for women but also for human life and he must therefore not go unpunished. The reckless actions of the accused led to the early death of a young lady whose age was estimated to be 18 years during the post mortem examination.”

13. In this matter, I have taken into account the fact that the accused is a first offender and that although he denied killing the deceased who was his wife, he appears to have been so emotionally attached to the deceased, that he decided that if the deceased refused to get back to him then she must die. Emotional attachment is not necessarily love as love is kind and patient. One should never kill the person they claim to love so much and if love is lost between them, the accused had the option of letting go. Live and let live.

14. I observe that the accused person has been in prison custody for close to four years from the date of his arrest as he was not on bond. He is a young man at the prime of his life. He is also HIV Positive. He prayed for sentence that he can serve and return home.

15. I have taken into account the lost love on the part of the accused and the need warn the youth in particular of the need to control their emotions while trying to love and the fact that the accused has been in custody for four years. In my view a deterrent and rehabilitative sentence will be the most appropriate sentence herein.

16. Accordingly, having taken into account the age of the accused, the circumstance under which the offence was committed, I sentence the accused person to serve a prison term of twenty (20) years to be calculated from the date of his arrest.

17. The accused has a right of appeal both on conviction and sentence whereas the State retains the right of appeal on sentence.

I so order.

Dated, Signed and Delivered at Siaya this 29th Day of September, 2020

R.E. ABURILI

JUDGE