



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 2 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KUNGURU MARTIN OPIYO JUNIOR.....ACCUSED

SENTENCE

1. The accused **KUNGURU MARTIN OPIYO JUNIOR** was initially charged with the offence of **Murder Contrary to Section 203** as read with **Section 204** of the **Penal Code**. On 12/6/2018 his trial commenced before me and as at the time of the plea bargain, five witnesses had testified on behalf of the prosecution. For record purposes, it must be stated that as at 2/2/2018 the accused had indicated his willingness to enter into a plea bargain agreement which was declined by the State on 22/2/2018.

2. Be that as it may, by a plea bargain agreement dated 2<sup>nd</sup> July, 2020 entered into between the accused and the prosecution, which was accepted and recorded by the court on 16/7/2020, the said charges of murder were reduced to manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, the particulars of which were that on the night of 15<sup>th</sup>/16<sup>th</sup> December, 2016 at Nyayo Embakasi which Nairobi County unlawfully killed **CHARITY MUKAMI WACHIRA** to which the accused pleaded guilty and was duly convicted on his own plea of guilty.

3. The brief facts of the offence to which the accused pleaded guilty were that the accused and the deceased were in a romantic relationship and lived together as a husband and wife in Nyayo Estate Embakasi within Nairobi City County as evidence through their marriage certificate produced as PExh. No. 1 The said marriage or relationship was characterized with allegations of infidelity and unfaithfulness on both sides, coupled with domestic violence meted out by the accused on the deceased.

4. On the night of 15<sup>th</sup> December, 2015 at about 8.00 a.m. the deceased left her parents' home and indicated that she would be returning back shortly, only to request her regular taxi operator to take her to Westlands to conduct some business, which she did and later on at 11.30 p.m. called the taxi operator to pick her up from Westlands, having finished her business and drop her to City Cabanas, where they had drinks before being joined by the accused, with whom she later on left, carrying along with her the operators car keys, which he later picked at the gate to the estate.

5. That was the last time the deceased communicated with the taxi operator until 22<sup>nd</sup> December, 2015 when a report was made on her being a missing person, causing the police to break into the accused house where her lifeless body was found. The accused was at the time missing and his phone switched off. The accused later on surrendered himself on 4<sup>th</sup> January, 2016 at Kitale DCIO office and was arrested and charged with the offence of murder which was reduced to manslaughter.

6. Post mortem examination report confirming the death and cause thereof to be chest, neck and abdominal injuries due to penetrating sharp force trauma (stab) was produced together with mental assessment report confirming that the accused was fit to stand trial.

7. Having been convicted on his own plea of guilty, the court thereafter called upon the accused to offer his mitigation and relied upon the pre-sentencing report which had earlier been ordered for when the accused had indicated his willingness to enter into a plea bargain agreement this being during the period of Covid-19 pandemic.

#### PRE-SENTENCING REPORT

8. It was indicated that the accused was the eldest son of his father in a polygamous family of three wives. He was a graduate of Business Administration from USIU – Nairobi and had worked with wanainchi online (now zuku) playnet/peas and East Africa Breweries Ltd as a salesman until September, 2015. He was married to the deceased who had one child aged 8 years from a previous relationship. Their marriage was strained during the last few months before the commission of the offence as a result of allegations of infidelity on both sides.

9. The accused admitted to the offence and stated that their union was dogged with a lot of domestic misunderstanding due to infidelity on both of them and unfulfilled promises on his part to the deceased. It was stated that the family of the deceased had organized for her to take up a job offer in Dubai but he convinced her not to take it up on the promise to open for her a wines and spirits shop which was not to be.

10. It was stated that the family of the deceased was opposed to their union and that the deceased was in an extra marital affair with a Sudanese General and his attempt to have her end the relationship was unsuccessful leading to the crime. It was the accused contention that despite his caring for the child of the deceased from a previous marriage, the same continually procured abortions every time she conceived, leading to pent up emotions and he mostly resorted to violence in resolving their mental issues coupled with their age differences.

11. It was stated therein that they had separated due to domestic problems, with the deceased going back to her parents' home and on the material day he had learned that she had gone to meet her lover and he tracked her down to a club at Pipeline, they proceeded home where he forced her to call her lover and while she was on phone with him stabbed her four times. He thereafter switched off his phone and stayed with her dead body for two days before driving to his rural home in Busia, when he realized that people were trying to reach him including the mother of the deceased.

12. The accused pleaded for mercy saying that his family still needed him. He stated that he loved the deceased and his action was as a result of pent-up emotions and unresolved issues. It was observed that the accused had a supportive family network that had been with him since arrest and pleaded for non- custodial sentence since he had been the pillar of the family as the first born and they were willing to welcome him back and support him in settling.

13. On the victim's impact statement; it was stated that she was 24 years old at the time of her death with one child now residing with her parents. She had initially worked with Kenya Breweries but was unemployed as at the time of her death. She was very supportive of the family financially before the offender messed her life and eventually killed her. They were of the view that due to their age differences, the accused used to string the deceased on with a lot of deception and empty promises in addition to subjecting her to both physical and psychological abuse. They advised the couple to break up but the accused kept on threatening to kill her if she ever left him or engaged in a relationship with another man.

14. In conclusion it was stated that the accused was highly intoxicated at the time of the commission of the offence and was therefore not in his right state of mind. The family of the deceased were against the plea bargain process since the accused killed their kin in a cold blood and were sure that a conviction for murder would be sustained. The victim's family had not come to terms with the untimely death of the same and sought for justice on her behalf.

#### **MITIGATION**

15. In mitigation, the accused through Mr. Amolo submitted that the same was 44 years old and the Eldest child in his polygamous family upon whom the family looked for leadership. He pleaded for mercy and leniency from the court on account of the same having been in custody since 2016 and had presented himself to the DCIO Kitale and had not tried to run away. It was submitted that it was not easy for the accused to lose a person he loved and that the offence took place in their home from which he had admitted his culpability right from the beginning of the trial.

16. It was submitted that the purpose of sentence is not only punishment but also rehabilitation to bring the accused back to society. It was submitted in mitigation that the court should take into account the period the accused had been in custody and therefore admit the same to probation for the period the court deems fit.

17. On behalf of the State, Mr. Okeyo submitted that the accused should be treated as a first offender as confirmed through the pre-sentencing report. It was submitted that since the conviction did not arise out of the evidence presented by the prosecution but out of the voluntary act on the part of the accused, the court should take that into account while passing an appropriate sentence.

18. 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

19. In sentencing the accused herein, the starting point is Section 205 of the Penal Code which provides: -

***“205. Punishment of manslaughter***

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

20. The term for life has been stated by this court in **REPUBLIC v JAMES NGANGA GICHURU [2019] eKLR** 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.”**

21. In this matter, it is not disputed that the death of the deceased arose in the confines of the home where she was expected to find love and comfort. Justice Lesiit in the case of **REPUBLIC v RUTH WANJIKU KAMANDE [2018] eKLR** had this to say: -

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

I cannot say it better than this.

22. 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.” See the Case of **REPUBLIC v CORNELIUS THUKU MBUGUA [2020] eKLR**.

23. On the other hand, the emotional turmoil on the part of the accused must be taken into account. He was in a relationship with the deceased who is alleged to have found comfort in the arms of another man, she had refused “to give the accused a child while he was bringing up a child she came with from her previous relationship.” Both the accused and the deceased were out of jobs as at that time which must have taken a toll on their relationship and emotions.

24. The deceased had on the other hand, according to his word admitted being in a relationship with someone allegedly known as “Major Deng” from the South Sudan whom he forced her to call as he stabbed her. That was perhaps his means of stopping the love affair between Major Deng and the deceased, which led to her death. The deceased is no more to tell us her side of the story.

25. Whereas it is sad that a young lady aged 24 years lost her life at the hand of a person from whom she expected love and protection, the accused at the age of 44 years can still be rehabilitated to be a useful member of society taking into account the fact that he recognized his blameworthiness by entering into a plea bargain agreement and pleading to a lesser charge of manslaughter. May be he might turn out to be an ambassador to tell the young generation that there are better ways of resolving disputes rather than resorting into violence, this only time will tell.

26. In passing an appropriate sentence I have looked at the following cases:-

**a) *REPUBLIC v PETER NGUGI MWAURA [2017] eKLR* where the deceased was the accused wife and in passing sentence Nyakundi J, sentenced the same to eight (8) years and having noted that the accused had been in custody for five years ordered that he serves three (3) years imprisonment.**

**b) *REPUBLIC v ALBANUS NYAYO KIEMA [2019] eKLR* where the accused killed his ex-wife and was sentenced to seven (7) years with five (5) years' probation upon release so as to undergo guidance and counselling on anger management, conflict resolution and alcohol and substance abuse and to enable him reflect on his past and reform accordingly.**

**c) *SINORAHA BAYA v REPUBLIC [2019] eKLR* where the Court of Appeal confirmed a sentence of 12 years in respect of a sentence on manslaughter where the trial court found that the appellant had been provoked by the deceased.**

**d) *ELPHAS FWAMBA TOILI v REPUBLIC [2009] eKLR* the Court of Appeal in pre-2010 decision reduced the death sentence to 10 years having taken into account what they considered as provocation when the wife of the appellant allegedly gave money to her boyfriend.**

27. Persuaded by the above authorities and having taken into account the consistencies of this case I have come to the conclusion that a sentence of ten (10) years with effect from 7<sup>th</sup> January, 2016 when the convict first appeared in court would be adequate sentence herein for which the last three (3) years thereof shall be served on probation so as to rehabilitate the convict further to be a useful member of the society.

28. The accused shall therefore be sentenced as follows: -

*a) Seven (7) years imprisonment with effect from 7/1/2016 to serve as deterrence to would be offenders and show the society's condemnation of the convict's criminal conduct.*

*b) Three (3) years thereafter on probation for purposes of rehabilitating the accused and for his placement in society and it is ordered.*

29. Both the accused and the State are entitled to right of appeal on the sentence only.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2020 THROUGH MICROSOFT TEAMS.**

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**J. WAKIAGA**

**JUDGE**

***In the presence of: -***

*Ms Kimani for the State*

*Mr. Amolo for the Accused*

*Accused present*

*Court Assistant - Karwitha*