



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 40 OF 2014

REPUBLICRESPONDENT

VERSUS

STEPHEN NGOTOWA ACCUSED

SENTENCE

1. The accused was found guilty and convicted of murder on 19th February, 2020. The court is now called upon to pass an appropriate sentence thereon taking into account Section 204 of the Penal Code as read 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. In compliance with the Judiciary Sentencing Policy Guidelines and as reinstated by the Supreme Court, the court called upon the accused to offer his mitigation and it was noted that the same being a Ugandan Citizen as well as the deceased. It was not possible to carry out pre-sentencing inquiry as the probation could not get in touch with his relatives more so due to covid-19 pandemic.

MITIGATION

3. In mitigation, Mr. Ndungu for the accused submitted that he was a first offender who was very remorseful. He had been in remand custody since 3rd of June, 2014 which should be taken into account.

4. The accused when called upon to offer his personal mitigation stated that he had undergone reformation while in remand and was married with five young children who were in Uganda. He submitted that he should be assisted to relocate back to Uganda.

5. On behalf of the State Mr. Okeyo submitted that the offence took place out of a disagreement over some payment for casual labour services and that there was no enmity between the accused and the deceased. He submitted that the court should consider the period the accused had been in custody as adequate sentence and order him to be taken back to Uganda.

DETERMINATION

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.

7. I have taken into account the fact that the accused has been in custody for a period of six years. He was a friend of the deceased whom he introduced to the family of PW4 Zipora Wambui Kiroka, where he briefly worked as a casual labourer before the fateful day. I have further taken into account the accused action upon the commission of the offence of not running away to go back to Uganda and escape the course of justice and is of the considered opinion and hold that the six years period in remand custody is an adequate sentence herein.

8. I therefore sentence the accused to six years imprisonment with effect from 26th May, 2014 when he first appeared in court. The accused shall be released to the probation office which shall facilitate his return to Uganda within the period of two months from the date of his release from prison to enable him rejoin his family and it is ordered.

9. The accused has right of appeal both on sentence and conviction whereas the State has right of appeal on sentence.

Dated, delivered and signed at Nairobi this 16th day of September, 2020

Through Microsoft Teams.

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Ndungu for the accused

Accused present

Court assistant: Karwitha