



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CRIMINAL CASE NO. 39 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES MUTISO.....ACCUSED**

**SENTENCING**

1. The accused herein, **James Mutiso**, was charged with the offence of murder contrary to section 203 as read section 204 of the **Penal Code**. It is alleged that the accused, on the nights of 11<sup>th</sup>/ 12<sup>th</sup> November, 2012 at Kithunguni Market in Machakos District within Machakos County, murdered **Mutua Mutiso Kasimu**. In support of its case the prosecution called 10 witnesses.

2. In finding him guilty of manslaughter, this Court held that:

**“In this case, it is clear that the action of the accused in so far as the deceased’s death was concerned can be traced to the offence of sodomy. Based on the holding in Nzuki vs. Republic (supra) I am unable to find that the ingredients of murder have been proved. Apart from that there was evidence that during the period that the deceased was unwell there intervened a strike by the medical personnel...For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the accused of the charge of murder but convict him of the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.”**

3. Under section 205 of the **Penal Code** the maximum sentence for manslaughter is life. Before sentencing the accused this court requested the probation office to provide pre-sentencing report which was prepared and filed.

4. According to the said report, the accused is 36 years old. He is however not remorseful though he is described by the family and the community as hardworking. According to the prison authorities he was cooperative during his period of incarceration. The family of the victim did not express any grudge against the accused though no attempts had been made towards reconciliation as the accused’s family snubbed any such attempts. According to them, the accused requires rehabilitation before being reintegrated back into the community.

5. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of section 329 of the **Criminal Procedure Code** which provides:-

**“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”**

6. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J Grove and Barr JJ** stated:

**“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”**

7. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

**“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”**

8. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

**“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”**

9. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, as a guide in sentencing held that:

**“[71]...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.**

10. In this case the accused does not seem to appreciate the fact that the Court has found that he committed the offence. He continues to maintain that he was innocent. As appreciated by the Probation Officer, he does not seem to be remorseful for the life that was lost. While both the family and the community have a positive attitude towards him, no steps have been taken by his family towards reconciliation despite the fact that the family of the victim was amenable to the same.

11. Having considered the mitigation as well as the probation report, I am not satisfied that the accused has sufficiently reformed and has been rehabilitated. It is neither in his interest nor in the interests of the community or the society that he be released back to the society as yet. There is no evidence that he has taken any steps to make amends with the family of the deceased which extended an olive branch to his family and maintains his innocence notwithstanding the findings of this court.

12. In the case **R vs. Scott (2005) NSWCCA 152 Howie, Grove and Barr JJ** stated:

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15. It is therefore my view that the accused ought to stay a little longer as the process of rehabilitating him back into the community is yet to bear fruits. I am therefore of the view that a sentence of 20 years would be the appropriate sentence. The said sentence will run from 19<sup>th</sup> November, 2012 pursuant to section 333(2) of the ***Criminal Procedure Code***.

16. The accused has the chance of leaving the prison earlier if he can satisfy the prison authorities that he has sufficiently reformed in order to benefit from remission. It is in his own benefit to seek out his own family members and the family of the deceased and start a genuine step towards reconciliation and rehabilitation.

17. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 16<sup>th</sup> day of December, 2020.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Wanjiku for Mr Mwangangi for the State**

**Mr Ngetich for the State**

**CA Geoffrey**