



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 24 OF 2016

LESIT, J

REPUBLIC.....PROSECUTION

VERSUS

AMOS KIBET BOTOK ACCUSED

RULING ON SENTENCE

1. The accused **AMOS KIBET BITOK** was convicted by this court of one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The sentence for the offence of murder is prescribed under **section 204** of the **Penal Code**. It provides for death sentence in mandatory terms.
2. The prosecution did not present any previous record of the accused. This court will therefore treat him as a first offender.
3. In mitigation Mrs. Omungala, learned Defence Counsel made a passionate plea on behalf of her client. Counsel urged that the accused was an orphan and was aged 28 years old with an 8 year old daughter, who was being taken care of by the 70 year old grandmother of the accused.
4. Mrs. Omungala urged that the accused had reformed and was attending church which was an indication of his spiritual growth.
5. Counsel urged the court to consider **Francis Kariko Muruatetu and Another versus Republic and Others [2017] eKLR, Petition No. 15 and 16 of 2016 [consolidated]** in which the court found that the mandatory nature of the Death Penalty was unconstitutional.
6. I have considered the mitigation of the accused given on his behalf by his counsel.
7. Before considering sentence, I requested for a Pre-sentence Report from Probation who filed one on 8th February, 2019. I have considered the Report. This is a very comprehensive Report. It contains the accused family background, personal history, circumstances to the offence, the accused attitude toward the offence, home and community sentiments regarding the accused. There is also contained therein a Victim Impact Statement.
8. The Report speaks for itself. The Probation Officer has done a thorough and commendable job. From her report it is very clear that the accused is dishonest. The mitigating circumstances which his counsel gave to court have been proven to be a false.
9. For instance, the accused indicated that he was a father and the Probation found he was not. He said he had less number of siblings than the Probation discovered upon visit to his home. It was established that the accused was expelled from two secondary schools due to indiscipline and that he finally dropped out of secondary school before completing. He lied about his parents that his mother's whereabouts was unknown and that he has never met his father. The Probation established that both parents are alive and that even though they had separated, they were both a part of the accused life. The Report also shows that the family of the accused was shocked by this offence.
10. According to the Report, the community who know the accused well view him as a threat to security due to his past violent life attributing serious crimes of having been committed by him, some still pending in court. They threatened to lynch him if released on a non-custodial sentence.
11. On the side of the victim's family they are yet to recover from the loss of their loved one. They expressed shock at her untimely death at a time she was processing a trip to further her studies in the USA.

12. I appreciate the **Francis Kariko Muruatetu and Another versus Republic and Others [2017] eKLR, Petition No. 15 and 16 of 2016 [consolidated]**. It is a Guiding Judgement from the Supreme Court. It gives the courts a discretion to determine which sentence is appropriate for an offence having regard to all factors affecting sentence including the unique circumstances of the case and of the accused. Most importantly it makes it mandatory for the court to receive and consider mitigation from the accused person before passing sentence.

13. The Supreme Court in the **Muruatetu** case, supra sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. 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.**

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINEJUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it”.

14. I have taken the Report into account, and the sentiments expressed therein by the accused own family, the community and the family of the deceased.

15. I considered the period the accused spent in custody during the pendency of his trial, in total a period of 3 years. I have taken into account his mitigation, the part that was not negated by the home visit. This includes the fact he has been attending church as proof of spiritual growth.

16. I have also considered the circumstances of this offence. The deceased went to visit the accused in the place where he was being housed by one Odera, PW4. All signs show that the accused murdered the deceased in cold blood. He even went further and extorted money from her family in order to give them information about her whereabouts. Indeed, the information he gave helped the family led by PW2 and 3 to trace the deceased body.

17. The action of the accused against the deceased, a naïve and trusting young woman according to the Pre-sentence report, was heinous. The accused left the deceased bleeding from her wounds and traveling 500 kms away to report to the police. This portrays the accused as a person with a dark and callous heart. This was a very serious offence committed in a most callous manner.

18. Having taken into account all the facts and circumstances of this case I find that a non-custodial sentence is not suitable and ought not to be considered. I find that accused was mean hearted, callous and aggressive. His family and community express no sympathy for him. There is no evidence of any provocation by the deceased. His mitigation reveals nothing that can stir pathos for what he did from the court.

19. I will sentence the accused to 30 years imprisonment.

20. The accused has a right of appeal against both the conviction and sentence within 14 days from today.

DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2019.

LESIIT, J.

JUDGE