REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 85 OF 2012

REPUBLIC...STATE

VERSUS

DAVID KIPKORIR KILEL..ACCUSED

RULING ON SENTENCE

1. In a judgment dated 23/05/2018, the Accused Person, David Kipkorir Kilel, was convicted of the murder of Everlyn Chebet (Deceased) contrary to section 203 as read together with section 204 of the Penal Code.

2. The facts as they emerge from the Judgment are as follows. On 30/11/2012, the Accused Person met the Deceased, who was in the company of Karen Cherotich Koros. This was at Kamnandi village in Chemaner location in Kuresoi district. Karen was carrying a load of firewood for the Deceased.

3. It is not clear what the source of controversy was, but the Accused Person commanded Karen to put the firewood down. Karen obliged. As Karen walked away from the load, the Accused Person took a piece of firewood and threw it away. This incensed the Deceased who confronted the Accused Person inquiring why he had thrown away her firewood. Anger begot anger: the Accused Person responded by striking the Deceased on the head once on the head with a jembe he was carrying. The Deceased fell to the ground. She died instantly.

4. Prof. Kangu, appeared for the Accused Person during the sentencing phase. He submitted at length on two aspects. First, he submitted that the death penalty is unconstitutional given the structure and text of our Bill of Rights.

5. The main argument advanced by Prof. Kangu, as I understood him, is that one must read any law permitting the death penalty in light of Article 2(5) and 2(6) as well as Article 20 of the Constitution. If one undertakes this reading, and then one considers the Bill of rights – in particular Articles 26 and 28 of the Constitution – on the right to life and human dignity respectively – the conclusion would be that one cannot derogate from the essential core content of a right. Prof. Kangu believes that the death penalty derogates from the essential core content of the right to life and the right to human dignity in Articles 26 and 28 of the Constitution respectively.

6. Prof. Kangu cited the famous decision by the Hungarian Constitutional Court – Decision 23 of 1990 "***On Capital Punishment***." In that case, the Hungarian Constitutional Court found that capital punishment definitionally imposes a limit on the essential content of the right to life and human dignity (guaranteed under Article 54 of the Hungarian Constitution) and is, thus, not compatible with Article 8(2) of the Hungarian Constitution. Article 8(2), like our Article 24(2)(c) of the Constitution precludes any limitation on the essential content of fundamental rights.

7. I had occasion to address similar arguments in ***R v Alice Moraa (Nakuru High Court Criminal Case No. 28 of 2013***). In that case, I expressed myself thus:

*5) This is an attractive argument. However, in light of the circumstances of this case, I do not wish to reach it and pronounce myself on the constitutionality of section 204 of the Penal Code in light of Articles 26 and 28 of the Constitution when seen against the categorical limits placed by Article 24 of the Constitution. This is for two reasons. First of all, I do not need to resolve the constitutional question presented because it is not necessary for me to resolve the controversy before me. Second, and related, the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** has already decided on the constitutionality of the mandatory nature of section 204 of the Penal Code. In that case, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.*

6) To this extent, the maximum penalty upon conviction for murder is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances. In the present case, I do not intend to impose the death penalty. Hence, under the salutary doctrine of constitutional avoidance, since I do not need to reach the constitutional question to resolve the case before me, the

resolution of the constitutionality of section 204 in light of Articles 24, 26 and 28 of the Constitution will await a properly pleaded case whose resolution will be necessary to resolve the controversy.

8. My position is the same in the present case. I do not consider the death penalty, even if it were constitutional, a proportional sentence given the circumstances of this case. I therefore find it unnecessary to decide the question of constitutionality of the death penalty to deal with the question before the Court.

9. I will now turn to the case at hand. Prof. Kangu urged the Court to consider non-custodial sentence or unconditional discharge in view of what he sees as significant extenuating circumstances.

10. In considering the appropriate sentence, I have considered the following as the mitigating circumstances in this case:

a. The Accused Person is a first offender;

b. The Accused Person suffers from a disability: he is hard of hearing;

c. He is a family man with a wife and children who rely on him for their livelihoods;

d. The Accused Person has already been in custody for about two years;

e. Fifth, the circumstances in which the homicide happened indicate that the Accused Person had not intricately pre-planned his use of violence. There was no use of gratuitous violence; and no utilization of particularly cruel or depraved means to commit a crime. It would appear that the Accused Person acted in anger and delivered a single blow which led to the death of the Deceased.

f. The family of the Deceased entered into peace and reconciliation negotiations with the family of the Deceased in which the Accused Person's Mososwo Clan gave out a heifer to the clan of the Deceased – the Sengere Clan in accordance with Kipsigis customary norms. A memorialization of the minutes of the meeting between the two clans was filed in Court.

11. While Prof. Kangu argued that the unique circumstances of this case calls upon the Court utilize options rather than the custodial option, Mr. Chigiti, the Prosecutor thought that a custodial sentence is warranted. In fact, he recommended imprisonment for thirty (30) years as the fitting sentence for the case at hand. His view was that this was a violent crime that should invite the society's opprobrium.

12. It is true that the crime committed was a serious one – and the Court found as a fact that it was pre-meditated. The use of deadly violence by the Accused Person in the circumstances of this case was clearly unwarranted. I have taken serious consideration of the fact that the two families have reconciled under Kipsigis customary norms. I have also taken serious consideration of the personal circumstances of the Accused Person. Still, I am persuaded that the circumstances of this case call for a custodial sentence as the society's mechanism for signaling categorical denunciation of the Accused Person's conduct. I believe that the circumstances are such that incarceration is the only suitable way of expressing society's condemnation of the Accused Person's conduct or deter similar conduct in the future.

13. **Consequently, in my view, a fit sentence that properly balances the mitigating circumstances with the aggravating circumstances is a sentence of seven (7) years imprisonment. Accordingly, I sentence the Accused Person to seven (7) years imprisonment. In coming up with this sentence, I have taken into consideration the period the Accused Person has been in custody.**

14. Orders accordingly.

Dated and delivered at Nakuru this 28th day of March, 2019.

....

JOEL NGUGI

JUDGE