REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 89 OF 2013

REPUBLIC...PROSECUTOR

VERSUS

FRANCIS MBOGO WAMBUGU................ACCUSED

SENTENCE

1. The convict **FRANCIS MBOGO WAMBUGU** was on 20th day of November, 2018 convicted of the offence of Murder of **J W M** his son. When his story is written he shall be one convict who has seen the faces of most of the Judges of the High Court of Kenya. As stated in the Judgment, he was initially charged in Criminal Case No. 81 of 2005 where he was eventually convicted on his own plea of guilty by Lesiit J., whose decision was overturned by the Court of Appeal in Nairobi, Criminal Appeal No. 123 of 2012 (P. Kihara Kariuki (now AG), P Mwilu (now DCJ) and J. Mohammed (JJA).

2. His journey along the corridors of justice is captured by the Court of Appeal in the said Judgment but a summary of the Judges he appeared before for record purposes is as follows:- He first appeared in court on 4/8/2005 before Mugo J. having been arrested on 29/4/2005. He then went before Mutungi J. and on 6/9/2005 before Rawal J. (who became DCJ) and took his plea on 7/9/2005 when he pleaded guilty to the offence and mental assessment ordered. He went before Ojwang J. (now SCJ) and Muga Apondi J. and maintained his plea of guilty. Having taken into account the circumstances of the case and in particular the action of Ojwang J. in explaining to him what constitutes murder and what does not, by a Ruling dated 4/7/2007 Muga Apondi J. recorded for him a plea of not guilty and set the stage for hearing.

3. On 8th October, 2008 he appeared before Lesiit J. when he once again maintained his plea of guilty and having cautioned him he maintained his plea of guilty and the Judge proceeded to convict him as captured by the Court of Appeal in the following terms: -

> ***"I have ordered that the accused has pleaded guilty to the charge of murder, the statement last made that he did not plan to kill the child coming from a lawyer is a misleading statement and I think that it is intended to derail the proceedings which I will not allow. I have considered that the accused has admitted collecting his son from his sister's house taking him to his house, dismembering it and wrapping it in a pair of bed sheets until passersby were attracted by a foul smell coming from his house. There is nothing more chilling than a father who admits cutting up his own child into small pieces which I see from the photographs before court. The doctors confirm he was in his proper mind, in full control of his sense. I do consider this act a murder most foul. As accused was warned there is no other sentence for the charge except death, I therefore sentence the accused to death as provided by law."***

4. He appealed that decision and the Court of Appeal ordered a re-trial and that is how he ended up before me having passed through Korir J. and Ombija J. (as he then was). Having found the same guilty, the court is now called upon to pass an appropriate, just and adequate sentence upon the same, for which I called for Pre-sentencing Report which has been filed, from which the following arises:-

a) He is the first born out of nine siblings in a family described as closely knit.

b) He started his work life as a hawker within Nairobi, then taxi driver before opening a hotel near GPO at the time of his arrest.

c) Was married to the mother of the deceased through customary law for twelve (12) years a marriage characterized by constant conflict, both verbal and physical leading to the wife running away. She eventually died in December, 2016 from breast cancer. They had one child, the deceased.

d) His chief at the time of the offence described him as a dangerous person who should not be allowed to gain his freedom as he can cause more harm to the society.

e) On victim impact statement:-

i) It was said that the victim aged 8 (eight) years was the only child of the convict and his deceased wife and was very close to both of them, so when the convict picked him up from his mother's relatives he dutifully followed him only to meet his death.

ii) After the mother of the deceased moved on she had two other children whose life should be in danger should the convict be given non-custodial sentence as he had previously traced and tormented members of his wife's family. He is alleged to have been threatening to harm the two children while he is in custody.

iii) During trial his wife had to be placed under Witness Protection Programme as a result of continued death threats from the offender.

iv) In conclusion the offender and his family are seeking non-custodial sentence noting that the same has been in custody for fifteen (15) years) while the victim's family from his mother's side are opposed to the same.

5. At the sentencing hearing Mr. Aswani R.T. appeared for the convict and filed comprehensive written submissions in which he urged the court to follow the Supreme Court of Kenya decision in **PETITIONS NO. 15/16/2015 FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** where the mandatory nature of death sentence was declared unlawful. He submitted that the offender had been in custody for the last fourteen (14) years having been arrested at the age of 39 and was now 53 years. He admitted being squarely involved with the death of the deceased and submitted that he was a first offender having been raised in a very humble family in Bahati Nairobi, being remorseful the court should find him worth being re-integrated into the society and start a new life.

6. It was submitted that during the period he had been in custody he had engaged himself in various activities among them being a member of **"Crime Si Poa"**. He had further involved himself in non-examinable activities such as being head of block solving disputes, official of Kamiti Maximum Prison Football Team and in support of favourable consideration quoted the Supreme Court of South Africa decision in **SVRO & Another 2SACR (SCA)** where Heher JA stated as follows: -

> ***"Sentencing is about achieving the right balance or more high-flown terms, proportionality. The elements at play are the crime, the offender, the interest of society with different nuance, prevention, retribution, reformation and deterrence . . ."***

7. In support of the submissions, the following authorities were submitted: -

a) William Okungi Kittiny Vs Republic, Criminal Appeal No. 56 of 2013 [2018] eKLR,

b) Douglas Muthaura Ntoribi Vs Republic, Criminal Appeal No. 4 of 2015,

c) Ahmad Abolfathi Mohamed & another, Criminal Appeal No. 135 of 2016,

d) John Gitonga alias Kadosi, Petition No. 53 of 2018, Meru,

e) Sebastian Okwero Mrefu ,Petition No. 151 of 2012 CA, Nairobi,

f) Peter Gitiya Vs Republic, Petition No. 66 of 2018 Meru,

g) Robert Mutashi Audi, Criminal Appeal No. 247 of 2014 CA, Nairobi,

h) Nelson Mwiti Gikunda & Another, Petition No. 47 of 2018 at Meru,

i) Martin Bahati Makoha & Another, Misc. Appl. No. 81 and 82 of 2009,

j) Titus Gatitu Ngumbau,

all which support the contention that trial Judges have discretion to give any sentence depending on the circumstances of the case.

8. The convict further relied on **MULAMBA ALI MABANDA, CRIMINAL APPLICATION NO. 12 OF 2013** where the court held:-

> ***"20. From the said mitigation, we note that the Appellant was a first offender, he had a young family he was taking care of, he was said to have reformed . . . the Appellant has already been incarcerated for almost 9 years. In our view, he already paid his debt to the society and learnt his lesson. In the circumstances the appropriate sentence that commends itself to us is that is reduced to the term already served. . ."***

The court was therefore urged to take into account the period spent in custody so as to give favourable and appropriate sentence, preferably the time already served or spread sentence which includes probation and suspended sentence for which **Titus Ngamau** case was relied upon.

9. On behalf of the prosecution Mr. Naulikha submitted that the victim was of the tender age of eight (8) years who was invited by the

convict and killed, body dismembered into more than twenty pieces having been taken away from the custody of the sister of the convict's wife. The court was therefore urged to look at the pain suffered by the victim in the hands of the father. It was submitted that owing to the unique circumstances of the case the convict should be sentenced to death.

DETERMINATION

10. The objectives of sentencing are now well settled in Kenya as can be seen from the Judiciary of Kenya Sentencing Policy Guidelines Number 4.1 which are as follows:-

> ***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.***

11. Whereas **Section 204** of the **Penal Code** provides for death sentence on conviction, The Supreme Court of Kenya in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** has now settled the law that death sentence is not mandatory and had this to say thereon:-

> ***"[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."***

12. Having stated the law as it now stands I now need to look at the circumstances of the case so as to arrive at an appropriate and just sentence proportionate to the crime and the objective to which the sentence passed herein is intended to serve. It is clear to my mind that any punishment imposed should be justified by the purpose and goal with corrective strategy as balanced with deterrence being the basis for assessing adequate sentence as was stated by the Supreme Court of India in **HAZARA SINGH v RAJ KUMAR [2013] 9 SCC 516** quoted by me with approval in **REPUBLIC v SAMUEL OTIENO FRANCIS, CRIMINAL CASE NO. 64 OF NAIROBI 2014 [2019] eKLR** as follows:-

> ***"The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the judges in arriving at a fair and impartial verdict. The court further observed that the cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence."***

13. The victim was the son of the convict, he trusted his father and expected protection from the same. There is evidence placed before me that shows that the marriage between the convict and the mother to the victim had reached the bottom. The last attempt to salvage what remained from that marriage failed as the convict declined to go with his parents to his in-laws. There is evidence that the mother of the victim was about to move on and indeed she did soon after the convict was placed in custody as evident through the birth of two children thereafter. There is evidence that the convict had stated that his son was not going to call anybody else "dad". The convict then took the victim from the home of his wife's sister only to end up taking the life of an innocent child who at that age did not know nor understand what the dispute between his parents were all about. He did not have to be a collateral damage of the said conflict.

14. I have taken into account how the crime was committed and how the convict cut his son into several pieces, with allegation that he had stored the same in the family deep freezer which he subsequently sold to unsuspecting citizen. According to **Dr. Peter Ndegwa**, the body of the deceased was dismembered into a total of twenty nine (29) small pieces using a sharp object. According to the evidence of **PW2 MICHAEL MACHARIA** the convict kept the said pieces in the house until it started to smell. He had as per evidence of **PW3** hit the boy with an iron bar killing him before embarking on dismembering his body when he could not hide the fact of his death anymore. In the usual manner to give credit to the devil which he does not deserve he stated that it is "shetani" which led him to commit the crime.

15. It is clear to my mind that this offence was committed in the most brutal manner in nature. It was premeditated, cold blood and in breach of the trust which his young son had placed upon him. This leads me to the finding that any sentence imposed upon the convict must be

retributive combined with deterrence as any other sentence objective, may have a knock-on effect on future offences of a similar nature. It is sad that even while in custody, the convict continued to torment his wife the mother of the deceased leading to her being placed in witness protection program and whereas the convict has spent the better part of his life in custody this case falls within what The Supreme Court of India considers the rarest of rare as stated in the case of **BACHAN SINGH v STATE OF PUNJAB (1980) 2 SCC 684** where death sentence is recommended.

16. Having taken into account the mitigation of the accused, the fact that he was found by the doctors to be in sound state of mind and his action after arrest, I am satisfied that death sentence would be the most appropriate punishment to the convict herein and therefore order that the same suffer death as by law established and it is so ordered.

17. The convict has right of appeal both on conviction and sentence noting that a man receives only that which he gives - *"whatever a man soweth that shall he reap."*

Dated, delivered and signed at Nairobi this 27th day of March, 2019.

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J. WAKIAGA

JUDGE

<u>In the presence of:-</u>

Mr. Naulikha for the State

Mr. Wakaba for the accused

Accused present

Court Assistant - Karwitha