



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL CASE NO.6 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

MNW.....ACCUSED

SENTENCE

In a world where children are increasingly facing the challenge of having no place to call safe and cruelty to children is becoming common place – the parent who, appearing normal and hale of health, takes away the life of his or her own child, presents a conundrum/contradiction to society. It is even more disturbing when that parent is the mother, the one who carried the pregnancy for 9 months, went through the birthing process and is naturally expected to nurture the infant, naturally by giving of herself, time, sleep, including through breast feeding; How then can that parent account for the act of taking away the life of the baby barely 10 days old through strangulation?

One can only imagine the helpless struggle of the innocent child to breath, and finally to give up and die. Worse still, where the 2 parents who brought this child to this world participate in the killing and hiding of the body hoping that the story will go away.

The accused person herein was charged with murder contrary to section 203 as read with s.204 of the Penal Code. It was alleged that on the 27th May 2016 at Karatina Sub county Nyeri County jointly with another not before court unlawfully murdered LWM an infant. The accused was found guilty of the offence of murder and convicted accordingly.

In her mitigation the accused person, through her counsel told the court that she was born in 1994. She has two children with her husband, who ought to have been her co accused. That he disappeared immediately after the deed. That the children were with the maternal grandmother. That she had been in custody for about 2 years and months. She sought a non -custodial sentence to go and raise her 2 children.

In January 2016 she left these children and went to live with her mother. She returned on 27th April 2016 and left again on 30th April 2016.

I have carefully considered the Pre-sentence report. It paints a picture of a young lady who was - good girl until the time she committed this offence. I have noted however that the Probation Officer's observations are in concurrence of this court's observations during the trial. That the accused person was not truthful. The probation officer also added that the accused person expressed no remorse for the offence she had been convicted of. That appears to be the reason for the dis-recommendation for a non-custodial sentence.

The accused herein faces the death penalty for the offence of murder. The pre-sentence report presents another conundrum, where the immediate family wants their daughter/ daughter in law back home because they need her to take charge of the lives of her 2 minor children who are in the care of their paternal grandmother. Can she be trusted with the care of these children?

The local administration through the assistant chief is of the view that the family somehow was engaged in some kind of attempted cover up and had she not stood her ground the death of that child would have been covered up.

The report points the picture of a person who is not remorseful, who did not tell truth who may be a risk to her own children if released. A non-custodial sentence is beneficial to a person who recognizes the wrong they have done, who is willing to be rehabilitated and with whom the officer can use the opportunity to bring the family together. Hence where that officer is of the opinion that the subject is not suitable for a non-custodial sentence especially in a case like this where there are minor children involved, the court must pay attention.

The sentence against the accused is not only for her own good but it bears a ripple effect on the community, or the victims and the whole scenario of the administration of justice.

In considering the sentence I checked out the Kenya Law Reports to see how this court has dealt with similar cases.

It is common for women who have been found guilty of the murder of their children to be granted a non-custodial sentence for good reason.

In Benard Atero Nyabwanga v Republic [2015] eKLR

The accused person had killed the child of the woman who was to be his wife because he wanted her without the child. He argued that he was under the influence of alcohol. Wakiaga J found that though the accused had already been in custody for four years and had suffered punishment, and that he was to undergo some cleansing ceremony, the manner in which he had killed the child meant that he needed rehabilitation. On top of the four years in custody, he was placed on probation supervision for two years.

In **Republic v Clare Moraa Obiero [2016] eKLR**, Okwany J, the case was about a minor who had killed her child. In granting her a probation supervision for two years the Judge observed;

9. Parents turning against their own children has been found by psychologists, to be an ultimate expression of emotional disorder. The social support systems where families were linked together and supported each other are no longer the norm, which makes this court to wonder what will happen to the child that the accused is currently carrying since she is reported to be pregnant. How safe will this child be in the hands of her own mother who has already been convicted of killing another baby?

10. These are the questions that this court is grappling with especially in the face of the Probation Officer's report that she could benefit from a non-custodial sentence.

11. To my mind, the accused is a young girl and indeed a minor who still needs the care and protection of her parents, family and the society at large.

12. I will take the cue from the Probation Officer's recommendation that the accused be given a non-custodial sentence.

In **A N M v Republic [2018] eKLR**, Joel Ngugi J was dealing with the case of a 16-year-old mother of a one-year-old. The accused subject and her mother were subjected to what can only be described as indescribable torture from the father of the child and his 'gang'. Taking this into consideration he noted:

There is one factor I have to deal with, though. A has clearly gone through much trauma. The Probation Report states that she may have anger management issues she has to deal with. It is also important that she goes through counselling. Finally, it is probably a good idea to remove her from the social milieu that produced her circumstances. It is in this regard that I fully agree with the recommendation of the Probation Officer that A should be sentenced to an institutionalized Probation sentence at Siaya Probation Hostel for intensive counselling on trauma and anger management. While there, she will also learn about life skills and vocational training.

13. Given the age of her child, I sentence her to six months of institutionalized Probation Sentence so that she can rejoin her daughter as quickly as possible to restart life.

With regard to the accused person herein, she starts off without the recommendation for a non-custodial sentence. She has been in custody since 31st May 2016 about 2 years and 8 months. The maximum sentence for murder remains the death penalty as determined in the **Muruatetu** case, leaving the court with discretion to determine the appropriate sentence.

The accused's person's case is aggravated by the fact that she and her accomplice attempted to conceal the evidence by disposing off the body of the child. She lied to different people about the whereabouts of the child, and the cause of death. Secondly, the deceased was a vulnerable victim being a few days old child in this world, who depended on the accused for protection. The only mitigating circumstance for her is that she is a first offender.

This court is apprehensive as to whether, in the circumstances of the case, the accused is ready to return back to society and whether, she is ready to take charge of her other children. She needs time to realise the magnitude of her actions, and take up her responsibilities when she is ready.

The accused person is young. She needs time to deal with the issues and to realize that anger and bitterness must be directed to the right target – whatever anger or bitterness she carries against her husband could just as easily be transferred to the children who so yearn for their mother's home.

Having considered the guiding principles as set out under paragraph 23.9 of the Sentencing Policy Guidelines, the accused person is sentenced to 6 years' imprisonment which should run from the date of arrest. Right of Appeal 14 days.

Dated, delivered and signed at Nyeri this 25th March 2019.

Mumbua T. Matheka

Judge

Before I leave this matter, it is necessary to address the issue of the children. I believe I can do so under the provisions of Article 165(3) and 53 of the Constitution, in the best interests of the children.

The accused person is the mother of two minor children. By virtue of these proceedings they have been rendered in need of care and protection under s. 119(c) and (q) of the Children Act. and their parental responsibility has devolved to their grandmother, the accused's

mother in law, who is anxious to hand over this responsibility to the accused person now that her son, their father is at large. This is the main ground for the plea to this court to give the accused person a non-custodial sentence. However as I have found she is not currently suitable for non -custodial sentence.

To safeguard the welfare of the children as required by s. 4 of the Children's Act, it is necessary that the Department of Children Services be involved. I direct therefor that the County Coordinator Children Services Nyeri do open a Protection and Care file for the two children. Part IX of the Act provides for Judicial Orders for the protection of Children. I find two of the section 114 orders suitable (d) and (e). I issue a **"child assessment order"** requiring the children to be evaluated by the County Coordinator Children Services Nyeri to assist the court in determining needs of the children related to their welfare and upbringing. In addition, a **"family assistance order" to issue to the County Coordinator Children Services Nyeri** assesses the need for counselling and guidance for the children and their guardians, and their mother, and make the necessary recommendations and appropriate referrals, including the issue of access.

This order be extracted and served on the **County Coordinator Children Services Nyeri for necessary action, and for placement in the P&C file to be so opened.**

Mention of the P&C file on 25th April 2019.

Mumbua T.Matheka

Judge