



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

COURT CRIMINAL CASE NO. 55 OF 2015

(Formerly Nakuru High Court HCCRC No. 79 of 2015)

REPUBLICPROSECUTION

VS

DISMAS AUMA OMUSUGU.....1ST ACCUSED

DANIEL NJOROGE MBUGUA.....2ND ACCUSED

DENNIS MUTABARI.....3RD ACCUSED

FREDRICK MACHARIA NDUNG’U.....4TH ACCUSED

FRANCIS MATU MWANGI.....5TH ACCUSED

JUDGMENT ON SENTENCE

1. The hearing of this case was conducted by Meoli, J. She wrote the judgment which I delivered on 1st April, 2019. The learned Judge found the 1st, 2nd, 4th and 5th Accused persons guilty of the murder of their cellmate Joseph Ong’are Ondulo. I am now called upon to sentence the convicts, the learned Judge having been transferred to another station.

2. I have carefully read and internalized the judgment in this case. In summary, the 1st, 2nd, 4th and 5th Accused were convicted inmates serving time for different capital offences in Cell Number 86D at G. K. Prison Naivasha. On the night of 3rd to 4th July, 2011, whilst in the said cell, the four accused throttled their cellmate Joseph Ong’are Ondulo. The 5th Accused wrote a note with a warning to the effect that “informers” and other undesirables would not be tolerated in that prison.

3. After they throttled the deceased, they then cut a blanket into strips using a razor, tied it around the deceased’s neck and hung him by the neck against the window grills in the cell. They then covered his body, but before doing so the 2nd Accused cut off the deceased’s hand with a razor. The post mortem report showed that the dis-articulation of the hand below the elbow was done after the deceased had died. The report also showed that the cause of death was asphyxia due to pressure on the deceased throat, consistent with strangulation. The deceased’s disarticulated hand was thrown into a bucket. The razors were thrown into the cell’s fecal waste buckets and retrieved during investigations.

4. When the accused persons had completed their heinous crime, they contrived to call a warden who they informed that the deceased had died. In court, they all told a similar story about the wardens having come at night, fully disguised, that they removed the deceased, and returned his lifeless body to the cell, with instructions to hang it on the grill to look like a suicide. All, that is, except their cellmate Accused No. 3 who balked and told the detailed and gory truth of the events of that night.

5. The Supreme Court, in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, held that prior to sentencing, an accused person has a right to a fair trial; that the trial should delve into mitigating and extenuating circumstances, and should take into account the following factors:

- a) The age of the offender.
- b) Whether the offender is 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-adoption of the offender.
- h) Any other factor that the court considers relevant.

6. During mitigation, Mr. P. K. Njuguna together with Mr. G. Kimani represented the accused persons.

7. The DPP stated that all the accused persons are presently serving life sentences for robbery with violence, and had committed the offence whilst in prison.

8. Counsel for the accused persons pointed out in mitigation, that all accused persons had been sharing a cell with the deceased victim. They urged the court to consider that circumstances in our jails may have led to psychological stress on the accused persons. Counsel, referring to the **Muruatetu Case**, also said that it may not be proper to impose the death sentence as the law is moving away from that direction. Counsel added that the fact that the accused are serving sentence should not be the main consideration to take into account.

9. Counsel was in favour of a custodial sentence with the eventual intention of assisting the accused persons to reform, and to some hope that the accused persons can indeed be useful members of the society. The custodial sentence should run from the date the Accused persons were arraigned in court in the present matter.

10. I have carefully considered the mitigation. The accused persons were all serving life sentence at the time of the murder. The modus of execution of the murder was extremely gory and horrendous. They were in essence punishing a cell mate who they considered to be an informer. There has been no inkling of a suggestion that any of the accused are remorseful. Nothing has been said about their families or future plans or hopes. They appear to be nothing but hardcore criminals.

11. Taking all these matters into account, I find that the only sentence to pass is the death sentence.

12. Each of the accused persons is sentenced to death as by law prescribed.

13. The accused persons have a right to appeal against conviction and sentence within fourteen (14) days.

14. Orders accordingly.

Dated and Delivered at Naivasha this 27th Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Mr. P. K. Njuguna and G. N. Kimani for Accused persons
3. Accused - 1st Dismas Auma Omusugu - present
- 2nd Daniel Njoroge Mbugua - present
- 4th Fredrick Macharia Ndung'u - present
- 5th Francis Matu Mwangi - present
4. Court Clerk – Quinter Ogutu