REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 2 OF 2017

DANIEL ONYONDI MOI.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTION

SENTENCE

Daniel Onyondi Moi denied vehemently having murdered **Regina Kiinya**, his girlfriend on 29th April 2017 at Kiawara Village, Mweiga township, Kieni West sub-county Nyeri County.

On 17th May 2019 I found him guilty of murder c/s 203 as read with s. 204 of the Penal Code, making him liable to the death penalty.

I ordered for a pre-sentence report which was filed by the Probation Office, Nyeri.

Regina was the single mother of four children who had to be separated to live with different relatives following her death.

RN- with grandmother in Meru.

JK- a girl, living with an aunt in Nyeri – dropped out of school- Form 1 last year for lack of school fees.

GK in PP1 living with same aunt in Nyeri.

CK living with a different aunt in Mweiga in Std 7.

A family was broken asunder and children turned into orphans. Why? Because their mother's boyfriend suspected her of being promiscuous.

The accused had known the deceased for over a year. He knew her children, he knew her sisters- he attacked her in broad daylight in the presence of her sister and her friend who was heavily pregnant.

He cut her down like firewood.

The injuries she sustained as shown in the postmortem report speak volumes.

> ***-Deep cut wound extending from left temporal region, parietal to right temporal region involving the scalp, skull and brain exposing severed brain extending from temporal region.***
>
> ***-Left upper limb amputated hand at wrist joint.***
>
> ***-Right upper limb mid forearm deep cut with severed tendons.***

These injuries are an indication that she raised her hands in self defence to cover her head but he cut her not once but at least three times.

Why again, because he suspected her of promiscuity.

The pre-sentence report indicates to his family in Ebushirikha village, Khisa Location, know him as a good person – laying blame on alcohol and bad company. They would welcome him back

The larger community represented by the elders and local administration stated that the offence is a taboo and that the accused ought to spend some time in custody.

The probation officer recommends a lenient sentence as the accused is ***"not depicted as a person with a pro-criminal record".***

The accused had left his home 5 years prior to the commission of the offence. His wife left him in 2015 with their only child for un disclosed reasons. He seeks leniency and is remorseful.

I must speak about the victims.

Before I get to his sentence I find it necessary to speak about the victims, and especially the child victims of offences.

It is Pravin Bowry, in his article '***What About the Rights of Victims of Crime?***' appearing in The Standard of 22 March 2011, soon after the promulgation of our new Constitution who decried the state of affairs of the Victims in the Criminal Justice system in the following words*;*

> *'The rights of an accused person in the legal system of Kenya are now so strongly entrenched that investigators and prosecutors are having acute difficulties to secure convictions and fight crime. The new Constitution has strengthened these rights with courts backing those facing criminal charges… What about the rights of victims of crime? Every single crime has a victim. And most sadly this unfortunate person has been disregarded in our legal system. The physical injury, the emotional trauma, the material loss and damage to person and sometimes reputation matter not to the law or the state authorities.**[1]***

Echoing his words, it baffles me that we could find it necessary to entrench the protections afforded an accused person in the Constitution while leaving those of the Victim to legislation by Parliament while at the same time still speaking about equality before the law, equal protection of the law, and right to fair hearing.

In this case, the victims here are the children of the deceased.

The Children Act Section 119 declares that they are children in need of Care and Protection. S. 4 of the same Act requires that the welfare of children be safe guarded in all actions affecting then.

The protection of the welfare of the victim is not as guaranteed as participation of Victims in our criminal justice processes which is to some extend guaranteed as was discussed by the Court of Appeal in **I P Veronica Gitahi & another v Republic [2016] eKLR** thus;

> *In recent times debate has commenced generally, on the question of the victim's right to participate in criminal trials, especially those conducted in international tribunals and courts. This move has been seen as essential to the legitimacy and effectiveness of the proceedings in the tribunal or court. It is based on the appreciation of the importance of victims' contribution to criminal investigations, judicial processes and decision-making, all of which can enhance the quality of criminal trials and willingness of the citizenry to accept outcomes from the courts*
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> *Under the Rome Statute for example, victims before the International Criminal Court (ICC) are granted far-reaching rights, as compared to the ad hoc Tribunals for Rwanda and the former Yugoslavia. Under Article 68 (3) of the Rome Statute victims are granted the right to be heard on issues affecting their personal interest. Victims who have been accepted by the court are entitled, during the proceedings, to be informed of all the relevant developments in the case, to have legal representation, to make statements at the beginning and end of the proceedings, present their views regarding investigations, charges and to put questions to witnesses, including the accused person.*
>
> ***It is against this backdrop that the recent developments in the law of victim protection in Kenya ought to be seen.***
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> *Articles 2 (5) and 50 (7) and (9) of the Constitution of Kenya, 2010 heralded a new dawn. Apart from enjoining the courts to apply general rules of international law, the Constitution also mandates the courts, in the interest of justice, to allow an intermediary to assist a complainant (or an accused person) to communicate with the court, while requiring Parliament to enact appropriate law to provide for the protection, rights and welfare of victims of offences.* ***That law, the Victim Protection Act was enacted in 2014****.*

The Victims Protection Act 14/2017 makes provision for the welfare of Victims. But that is here it stops. The connecting threads between its provisions, those of the children Act and the Criminal Justice System have not been clearly set out. Hence the glaring that Upon the arrest of the perpetrator, the thinking of the Criminal Justice System is linear- single sight vision dealing with the perpetrator. There is need for a meeting point to ensure that these laws work hand in hand- a meeting point needs to be found to ensure that even as we deal with the criminal matter we are also dealing with the welfare of the victims – there should be no disjoint of efforts.

A police officer is an authorized officer as per s. 2 of the Act ***"authorized officer"*** *means a police officer, an administrative officer, a children's officer, an approved officer, a chief appointed under the Chiefs' Act (Cap. 128), a labour officer or any other officer authorized by the Director for the purposes of this Act;* For example, an Investigating officer who finds that there were child victims as in this case, who by virtue of the killing of their mother became not only victims but children in need of care and protection under s. 119 of the children act, ought to be able to refer the case to the Department of Children Services for appropriate action to take place simultaneously with the criminal case. He could open a Protection and Care file simultaneously with the Criminal file and have them registered in court leaving the Children

matter to be pursued by the Children Officer under the provisions of s. 119, 120 to 125 of the same Act. He could bring the court's attention through the prosecution the plight of the children during the preliminaries a of the criminal case so that the court can give appropriate directions

This is because every day for a growing child is precious.

The words of Gabriela Mistral, 1945 Literature Nobel Prize Winner, who in *Su Nombre es Hoy* (His Name is Today)[2] ring true loudly today as they did then;

> ***"We are guilty of many errors and many faults, but our worst crime is abandoning the children, neglecting the fountain of life. Many of the things we need can wait. The child cannot. Right now is the time his bones are being formed, his blood is being made, and his senses are being developed. To him we cannot answer 'Tomorrow,' his name is today."***

Despite what we do with the accused person herein, for Regina's children, justice will not be seen to have been done until life is breathed into the implementation of the Children's Act and the Victims Protection Act to safe guard and protect their welfare.

So what is the appropriate sentence?

The appropriate guidelines were set out in the **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR** e by the Supreme Court by amending the provisions of the Judiciary Sentencing guidelines for Murder.

> ***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:***
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> ***(a) age of the offender;***
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> ***(b) being a first offender;***
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> ***(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:***
>
> ***GUIDELINE JUDGMENTS***
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> ***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".***

I have considered the mitigation of the accused person, the contents of the pre-sentence report, the provisions of Article 26(3) of the Constitution that

> ***A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.***

In spite of the discretion granted in Muruatetu, I am of the view that the accused person herein is not deserving of the exercise of my discretion in his favour. What he did and the way he did flies in the face of the basis upon which justice can be tempered with mercy.

I am fortified in this by the persuasive judgment of Lesiit J in in **Republic v Ruth Wanjiku Kamande [2018] eKLR where** she stated:

> ***In terms of sentence, the sentence for murder is the death penalty. It is true that pursuant to Muruatetu case, supra the courts now can exercise discretion when considering and passing sentence. It is important to say that in my view that discretion to***

pass a sentence other than death in capital offences should only be exercised in the deserving cases. I do not find this a deserving case.

I have carefully considered the mitigation, the pre-sentence report and the state of the victims. I have considered the manner in which this offence was committed. It sets it apart from other murders. It demonstrates the reason why the **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR** holding was long overdue. That there was need to consider the circumstances of each offence, offender, and victims in arriving at the sentence and the courts needed to have that discretion in the interests of justice.

Regina's vessel of life will never sail in this sea of the existence that we all know. It is drowned by the storms caused by the accused's person's inhuman action. The lives of her children were thrown into the storms that come when you are an orphan.

Why? Because the accused could not accept the fact that Regina could not accommodate him as she was still in a relationship with the father of her children.

He could have noted this and just walked away. But instead decided if she could not be with him, then she would not be.

Courts must send the strongest message marital/ relationship disputes cannot, should not/ should never be resolved through killing or causing any harm to the other party. The sanctity of love and the family must be protected by people understanding that there are better ways to resolve disputes. If it is not tolerable, that it is better to walk away and forget that relationship. Our society must revive its revulsion to any form of violence. Our society must have no tolerance to domestic violence and gender based violence. The message must be heard loud and clear, killing girlfriends will not be tolerated by this society. Killing wives will not be tolerated by this society. Killing boyfriends and husbands will not be tolerated.

If a relationship goes sour, if a marriage breaks down, then those people in it must have the human sense to walk away and seek other solutions.

The accused is sentenced to death as prescribed by law.

Right of Appeal 14days.

Dated, delivered signed in open court this 28th day of June 2019 at Nyeri.

Mumbua T Matheka

Judge

In the presence of:-

Gathiga Mwangi for Accused

Mrs Owuor for the state

Court Assistant: Juliet

Accused- present

Judge

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[1] https://www.academia.edu/5382749/THE_PLACE_OF_THE_VICTIM_OF_CRIME_IN_KENYA (twenty eight june 2019)

[2] https://en.wikipedia.org/wiki/Gabriela_Mistral