



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 104 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

EVERLYNE WANZA KILUNGYA.....ACCUSED

SENTENCE

1. The convict was on 24th day of January 2019 found guilty and convicted of the murder of **JOHN ONCHIRI OGAO** on 30/10/2015 contrary to **Section 203** as read with **Section 204** of the **Penal Code**. What the court is now called upon is to pass out an appropriate, just and adequate sentence herein.
2. The starting point in this journey is **Section 204** of the **Penal Code** as read together with the Supreme Court decision in **Petition No. 15 of 2015**, the Muruatetu case where the Supreme Court stated that death sentence was now not mandatory and that the trial court has discretion to met out any sentence including death based on the circumstances of each case.
3. In line with the Supreme Court decision and the Judiciary Sentencing Policy Guidelines, the court called for Pre-sentencing report and invited the convict to offer mitigation. It was stated by Mr. Njuguna in mitigation on behalf of the convict that she was a first time offender and a mother of a five year old daughter who required her presence to teach her how to be a good mother. It was stated that she was the sole bread winner, was remorseful and regretted the incidence. She was ready to reform and asked for leniency based upon her poor decision. She sought for a custodial sentence of about five (5) years.
4. The State through Mr. Naulikha submitted that though the convict was a first offender based on the circumstances of the case, the convict should be given death sentence as choices have consequences. It was submitted that the victim and family will forever miss their member.

PRESENTENCING REPORT

5. It was stated that the offender grew up in an abusive family who depended upon the mother for care and education. The family stated that she was a very responsible person who was in the process of putting up a house for the family at their rural house. She dropped out of secondary school due to early pregnancy, was single but cohabiting with the deceased at the time of the offence. She admitted committing the offence when the deceased assaulted her all of a sudden from behind while she was cutting a mango for a customer and stabbed him in self defence. She states that they were arguing over a phone that the deceased had confiscated over an allegation of prostitution. She pleaded for a non-custodial sentence. The village elder reported that there was a report on the convict where members of the public allegedly reported that she was a violent person who had previously stabbed another man she was cohabiting with.
6. On the Victim Impact Statement; it was stated by the mother that he had a bright future and had taken over the role of his deceased father. She stated that the offender had other avenues of seeking redress for their differences without killing the deceased. It was stated that the offender had on many occasions shown her violent side and in fear of fatality the family had sat the deceased down and tried to convince him to get out of the relationship but he had not heeded their advice believing that he was in love.
7. On recommendation; it was stated that the offender was a first offender who will endeavour to live a crime free life. Her family pleaded for mercy since she had a child who needs her care and they were willing to be allowed to settle the matter through the provisions of the Kamba Customary Law. On the other hand the family of the deceased rejected the proposal to settle the matter within the customary law as it was not genuine but offered as an afterthought upon the conviction of the same. It was stated that the offender tried to depict herself as a victim first of her family especially her father's violence and later on the community at large and did not take full responsibility of her actions.

8. Sentencing objectives as per the Sentencing Policy Guidelines Number 4.1 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.**

9. Whereas the convict has a young child and daughter to be specific, who needs her care and protection and whereas her other family members too needs her support, from the material placed before me, the same is depicted as a violent person and abusive to the male gender, as the probation officer's report indicates that she had previously stabbed another man she had been cohabiting with, who was fortunately treated successfully. There is information that the dispute which led to the death of the deceased arose as a result of some cell phone which the deceased had confiscated from the convict on allegation of prostitution. It therefore follows that the convict needs further counselling on dispute settlement mechanisms and to learn on how to positively live with others which can only be done in a confinement environment and not while at large where she is likely to commit similar offences going by her previous conduct. She needs to be kept away so as to protect the male gender who might once again fall in love with her before she deals with her past.

10. Having taken into account the material placed before me and the sentencing objectives, I have come to the conclusion that a rehabilitation sentence combining both custodial and non-custodial sentence will be the most appropriate sentence herein and therefore sentence the convict to serve a sentence of ten (10) years to be served as follows:-

- a) The first seven (7) years in custody so as to benefit from the prison rehabilitation programs and for purposes of community protection so as to protect any other man who might in future decide to cohabit with her from harm and danger.**
- b) The next three (3) years thereafter on probation for further rehabilitation and settlement into community.**
- c) The convict is entitled to remission if any on the first seven (7) years.**

11. The convict has a right of appeal on both conviction and sentence while the Prosecution has right of appeal on sentence and it is hereby ordered.

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

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Njuguna for the accused

Accused present

Court Assistant – Karwitha