REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 52 OF 2011

REPUBLIC.....PROSECUTOR

=VERSUS=

CATHERINE NDUNGE MUTHOKA.....ACCUSED

SENTENCING

1. The accused herein, **Catherine Ndunge Muthoka,** was on 15th day of October, 2019 convicted by this court on two counts of murder contrary to section 203 as read section 204 of the ***Penal Code***. In count I, it was alleged that on the 15th August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County, the accused murdered **Alphonse Mutinda**. In count II, it is similarly alleged that on the 15th August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County, the accused murdered **Agnes Nduku Ndunge.** The deceased were children of the deceased and they died as a result of drowning.

2. In finding her guilty of manslaughter this court found that:

> **"In this case the deceased were last seen with the accused at around 7.30pm. At 10pm the accused appeared in the house of her sister, PW5, alone without the children and did not even mention them. After that the deceased were never seen alive again. Whereas in cases where the deceased are not related to the accused or have no close relationship, one may say that the accused has no business inquiring into where the deceased goes after they leave each other and therefore some other evidence may well be required; in a case such as this where the accused was the mother of the deceased, surely some strong evidence is required as to how she parted ways with the deceased. Her evidence that she took them to their father that same day is obviously untrue."**

3. The issue before me is sentencing. Section 204 of the Penal Code provides that:

> **Any person convicted of murder shall be sentenced to death.**

4. This section was the subject of interpretation by the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** (**Muruatetu's case**), held at para 69 as follows:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
>
> **[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.**
>
> **[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence**

to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[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.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

5. In arriving at its decision the Supreme Court relied on a number of foreign decisions and international instruments and in so doing expressed itself as hereunder:

"[31] On the international arena, however, most jurisdictions have declared not only the mandatory but also the discretionary death penalty unconstitutional. In *Roberts v. Louisiana*, 431 U.S. 633 (1977) a Louisiana statute provided for the mandatory imposition of the death sentence. Upon challenge, the US Supreme Court declared it unconstitutional since the statute allowed for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed. In *Reyes* (above), *t*he Privy Council was of the view that a statutory provision that denied the offender an opportunity to persuade the Court why the death sentence should not be passed, denied such an offender his basic humanity. And in *Spence v The Queen; Hughes v the Queen* (*Spence & Hughes*) (unreported, 2 April 2001) where the constitutionality of the mandatory death sentence for the offence of murder was challenged, the Privy Council held that such sentence did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability. In the words of Byron CJ;

> **"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."**

[32] Two Indian decisions also merit mention. In *Mithu v State of Punjab*, Criminal Appeal No. 745 of 1980, the Indian Supreme Court held that "a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just" while in *Bachan Singh v The State of Punjab (Bachan Singh)* Criminal Appeal No. 273 of 1979 AIR (1980) SC 898, it was held that "It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."

[33] The UN United Human Rights Committee has also had occasion to consider the mandatory death penalty. In case of *Eversley Thomson v St. Vincent,* Communication No. 806/ 1998U.N. Doc. CCPR/70/806/1998 (2000), it stated that such sentence constituted a violation of Article 26 of the Covenant, since the mandatory nature of the death sentence did not allow the judge to impose a lesser sentence taking into account any mitigating circumstances and denied the offender the most fundamental of right, the right to life, without considering whether this exceptional form of punishment was appropriate in the circumstances of his or her case.

……..

[39] The United Nations Commission on Human Rights has recommended the abolition of the death sentence as a mandatory sentence in *Human Rights Resolution 2005/59: "The Question of the Death Penalty"* dated 20 April 2005, E/CN.4/RES/2005/59. It urges all States that still maintain the death penalty*:*

'…(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

…

(f) To ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults <u>nor as a mandatory sentence.</u>"

6. The Court therefore concluded as follows:

[56] We are therefore, in agreement with the petitioners and amici *curiae* that Section 204 violates Article 50 (2) (q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender. This also leads us to find that the right to justice is also fettered. Article 48 of the Constitution on access to justice provides that:

"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

[57] The scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution."

7. The Court also found that:

"Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.

……..

[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.

……

[69] Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

8. In addition, the Supreme Court said at para 111 of the said judgment that:

"It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the

appropriate sentence befitting the offence committed by the petitioners."

9. Before sentencing the accused this court requested the probation office to provide pre-sentencing report. However, considering the relationship between the accused and the deceased, it was not necessary to call for a victim impact report.

10. According to the Probation Officer's Report, the accused is 31 years old. Before the commission of the offence the accused was taking care of her three children two of whom are the deceased while the eldest one is currently a form one student at Kaloleni Secondary School and in the custody of her grandmother, her mother being deceased while she was born in a surrogacy union. However, while in remand she gave birth to another child who is currently under the foster care of her aunt and is now 5 years old and is a nursery school pupil at Kabaa Primary School.

11. According to the report, the accused's grandparents are elderly and ailing. It was reported that the father of the deceased was initially traumatised by the incident but has since come to terms with it and has left the matter in the hands of the court though he had long forgiven her. As for her eldest daughter, it was reported that she has had to endure the absence of both her siblings and the mother. It was reported that she was missing the accused's care and was leading a relatively hard life since the parents were elderly and ailing. The accused was described as hardworking and peaceful and the family members had no clear reason why the accused committed the offence as she did not mistreat the deceased and had not attempted to harm them before. According to the family the years spent in custody should have been a hard lesson for the accused and they pleaded with the court to be lenient with the accused in passing the sentence. The family expressed willingness to support the accused restart her life and settle down.

12. According to the report, the local administration and community members were positive towards the accused. It was reported that though initially the community was hostile towards her, with time the hostility abated and that she is no longer a threat to the community.

13. From the prison, the reported indicated that the accused's record was positive. It was reported that she had significantly improved after series of counselling sessions. She was actively involved in cooking for kindergarten children in prison and had learnt tailoring and embroidery skills and had no disciplinary issues and related well with her fellow prisoners.

14. Before me, it was submitted by **Mr Muia**, learned counsel for the accused that the court ought to consider a non-custodial sentence as she had learnt her lesson and was remorseful. On the other hand, **Ms Mogoi**, learned prosecution counsel, was of the view that the court ought to take into account the fact that the accused took two innocent defenceless lives of children of tender years. She showed no mercy to her own blood and showed no respect for human life. The court was urged that since the accused has two children, the two children need to be protected. It was argued that if the offence was committed due to hard economic time, the times are even harder now than it was then and that the accused is likely to harm the other two children as well. The court was therefore urged to impose a harsh sentence in order to send a clear message to potential offenders that the court and the society does not condone the act. According to learned counsel the time spent in custody so far is not sufficient for the two lives and there is no evidence that the sister cannot take care of the child. She therefore sought a stiff penalty for the accused.

15. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of **section 329** of the ***Criminal Procedure Code*** which provides:-

> **"The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence."**

16. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ** stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

17. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

> **"… One of the main purposes of punishment…is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."**

18. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

> **"Except in well- defined circumstances such as youth or mental incapacity of the offender…Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."**

19. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** as a guide in sentencing held that:

"[71]…the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being 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-adaptation of the offender;

(h) any other factor that the Court considers relevant.

20. That loss of life and any life for that matter is a very serious matter is not in doubt. That it is a matter taken seriously is appreciated by the Constitution itself which provides in Article 26(3) that:

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

21. No person should therefore be intentionally deprived of life unless such deprivation is authorised by the Constitution itself. However, in meting out a sentence, it was appreciated by the Supreme Court in ***Muruatetu Case*** (supra) that:

"In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,* where the High Court held that the objectives include: *"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."* The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

***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 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. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.**

***5.* Community protection: To protect the community by incapacitating the offender.**

***6.* Denunciation: To communicate the community's condemnation of the criminal conduct."**

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

22. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.

23. In this case, it is true that the accused took the lives of her own children. Such crimes are not normally committed for gain, revenge, lust or to emulate other criminals. Most likely than not they are committed due to underlying psychological factors. Accordingly, they are not the crimes which one can say the accused is likely to repeat in future. While the possibility cannot be ruled out, their repetition is rather remote unless it is shown that the accused is a psychopath. In this case there is no such evidence. While **Miss Mogoi** is of the view that if released the accused may harm the other children, the evidence we have is that the accused is actively involved in cooking for kindergarten children in prison. Ordinarily a person with the tendency to harm children cannot be placed in a position where the lives of the children depend on her.

24. It is also submitted that taking into account the hard economic times, the accused if released may not cope and that the reasons that led

her into committing the crime are now greater than they were before. However, the report from the prison indicates that the accused has learnt tailoring and embroidery skills. Her family has expressed willingness to support her restart her life and settle down. Though her eldest child is being taken care of by her grandparents, it is indicated that the grandparents are elderly and sickly and that the daughter is missing motherly care and is going through hard times. While the sister is taking care of the younger child, considering the said hard economic times it must also be taking some toll on the sister. If the accused can take full advantage of her training in order to get herself involved in a meaningful source of income, not only will she unburden her ageing parents but also give the children the care they badly yearn for.

25. While I appreciate that the court need to send a strong message to the society that the conduct of the accused is deplorable, Article 55(4) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. This Court should not be seen to be sacrificing the interest of the children in order to appease the spirits of the society. The accused has been in custody for eight years. In my view the fact that the deceased were the accused own children who lost their lives at the hands of the accused herself is a much heavier sentence than this Court could ever hope to impose on her. She will forever have to live with that psychological trauma for the rest of her life and may have to answer for it in her life hereafter.

26. I have taken into account the foregoing factors. To my mind the accused herein require therapy rather than punishment and ought to be placed on probation in order for her to undergo guidance and counselling.

27. In my view keeping the accused in custody will not only be detrimental to her but also to the welfare of her children and her ageing grandparents. Having considered the circumstances of this case, while I agree that the period that the accused has served in custody is not sufficient to have her unconditionally released, the factors of this case militate against her being kept in custody. It is neither in her interest, the interest of the society or her family that she continues being in custody.

28. In the premises together with the period that she has spent in custody, I hereby sentence her to 5 years' probation during which period she will undergo counselling and therapy.

29. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 27th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Accused in person

Miss Mogoi for the State

CA Geoffrey