

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 31 OF 2014

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

ISSA ABDALLAH WAMUKOYA.....1ST ACCUSED

HAMSA ANANGWE MAKOKHA.....2ND ACCUSED

RULING

1. The accused persons herein were convicted on 29th November 2019 by Sitati J. of the murder of Ismael Watota Wamukoya on 21st June 2014. They are now convicts. I am called upon to sentence them for that offence for which they have been found guilty. To enable me do that I need to consider the penalties available in law for such offences, the circumstances of the commission of the offence, the feelings of the family of the victim and the antecedents of the accused persons.

2. The penalty prescribed by the law for murder is mandatory death. That is what is in the Kenyan statutes. However, the Supreme Court recently ruled that mandatory sentences were unconstitutional, and directed that a trial court ought to be given room to consider the matters that I have set in in paragraph 1 above to assess whether to award the death penalty as prescribed or some other lesser sentence.

3. Murder is where death is caused intentionally. Then there is manslaughter, where death is caused unintentionally, whether by accident or mistake. As stated above, the penalty for murder according to section 204 of the Penal Code, Cap 63, Laws of Kenya, while that for manslaughter is a maximum of life imprisonment by virtue section 205 of the Penal Code. The Supreme Court decision has no doubt thrown everything into disarray. There is no clarity at all when it comes to assessing the appropriate sentence to award for both manslaughter and murder. It is an open field and, in terms of sentence, it would now appear that there is no difference between murder and manslaughter. The line has been blurred.

4. I called for pre-sentence reports. The probation office filed them on 5th December 2019. The report in respect of the first accused is generally favourable to him. He is said to be generally well regarded in the community. The circumstances leading up to the murders were unresolved long standing disputes with the deceased, the probation office recommends a non-custodial sentence. That for the second accused is in similar terms, and similar recommendations are made. The victim's widow is said to be still very bitter with the convicts.

5. Mitigation was made on their behalf by Mr. Liyayi. He averred that the two were family men, who were not informal employment. He submitted that their families were going to be very badly affected should they be sent to jail. He stated that they were first offenders, with no previous records of criminality. He submitted further that when they were placed on bail they faithfully adhered to the bond terms. He prayed for lenience and non-custodial sentences. For the state, Mr. Mutua submitted that the two were murder convicts, and the court had found that the offence had been proved beyond reasonable doubt. He submitted that the deceased was also a family man, and that his own family suffered loss.

6. The two convicts were found guilty of the offence of murder. The facts placed on record clearly pointed to a premeditated killing. The law protects sanctity of life. The ultimate penalty for murder is death. What I should consider is whether there exist antecedents in favour of the convicts to warrant granting them a sentence other than that of death. They have pleaded for leniency, and are said to have been previously well behaved. I have not heard them express remorse for what happened. Justice would not be served if they are given non-custodial sentences. The justice of the situation calls for a deterrent sentence.

7. In the circumstances, I shall sentence the convicts to thirty-five (35) years imprisonment. There is a right of appeal to the Court of Appeal within fourteen (14) days.

DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE