



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO.31 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMOCK KAMAKYA MBUVI.....1ST ACCUSED

FRANCIS NZIOKA PETER.....2ND ACCUSED

SENTENCE

1. **JAMOCK KAMAKYA MBUVI and FRANCIS NZIOKA PETER**, were found **GUILTY** of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convicted accordingly.

2. In terms of Section 203 as read with Section 204 of the Penal Code they are subject to the automatic death sentence. However I am alive to the fact that pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Anor v R (2017) eKLR**, which found that the mandatory death penalty regime was unconstitutional and hence I need to make a decision that is in line with the above holding.

3. The prosecution is represented by the Mr. Machogu, whereas, the convicts are represented by Mutinda Kimeu for the 2nd accused and Mr. Langalanga for the 1st Accused. The learned counsels presented brief oral submissions.

4. Mr. Langalanga submitted that the 1st accused is aged 41 years and has a family with school-going children, is a remorseful first-time offender who has been faithful in court attendance. Counsel submitted that the family of the deceased were offered compensation and are accommodative and he requested for a non-custodial sentence for the 1st accused. Counsel added that the area chief vouched for the good character of the 1st accused.

5. Learned counsel for the 2nd accused submitted that he relies on the pre-sentence report and added that the 2nd accused is a 39 year old orphan who is remorseful and has initiated compensation initiative and ready to pay up the balance. He submitted that the 2nd accused spent six years in custody and the respective families are ready to accept compensation under Kamba Customs. It was also submitted that the pre-sentence report has given the 2nd accused a clean bill of health and that he should be given a chance.

6. Mr. Machogu submitted that the convicts ought not to use voluntary intoxication as a reason to escape justice. He pointed out to court that the 1st convict was a petty offender and a nuisance hence should be kept away from society for counselling. In respect of the 2nd accused it was submitted that the compensation under Kamba customs is not reason enough for a non-custodial sentence. He submitted that the offence was serious and that both accused should be given reasonable jail terms.

7. A perusal of the probation officers report indicated that the 1st convict dropped out of school due to lack of interest in education. He was indicated as being remorseful and that the family of the deceased and the 1st convict held reconciliation meetings. However the local administration referred to him as a petty thief who becomes violent while drunk.

8. In respect of the 2nd convict, the probation report indicated that he was a hardworking man and no records were found for previous criminal activities. It was reported that the community members and the local administration felt that the offence was committed as a result of alcoholism.

9. In sentencing the convicts, the following factors/reasons are considered:-

a) The case of Francis Karioko Muruatetu & Anor v R (2017) eKLR.

b) All the mitigating factors submitted by counsels for the prosecution and the convicts. The counsels presented convincing

arguments which have ably guided me to pass an appropriate sentence against each convict.

c) The Judiciary Sentencing Policy Guidelines, particularly paragraph 23.7.

10. For special emphasis, I have also considered the following factors:-

a) The convicts were convicted of murder.

b) From the facts of the case and the way the deceased was killed, the accused persons were said to have hit the deceased on the head. The 2nd accused brought a stool and broke it on the head of the deceased while the 1st accused used the broken piece to hit the deceased and those actions on a sensitive part of the body led to his death.

c) Each convict is a first offender. However the 1st accused is indicated as a nuisance in the community.

d) The convicts were granted bond on 12.5.2015 and there is no indication that they met the terms. The 1st accused was arrested on 17.9.2012 and the record indicated that the 2nd accused was arrested on 6.7.2013 hence the 1st accused spent 7 years in remand before conviction whereas the 2nd accused spent 6 years and 2 months in remand before conviction which period I have taken into account in passing a sentence against each convict.

11. In the result and for the reasons given hereinabove in this ruling, each convict deserved the death sentence. However, owing to the legal authorities cited hereinabove, this court has a wide discretion in determining a sentence to pass against each convict. It is noted that the two accused persons teamed up and viciously attacked the deceased leading to his death. Even though the deceased is alleged to have insulted one of the accused persons prior to the incident the retaliation was excessive and unwarranted. The actions of the two led to loss of life which cannot be restored back. A custodial sentence is called for.

12. Accordingly, I make a finding that each convict in this case deserves an appropriate sentence of imprisonment. In **Jonathan Lemiso Ole Keni v Republic (2018) eKLR** where the appellant shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment. In **John Ndede Ochodho alias Obago v Republic (2018) eKLR**, the Court of Appeal upheld a sentence of 30 years in a case of murder where the appellant assaulted the deceased several times causing his death. Thus, taking into account the time that each convict spent on remand before conviction, I would have sentenced each convict to 30 (thirty) years imprisonment, but have factored the said period each convict spent in remand before conviction.

13. In the result the accused persons are hereby sentenced as follows:

a) The 1st accused is ordered to serve 23 years imprisonment from the date of conviction.

b) The 2nd accused is ordered to serve 24 years imprisonment from the date of conviction.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge