



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL CASE NO. 31 OF 2016**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOHN NGANGA GACHERU.....1<sup>ST</sup> ACCUSED**

**JOSEPH KAMAU WANYOIKE.....2<sup>ND</sup> ACCUSED**

**SENTENCE**

1. The Accused Persons, John Nganga Gacheru (“1<sup>st</sup> Accused”) and Joseph Kamau Wanyoike (“2<sup>nd</sup> Accused”) (together “Accused Persons”) were charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. On 21/09/2017, I convicted them of the offence of unlawfully killing John Ngatha on 28/11/2015 at Gitombo Area within Kigumo Location in Murang’a County after a fully-fledged trial in which they pleaded not guilty.
2. The circumstances in which the murder was committed are contained in the judgment dated 21/09/2017.
3. At the time of conviction, a conviction for murder attracted a mandatory death sentence in Kenya. This changed on 14/12/2017 when the Supreme Court of Kenya, in **Francis Kiarioko Muruatetu & Another v Republic (Sup. Ct. Pet. No. 15 of 2015)** decided that the mandatory death penalty imposed under Section 204 of the Penal Code is unconstitutional. In essence, the Supreme Court permitted a Court that has convicted an Accused Person of murder to conduct a sentence hearing to determine the appropriate sentence. I therefore scheduled a sentence hearing on 21/12/2017.
4. The Victim’s family preferred not to file a victim impact statement or address the Court. The Prosecution informed the Court that although both Accused Persons were first offenders, the State prayed for the death sentence in this case. This was because, Mr. Kinyanjui – the Prosecutor – informed the Court, this was a well orchestrated murder. There was nothing in the circumstances of this case, he argued, that would allow the Court to be lenient to the Accused Persons.
5. Mrs. Omung’ala who appeared for the Accused Persons throughout the trial informed that the Court that she had firm instructions from her clients not to mitigate. I confirmed with the Accused Persons that those were indeed their instructions. They each told the Court that they had said all they needed to say during their defence.
6. Death sentence should be reserved for the highest level murder offence. I am certain the homicide in this case does not rise to that level. Although Mr. Kinyanjui argued that the murder in this case was orchestrated, the facts do not bear this out. While the Court found as a fact that the element of statutory

premeditation was satisfied in this case, that is not the same thing as saying that there was substantial, orchestrated or intricate planning for the offence. In this case, there was no such evidence. Neither was there evidence that the homicide was committed in a particularly heinous, cruel or depraved manner. For these reasons, I am not persuaded that the death penalty is merited in this case.

7. There is one glaring aggravating factor: both Accused Person actively and positively proved not to be remorseful and refused to acknowledge the crime committed or address the Court on it. I will take that into consideration.

8. There are a number of extenuating circumstances, however, which should reduce the sentence imposed on the Accused Persons. Even though the Accused Persons elected not to mitigate, I have identified the following mitigating factors:

a. It appears from the facts of the case that the Accused Persons were under the influence of either alcohol or some other drugs. Even though this was not offered as a defence and it would not have risen to the level of diminishing their criminal culpability, it is a relevant factor to consider in sentencing since it lowered the degree of blame;

b. Both Accused Persons are first offenders;

c. The homicide did not occur during the commission of another crime or during the immediate flight from the commission of a crime. Instead, it occurred in the midst of a seemingly spectacular and perhaps drunken orgy of violence occasioned by what the Accused Persons believed was a wrong committed on them (helmet stolen).

**9. After considering all these factors, I am persuaded that a custodial sentence of fifteen (15) years will be an appropriate sentence for this homicide. In coming up with this global figure, I considered that the Accused Persons have been in custody since 10/12/2015. I therefore sentence each of the Accused Persons to serve fifteen (15) years imprisonment.**

10. Orders accordingly.

**Dated and Delivered at Kiambu this 16<sup>th</sup> day of January, 2018.**

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**JOEL NGUGI**

**JUDGE**