



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 40 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHANA MUNYAU MWENI.....ACCUSED

SENTENCE

1. The convict **JOHANA MUNYAU MWENI** was on 12/4/2018 found guilty and duly convicted of the murder of **ROSE WAIRIMU NGUGI** on the 7th day of April 2015 at Kamulu in Njiru District within Nairobi County. What the court is now called upon to determine is the reasonable, just and appropriate sentence to be meted out to the same.

2. The starting point in sentencing herein is **Section 204** of the **Penal Code** which provides that any person convicted of murder shall be sentenced to death as read against the Supreme Court decision in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC, PETITION NO. 15 & 16 OF 2015** consolidated and reported in **[2017] eKLR**, where the court had this to say on **Section 204:-**

“[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 punishment.”

3. In compliance with the Judiciary Sentencing Policy Guidelines the court ordered for a Pre-sentencing social inquiry report with Victim Impact Statement which was duly filed and in which the following factors were stated:-

a) The offender did not have a chance of meeting his father who lived a short while with his mother who thereafter committed suicide by jumping into a moving motor vehicle as a result of which the convict and his siblings were placed in different Children’s Home with the offender being placed at Thika Children’s Home before being taken up by a well wisher who assisted him get a job at the then Nairobi City Council. The offender then got married to one V.N. with whom he had a one child. They later on separated after seven (7) years of marriage before he married the deceased who was never blessed with a child.

b) Later on in life the offender was reunited with his sister who together with his ex-wife, daughter and niece described him as loving due to his generosity and readiness to assist those in need irrespective of their tribe and religious background though he kept to himself and had very few friends. The offender’s ex-wife confirmed that during their seven (7) years of marriage there were isolated cases of domestic violence while the sister stated that while staying with him, she was put off by his fits of anger forcing her to move out but believed that their troubled childhood could have played a role. The offender’s daughter on the other hand stated that life had been a challenge in absence of her father who was the main breadwinner. She prayed together with other relatives that the offender be given a chance to make right his past mistakes.

c) On the circumstances of the offence the offender stated that on the material day he had a drink with the deceased before they had a disagreement over whether to employ a house help or to stay with the daughter of the accused from his previous marriage which led to a physical fight resulting into him inflicting the fatal injuries on the deceased.

d) On the Victims Impact Statement it was stated that the same was 44 years of age at the time working with the then City Council of Nairobi from where she met the accused. Her parents stated that she had reported to them that she was subjected to domestic violence by the offender as a result of their union lacking a child which he blamed upon her. The convict to them was an anti-social person who avoided family get together and discouraged the deceased from attending them in addition to stopping her from sharing her marital problems with anybody. The family prays for a punitive sentence.

e) It was concluded that the offender who was 48 years old with a college going daughter, first offender and being remorseful, had learned from his mistakes and sought to be granted a second chance to rebuild his life.

4. In mitigation Mr. Muraguri for the convict reinstated his past as the cause of his violent character. He stated that during the time he has been in custody the convict had had time to make peace with his maker and had been a pastor to his cell. He undertook to be a changed person should he be granted chance and will attend Anger Management Counseling.

5. Miss Mwaniki for the state urged the court to consider the injuries inflicted on the deceased internally and externally. She stated that the convict failed his daughter whom he alleged was looking up to him and should therefore be sentenced to death. Mrs. Kinyanjui for the Kenya Human Rights Commission stated that the matter was a case arising out of domestic violence and should be considered as such. Miss Kali on behalf of the family made no submissions.

6. The objectives for sentencing are stated in the Sentencing Policy Guidelines 4.1 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.**

7. The Supreme Court of Kenya at paragraph [71] in **FRANCIS KARIOKO MURUATETU (supra)** gives the following factors to be applicable in a re-hearing sentence for conviction of a murder charge:-

(a) **age of the offender;**

(b) **whether 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.**

8. Justice P.N. BHAWATI in **SANTA SINGH v STATE OF PUNJAB [1978], 4 SCC 190** had this to say:-

“Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances--extenuating or aggravation of the offence. The prior criminal record', if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence.”

(Emphasis added)

9. This offence was committed as a result of domestic violence, the deceased a workmate of the accused gave her life and love to the convict from which she expected love and protection in return. The fact that the deceased had not given birth to a child a factor which was beyond her control was no reason enough for her to lose her life. Whereas the convict had an unhealthy past which might have contributed to his character, there is no indication that the accused took any steps to seek help and therefore cannot use his past as a ground to escape punishment.

10. The court is alive to the rise in the number of deaths arising out of domestic violence or in family setting and therefore any Judgement/Sentence meted out by the court should send a warning that the home is a city of refuge and not a place where one has to be on

his/her guard as was in the case herein.

11. I have looked at the conduct of the convict upon the commission of the offence herein, the nature of the injuries inflicted on the deceased and whereas the court has been urged to look upon the convict with mercy, the blood of the deceased and any other victim of domestic violence cries to the court to send out a warning that enough is enough and a stop must be put to it if not by society then by this court.

12. Whereas the state has urged the court to pass the maximum sentence of death, I have taken into account the age of the convict and his mitigation and has come to the conclusion that a sentence of thirty five (35) years in jail will send an adequate just signal to any person including the convict that Article 45 (1) the right to family which is the natural and fundamental unit of society and the necessary basis of social order was not placed in the Constitution for love and affection but has a fundamental right which shall be protected at all cost.

13. Of those thirty five (35) years the convict shall be given credit for the pre-trial detention as period served and it is so ordered.

14. The convict has a right of appeal both on conviction and sentence while the state has a right of appeal on sentence.

DATED, DELIVERED and SIGNED at Nairobi this 23rd day of May 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mr. Muraguri for the accused

Mrs. Kinyanjui for KNHR

Accused present

Court Assistant - Paul