



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LESIT J

HIGH COURT CRIMINAL CASE NO. 113 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

EKK.....ACCUSED

RULING ON SENTENCE

1. The accused **E K K** was convicted for the offence of murder contrary to **section 203** of the **Penal Code**.
2. Ms. Onunga Learned Prosecution Counsel has treated the accused person as a first offender. Having not had any past record of the accused.
3. Mr. Githinji the advocate of accused in this case in mitigation on behalf of the accused urged the court to consider that at the time the offence was committed the accused person was a minor then aged 15 years of age. Counsel urged that the accused person has since had an opportunity to grow and mature and that as he stood now has come to appreciate the gravity of his conduct. Mr. Githinji urged that as the case went on the accused person had time for deep reflection and that he is very remorseful for what happened.
4. Mr. Githinji urged the court to give a non-custodial sentence to the accused urging that the accused had covenanted to abide by the conditions that the court will give and also to enable the accused person be re-integrated into the community and start out his life to be a role model to others.
5. He also submitted several certificates showing the training the accused had undergone in fundamental bible teachings in Christian discipline. He also submitted school leaving certificate with comments from head teachers showing that the accused person was of good conduct, was hard working, responsible and disciplined and involved in games. There was also a letter from the administration from Cianda also stating that the accused person was both responsible and intelligent. I have considered those certificates and others which were submitted.
6. Mr. Githinji for the accused urged the court to recall that all those testified in the case gave a growing picture of the relationship between the family of the accused and the family of the deceased. He urged that the motive was not established in the case which was an important consideration in sentence. Counsel cited the case of **Gerald Ndoho Munjuga vs. Republic (2016) eKLR** where the High Court seating in Appeal quoted with approval the Supreme of India in the **State M.P. vs. Bablu Natt** where the court held:

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”.

7. Mr. Githinji cited the Supreme Court Petition No. 15 and 16 of 2016 urging that he took solace in the direction given by the Supreme Court at paragraph 71 where the court set out useful guidelines in helping courts in the rehearing of sentence for convictions of murder.
8. Ms. Onunga the Learned Prosecution Counsel in response to submissions by the defence on the Petition No. 15 ad 16 of 2016, submitted that the guidelines referred to in the Supreme Court decision were advisory and not mandatory and cannot alter the court discretion. Counsel urged that the death penalty still exist and the Supreme Court did not purport to set it aside.

9. Regarding motive, Ms. Onunga submitted that a life was lost in this case at the tender age of 8 years and that loss has affected the entire community.

10. The full citation for the Supreme Court case cited by Mr. Githinji is **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR**. The Supreme Court in the **Muruatetu** case, supra sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, 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.**

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it”.

11. I have taken into consideration the submissions by both the defence and the prosecution in mitigation and other considerations before sentence. I am in agreement with the decisions in the cases cited by the defence which goes to show that the sentencing is a very important task in the matters of crime and that the court when exercising that power should be guided by the Sentencing Guidelines, the relevant Law and also by Guidelines Judgments. It is important that a court exercising this power must act judiciously and not capriciously and must be guided by legal principles and other factors including the circumstances of the case.

12. Ms. Onunga was also correct in her submissions but in Supreme Court in **Muruatetu** made it very clear that the guidelines they gave in their decision was not intended to replace judicial discretion and that they were advisory and not mandatory and were geared to promoting consistency and transparency in sentencing.

13. This case involved a minor because at the time that the offence was committed the accused person was between 15 and 16 years of age and therefore was a child under the **Children’s Act section 191** of the **Children Act** sets out methods of dealing with child offenders. **Section 191(1) (i)** provides that a child may be dealt with “*in other any other lawful manner.*” That is the one relevant to this case. The law is clear that a child convicted of a capital offence punishable by death, that the order the court should make is that he should be detained at the President’s pleasure.

14. I have considered the circumstances of this case. To say the least it was disturbing. I took into consideration the age of the victim. The deceased was eight and a half years at the time of her death. The circumstances and the manner in which she was murdered was akin to an execution. The injuries were crude, excessive and also extreme. The post mortem report indicated that the deceased died as a result of neck compression due to ligature strangulation, neck injury due to sharp force trauma resulting in a cut injury of the neck from end to end and head injury due to blunt force trauma leading to skull fracture.

15. I also called for a Probation Officer’s Report. It indicates that the family of the deceased has not recovered from the effects of the loss of their daughter and sister. The family of the accused person on the other hand had pleaded with the court to forgive the accused because of his age at the time he committed the offence. The Probation Officer was neutral in her recommendations and did not make any recommendations suggesting the manner in which the court should deal with the accused.

16. Having taken into account all the factors and the circumstances of this case, together with the seriousness of the offence, I find that a non-custodial sentence is not suitable. Consequently, I pass sentence and the following orders:

(1) The accused person shall be Detained at the President's Pleasure.

(2) That this case should be brought to the attention of the President 3 years from today's date.

(3) Where the President will not have taken any action in regard to the sentence of the accused person in this case, the case should be placed before the President every three years thereafter.

(4) The accused person has a right of appeal against both the conviction and sentence within 14 days.

DATED AT NAIROBI THIS 1ST AUGUST, 2018.

LESIT, J

JUDGE