



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO. 12 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

WILBERFORCE KIRUI.....ACCUSED

SENTENCE

1. In the judgment of this court delivered on 25th September 2018, I found the accused, Wilberforce Kirui, guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was my finding that the accused had, with malice aforethought, on the night of 16th and 17th March 2014, at Kabitungu village in Bureti Division within Kericho County, murdered his wife, Faith Chepngeno Kirui.

2. In his mitigation on behalf of the accused, Mr. Langat stated that the accused expresses genuine remorse and accepts responsibility for his actions. The offence that he committed was as a result of domestic violence, which has no winners, just losers. The accused has no previous convictions, and is a father of three children, two of whom are in secondary school and are sitting for their exams. He had been taking care of them since the demise of their mother. Mr. Langat submitted that incarcerating the accused will traumatise his children even more.

3. I directed the Probation Office to prepare a social inquiry report in respect of the accused. The report, which was filed in court on 8th October 2018, portrays the accused as a hitherto good man, who had lived well with his wife. However, underlying the report, in the views expressed by the accused, is a sense in which the accused seems to still blame the deceased for the current situation. She had 'formed a habit of taking loans' but was not making an effort to repay. She had sought employment which he was uncomfortable with.

4. The report also reiterates some of the arguments made by Mr. Langat in his mitigation that the children of the deceased would suffer if the accused is incarcerated. Two of the children are in secondary school and about to do their exams. They are bright and doing well in school, and the incarceration of their father would adversely affect their education. The import of the plea by both Mr. Langat in his mitigation on behalf of the accused and in the comments made by the relatives of the accused and the local administration is that the accused is a good man who briefly went astray as a result of a domestic conflict and should be given a non-custodial sentence so that he can continue to look after his children.

5. I must observe, however, that the social inquiry report does not quite accord with the evidence that was before the trial court, and that Mr. Langat alluded to in his mitigation when he submitted that the couple should long have ended their marriage. The evidence showed that the accused and the deceased had a turbulent domestic relationship. The deceased often would leave her matrimonial home, then return. She had tried to leave on the day of her death, but had been prevailed to stay for the night. That is the night that the accused committed the offence of which he has been convicted. He had also referred in his defence to their fighting 'as they regularly did'. The social inquiry report has therefore sought to somewhat burnish the character of the accused.

6. Be that as it may, the accused has been convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 204 of the Penal Code provides that the penalty on a conviction for murder is death.

7. In its decision in **Francis Karioko Muruatetu vs Republic Petition No. 15 of 2015(Consolidated with Petition No. 16 of 2015)**, the Supreme Court of Kenya held that the mandatory nature of the death penalty contained in section 204 of the Penal Code was unconstitutional. The Court held that the death sentence is not per se unconstitutional, but that imposing the death sentence without considering mitigating factors or extenuating circumstances violates the right to a fair trial guaranteed under Article 50 (2) of the Constitution.

8. The effect of this decision in my view is that the penalty for murder remains the death sentence. However, where the court has found a person guilty of the offence of murder, the court has the discretion to determine whether or not to impose the death penalty. In reaching its decision, the court can consider the circumstances of the case and the mitigating factors, and is not bound to impose the death penalty.

9. In **Muruatetu**, the Supreme Court varied the **Sentencing Policy Guidelines** promulgated by the Judiciary in 2016 and provided the following guidelines with regard to mitigating factors that a court may consider in determining an appropriate sentence for a conviction for murder:

- i. The age of the offender;**
- ii. Being a first offender;**
- iii. Whether the offender pleaded guilty;**
- iv. Character and record of the offender;**
- v. Commission of the offence in response to gender-based violence;**
- vi. Remorsefulness of the offender;**
- vii. The possibility of reform and social re-adaptation of the offender;**
- viii. Any other factor that the Court considers relevant.**

10. In this case, the accused murdered his wife, in the course of perpetration of gender based violence. He and some of his relatives prevailed upon her not to leave on the fateful night, though she was determined to go. The accused killed her that same night, in the same house that he and the deceased shared with their youngest child, the daughter he now says he should be given a non-custodial sentence in order to care for.

11. Had the deceased died from hitting her head on the wall in the course of a fight with the accused, or had he hit her with an object in the course of a fight, resulting in her death, perhaps one may have had some sympathy for him, and accepted his contention that the death was accidental and that he was remorseful.

12. However, the post mortem report showed that the deceased died from strangulation. She had central and peripheral cyanosis on the nail beds and the lips, an indication that she died from deprivation of oxygen. She also had ruptured blood vessels in the eyes, which were also bleeding and very red, an indication that her neck was compressed. Her larynx was displaced and mobile, and the doctor had found that it had been crushed.

13. The accused had, deliberately and without mercy, compressed the neck of his wife with such force that her larynx was crushed, her lungs collapsed from lack of oxygen, the blood vessels of her heart had no oxygen and had turned blue in colour, and she had bit her tongue so hard during her ordeal that she had caused it to bleed. Are these the actions of a good man who had a temporary lapse in judgment, and who deserves a non-custodial sentence in order to care for the very children whose mother he murdered?

14. I have great sympathy for the children of the accused. By murdering his wife, their mother, the accused effectively rendered them without any parent. He committed a heinous crime, and deserves a severe sentence.

15. Even had the law allowed the court to pass a non-custodial sentence for the offence of murder, the accused in this case would not have been deserving of such consideration. He is a 46 year old man who deprived his children of their mother. Rather than allow her to leave him, he preferred to kill her. With his own bare hands.

16. In my view, he is deserving of a most severe penalty, and though I will not sentence him to the ultimate penalty provided by the law, I find he is not deserving of any leniency beyond that. I accordingly sentence him to imprisonment for life.

17. The accused has a right of appeal within 14 days of today.

Dated Delivered and Signed at Kericho this 24th day of October 2018

MUMBI NGUGI

JUDGE