



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 38 OF 2015

REPUBLIC.....PROSECUTOR

Versus

G M M.....ACCUSED

SENTENCING REMARKS AND VERDICT

G M M on 27/2/2017 you were convicted after a long trial for the offence of murdering your own child herein referenced as V.G on 30/7/2015 while he was in your physical custody. V.G. at the time of his death was only aged 1½ years old, innocent not yet capable scanning the risks that they may exist which pose a danger to his life, including fellow biological parents like you G M M. The deceased V.G. was left under the care of a friend one who testified as PW6 – Grace. As a result of the knowledge she had that V.G. was your son by virtue of the relationship you had with R N (PW5) she gave in to your request and allowed you to go with the child to enable you spent some time with him as a father. At that time the lady who took care of V.G during the day when his mother was away at work did not suspect that in your hands something grave would happened to V.G.

As fate would have it you brought his life to a cruel end by administering poisonous substance. This murder from the findings of this court was planned well in advance where you secretly purchased diazinon pesticides as admitted by you which was meant to kill cockroaches. Having killed V.G you then had the chance to take the same poison to terminate your life as well but that was never to be in the circumstances of this case. Your survival from the poison led to you being charged with the murder of V.G. The pathologist and the government analyst concluded that V.G had high levels of diazinon pesticides toxicity which caused his death.

During sentencing I accept the submissions made by the prosecution that you have no previous convictions. I also accept the submission that in committing this offence there was a significant degree of planning which went into obtaining the pesticides in advance and having V.G the deceased to your house where you had the opportunity to commit the offence.

I have considered your mitigation as presented on your behalf by Mr. Ochieng learned counsel who has represented you since the commencement of this trial. According to Mr. Ochieng you are remorseful and do regret the death of your son. Mr. Ochieng also asked this court to consider your personal circumstances of being under intense pressure and psychological stress which must have impaired your judgment. Mr. Ochieng further made reference to the pre-sentence report indicative of the fact that as a young man aged 32 years you left home for Nairobi in order to fend for yourself by engaging in gainful employment where you worked as a boda boda operator. According to Mr. Ochieng it was in the course of your working life you came across the mother of V.G deceased to whom a close relationship developed leading to the birth of V.G. the victim of this offence. Further in addition Mr. Ochieng made reference to the family history through the witnesses you called in your defence that occasionally you will suffer from

lapse of memory.

I have read also the pre-sentence report the family background, your personal profile as a child in the home of your parents and adult life. The relationship between you and the mother of the deceased was well articulated in the report. The circumstances prevailing at the time you committed the offence were also captured in the report more specifically your version on how the deceased met his death. The community in Laikipia where you grew up had no serious negative factors against you save for your bouts of anger and drunkenness.

I have heard and taken note of the moving victim impact statement by R N, the biological mother of V.G. the deceased. I am mandated to restate the law in Kenya under section 204 of the Penal Code which provides as follows:

“Every person who commits murder shall suffer death.”

In my practice at the bench I have probably not found any offence in the category of capital offences that varies in both degree and character as to what one clearly stipulated to fall within the definition of the offence of murder. This issue has occupied the minds of judges of the superior courts in Kenya as to interpretation as to both the character and moral guilt of an accused person as to the key element of malice under section 203 in comparison with section 202 of the Penal Code on unlawful act without intention. However the case law has provided guidelines on this matter as to when an offence falls under the mandatory sentence of death under section 204 of the Penal Code or within sentencing under section 205 which provides for a maximum sentence of life imprisonment. In the latter the court has a measure of discretion.

In my view I am alive to the fact as to the ongoing debate within our jurisdiction as to the constitutionality of the mandatory death sentence. The fact remains at the moment death sentence is a lawful and until parliament amends the law of any jurisprudential development through case law, courts will be guided by *Njuguna Case*.

Before a final order it's worthwhile to draw guidance from the several decisions of the Court and Sentencing Policy Guidelines 2016. The main purposes of punishment are retribution, deterrent, rehabilitation reformative or restorative, community protection and denunciation. In a persuasive authority from Seychelles a Common Law Jurisdiction like ours in the case of *Poonoo v A.G. 2010 SLR 361*, **“sentencing involves a judicial duty to individualize the sentence turned to the circumstances of the offender as a just sentence.”**

In Kenya what would be said to be a just sentence in a murder case. The Court of Appeal in the case of *Johana Njuguna Mwaura & Others v Republic Cr. Appeal No. 5 of 2008 [2013] eKLR* the court held inter alia that:

“The law of the land still recognizes the death penalty as a mandatory sentence and courts have no discretion in respect to offences which attract a mandatory death sentence.”

This therefore confirms that in our jurisdiction death sentence should not be considered as a maximum sentence but the only mandatory in the event of a conviction in the category of offences classified as capital offences i.e. treason, attempted robbery with violence, robbery with violence etc.

In addition I find the principles elucidated in the case of State of *Karnataka v Krishnappa 2000 4SCC 75* the Supreme Court of India had a take at a discussion on the death penalty and the guiding principles where the court held that:

“The reasons that an unsophisticated and illiterate citizens belongs to the weaker section of the society. That he was a chronic addict to drinking and had committed rape of a girl where in the state of intoxication and that his family comprise of an old mother, wife and children depends upon him. These reasons are neither special or adequate. The measure of

punishment in the wake of rape cannot depend upon the social status of the convicts or the accused. It must depend upon the conduct of the accused the state and age of the sexually assaulted female and the gravity of the criminal act. The crimes of violence upon women needs to be severally dealt with. The social – economical status, religion, race, caste, creed of the accused or the victims are irrelevant consideration. In sentencing policy, the protection of society and deterring the criminals is the avowed object of law and that is required to be achieved by imposing an appropriate sentence.

The sentencing courts are expected to consider all relevant facts into consideration bearing on the questions of sentence and proceeds to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. To show mercy in the case of such heinous crime would be travesty of justice and the plea of leniency would be wholly misplaced.”

I have considered these principles and also the dicta by the court of appeal in the ***Joseph Njuguna Case (Supra)*** on mandatory death sentence. I find that this court has no discretion to depart from the mandatory sentence of death set out under section 204 of the Penal Code. That is the sentence I pass that you G M M be sentenced to suffer death by hanging. So be it by order of the law.

14 days right of appeal to the Court of Appeal explained.

Dated, read in open court at Kajiado on 29th day of March, 2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Accused - present

Mr. Akula Senior Prosecution Counsel – present

Mr. Ochieng for the accused - present

Mr. Mateli Court Assistant – present

Victim (mother – R) - present