



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 34 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

MUSEMBI NGULA MUTHUSI.....ACCUSED

SENTENCE/VERDICT

Musembi Ngula Muthusi you have been convicted of the offence of murder contrary to section 203 of the Penal Code. The brief circumstances upon which the case against you was founded were that on the night of 22 -23/12/2013 you lured Augustine Ndinda Muema who was at the time your patient consulting you in your herbal clinic at Isinet in Loitokitok. That by virtue of the patient/doctor relationship you got acquainted with Augustine Ndinda including exchanging of mobile phone numbers as a means to favourably share communication. On the material day late 22/12/2013 and early hours of 23/12/2013 this was the method to be employed by you to come in contact with Augustine Ndinda and subsequently participating in causing her death.

It is this offence which I finally entered a verdict of guilty and a conviction which now I proceed to sentence you. The circumstances in mitigation were broadly presented by Ms. Moinket, learned counsel who has walked with you through this journey during the pendency of this trial. According to your learned counsel you are a family man with three young children still in need of your care and support. She also alluded to the fact that you are remorseful and regret the offence. In her closing remarks she sought leniency in sentencing you.

Mr. Akula for the state submitted that you are a first offender and no previous record of any criminal antecedent has been recorded about you. He however urged this court to consider the age of the victim, the circumstances of the offence which resulted in her death.

APPLICABLE LAW:

It will be prudent to state the law on this aspect. Section 26 (1) of the Constitution provides for the right to life for every person in Kenya. Section 26 (3):

“A person shall not be deprived of life intentionally except to the extent authorized by this constitution or any other written law.”

Death penalty is imposed against offenders convicted of: murder section 204, treason, section 40, capital robbery, section 296 (2) and attempted robbery 297 of the Penal Code.

In the case of *Joseph Njuguna Mwaura & Others v Republic Cr. Appeal No. 5 of 2008 (2013) eKLR* the Court of Appeal held inter alia:

“Death penalty is a mandatory sentence and the courts have no discretion to pass any other punishment.”

That is the law at the moment in our country. The other jurisdictions with whom we share a common law heritage and have retained the death penalty have espoused clear principles in the award of the death sentence. In the case of Bachan Singh v State of Panjabi [1980] 2 SCC 684 the Supreme Court held that:

“In many cases the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments if murder involves exceptional depravity it shall be an aggravating circumstance for imposition of penalty of death.”

In addition the same court in Machhi Singh v State of Panjab [1983] 3 SCC 470 held:

“In the first place, the very humanistic edifice is constructed on the foundation of reverence for life principle. When a member of the community violates this very principle, the society may not feel itself bound by the shackles of this doctrine.

Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it.”

There is also the principle enunciated in the case of Republic v Howells [1999] 1 ALL ER 50 at pg 54 where the court observed:

“Courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him and others, or all of these things. Courts cannot and should not be unmindful of the importance of public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing.”

I have referred to the above decisions as a guide in exercising discretion on the award of sentence against you. I have considered the mitigation submitted in your favour. It is also submitted that you have no previous record against you. There is only one sentence that can be passed for the offence of murder under section 204 of the Penal Code. It is a mandatory death sentence. This sentence in your case is supported with the exceptional and grave nature the offence was committed. The principle of deterrence it is also for the interest of justice that the prescribed sentence by parliament be passed against you.

All in all weighing one factor after another I sentence you to suffer death as provided for under section 204 of the Penal Code. 14 days right of appeal explained.

Dated, delivered and signed in open court at Kajiado on 18th day of May, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused - present

Mr. Akula Senior Prosecution Counsel – present

Ms. Moinket for the accused - present

Mr. Leonard Court Assistant - present