



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 66 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**S M M.....ACCUSED**

**SENTENCE**

1. The accused was found guilty and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code which provides that

***“Any person convicted of murder shall be sentenced to death.”***

2. In mitigation the accused through his advocate Mr. Magero submitted that the accused was very remorseful of what had happened noting that the relationship between the accused and the deceased who was his business partner was very good. It was submitted that the accused had been in custody for a period of six years during which he had undergone rehabilitation and training. It was submitted that the accused was 53 years of age who should be accorded an opportunity by the court to start his life afresh.

3. In compliance with the Sentencing Policy Guidelines the court ordered for a pre-sentencing report which has now been filed in which it was indicated that the accused is HIV positive, on medication and that he still maintained that he did not commit the offence herein. It was further indicated on the said report that the relatives of the victim were not reached for interview.

4. A clear reading of Section 204 of the Penal Code shows that upon conviction on a charge of murder the sentence available is death as provided for in law. There is the debate as to whether the mandatory nature of the language of the Statute means that it is the only sentence available upon conviction and this court is aware of the following decisions of the Court of Appeal and the High Court:-

1. GODFREY NGOCHO MUTISO v REPUBLIC CR. APPEAL No. 17 of 2008 [2010] eKLR.

2. JOSEPH NJUGUNA MWAURA and Others v REPUBLIC CR. Appeal No. 5 of 2008 [2013] eKLR

3. JACKSON MAINA WANGU & Another v REPUBLIC High Court Cr. No. 35 of 2012 [2014] eKLR.

5. The court is also well aware of the Sentencing Policy Guidelines which emphasize that unless parliament amended the law the courts ought to provide the only available sentence. This court is also

aware that under International Covenant on Civil and Political Rights (ICCPR) in the countries which have not abolished the death penalty, sentence of death may be imposed only on the most serious crimes in accordance with the law in force at the time.

6. I take the view and hold that the judicial decision in sentencing must of necessity depend on the circumstances of each particular case and the choice whether to pass the death sentence or not should be left to the judge who has heard the case and is well aware of the special circumstances of each case.

7. In this case the accused cannot be said to had premeditated in the sense that he pre-planned to lay in wait to get the opportunity to kill the deceased but when he found that his handcart had been damaged he was actuated by uncontrolled anger which led to the death of the deceased and therefore there are extenuating circumstances in favour of the accused not being sentenced to death.

8. Having said the above I find that a sentence of four (4) years imprisonment would be appropriate in the circumstances of his case having taken into account the fact that the accused has been in custody for a period of six years.

### **ORDER**

9. In the final analysis the accused is sentenced to four (4) years imprisonment and it is so orders. The accused has a right of appeal on both the conviction and sentence.

DATED, DELIVERED and SIGNED at Nairobi this 31<sup>st</sup> day of July, 2017.

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**J. WAKIAGA**

**JUDGE**

***In the presence of:-***

*Mrs. Kinoti for the State*

*Mr. Magero for the accused*

*Accused present*

*Tabitha court clerk*