



REPUBLIC OF KENYA

IN THE HIGH COURT

OF KAJIANDO

CRIMINAL CASE NO.3 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

REDEMPTA NTHENYA MWANZIA.....ACCUSED

SENTENCING REMARKS AND VERDICT

REDEMPTA NTHENYA MWANZIA, this Court after a full trial convicted you with the offence of causing the death of Teresia Wacuka Maina on 23.12.2015, a person who was well known to you.

According to her mother Monica Wanjiku Maina, the deceased Teresia Wacuka Maina was at the time of her death aged only 25 years old who was in good health going about her life as a citizen whose future can be described as bright.

However it emerged at the trial that on the fateful day you brought her life to a premature end by killing her and dumping her body in a septic tank for it to decompose. This made her disappearance a case of missing person for both the state and her family. The deceased for a long time remained classified as a missing person until when the police made a breakthrough in arresting you as a suspect in the murder of Teresia Wacuka Maina.

The circumstances of her death were meticulously planned and executed. The prosecution on their part submitted during this sentencing hearing that there are no previous criminal records against you. This Court therefore treats you as a first offender. The prosecution prayed that you be sentenced to a mandatory sentence of death as provided for under Section 204 of the Penal code, urging this Court to give consideration to the cruel and barbaric circumstances the deceased Teresia Wacuka met her death.

Mr. Chege learned Counsel in mitigation prayed for a lighter sentence of imprisonment given the fact that you are young, a mother and a daughter to Mwanzia family. Mr. Chege submitted by departing from the position taken by Mr. Akula, the senior prosecution Counsel on the legal position on the death penalty in Kenya. Mr. Chege's contention was that the death penalty has been found to be inhuman, and degrading sentence in contravention to the right to life entrenched in our Republic Constitution.

In support of learned counsel submissions that this court has the discretion to pass a sentence than that of death, he referred to the following cases: **Republic v Jackline Atieno Awour murder Case No. 28 of 2008** decided in the High Court of Kenya at Kisumu and in **Republic vs. Peter Lokio Kisaka 2012 eKLR**. The High Court in both cases took a position that the mandatory death sentence contrary to section 204 is antithetical to the Constitutions provisions on protection against inhuman and degrading punishment or treatment and a negation to a fair trial. Each of the accused therefore was sentenced to serve a period of

imprisonment.

I have further considered the victim impact statement of Monica Wanjiku Maina, the mother to the deceased in what she sets out the psychological trauma the family has suffered and will continue to experience during their life time as a result of the death. As stated by Monica Wanjiku Maina the death of Teresia Wacuka has not only robbed them of a provider from where the family looked up to for finance support but their personal life have changed forever without her.

The current legal frame work on the the mandatory death penalty in relation to the offence of murder contrary to section 203, robbery with violence contrary to section 296(2), attempted robbery contrary to section 297, Treason contrary to Section 40 is fixed by law.

The Republic Constitution 2010 under Article 26(1) recognizes the sanctity and right to life. Under article 28 **“every person has inherent dignity and the right to have that dignity”** respected and protected. The same Constitution further in Article 25 provides for the right as to freedom from torture and cruel, inhuman or degrading treatment, or punishment which is non-derogable right. The same constitution recognizes the death penalty as a legal and just sentence to be executed to all those offences specified in the Penal Code. The other relevance provision under the Constitution is Article 2(5) provides that the general rules of International law shall form part of the laws of Kenya.

“(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

The constitution and statute law is therefore not in conformity with international instruments as regards the death penalty. As a trial court that shall remain the applicable law until parliament has legislated or a decision made from the superior courts when the court of Appeal in Geoffrey Ngotho case outlawed the death penalty as a mandatory sentence was a sign of relief to the benefactors.

Pursuant to Article (2) (5) and (6) of the Constitution there are International Instruments and treaties which the country has ratified which outlaws the death penalty i.e. the International Covenant on Civil and political rights (ICCPR), The African Charter on Human and Peoples Rights, The protocol of the African charter on Human and Peoples Rights, The universal Declaration on Human Rights, the African Charter on the Right of Women in Africa. All these instruments provide for against the death penalty as a form of punishment.

On 13.4.2017, the President assented to the prevention of Torture Act no. 12 of 2017. The preamble of the Act provides as follows,

“An Article of parliament to give effect to Article 25(a) and 29(d) of the Constitution and to the principles of the convention against torture and other cruel, inhuman or degrading treatment or punishment. To provide for the prevention, prohibition and punishment of acts of torture and cruel in human or degrading treatment or punishment; reparations to victims of torture and cruel, inhuman or degrading treatment or punishment and connected purposes.”

In my view despite the applicable provisions under international law on the death penalty and the recent legislation on the Prevention of Torture Act No. 12 of 2017 our constitution remains the higher law. It is superior to any other law in the land.

The debate and deliberation on whether to abolish/retain the death penalty continue to occupy the minds of scholars and jurist in the country. This single most important question has already found its way to the superior courts. I am looking up to the Apex court to determine whether the death penalty is inconsistent with the constitution since the issue has already been framed for consideration. In exercising discretion in sentencing the accused, my duty is to enforce and interpret the law as it stands at the moment.

The Court of Appeal in **Godfrey Ngotho Mutiso v. Republic CR Appeal No. 17 of 2008 [2010] eKLR** held inter alia that the mandatory death penalty violated the right to life and Constitutional arbitrariness

since it failed to provide concerned individuals with the opportunity to mitigate the death sentence demonstrated in the passage herein,

“Not everyone convicted for murder deserves to die and therefore a sentencing regime that imposes a Mandatory sentence of death on all proven murder cases or all murders within specific and categories is inhuman and degrading because it requires sentence of death to be passed without any opportunity for the accused to show why such sentence should be mitigated without consideration of the deserved facts of the particular cases or the personal history and circumstances of the offender where such sentence might be wholly disproportionate of the accused’s criminal culpability.”

This landmark decision on the death penalty came as a relief to the convicts or would be convicts on offences demanding for a death penalty making it possible for the Courts to exercise discretion. The jurisprudence and the dicta on this case allowing the Court to take into account the personal mitigating circumstances of the offender and aggravating factors in imposing the sentence trended for a short period of time. The same Court in the case of ***Joseph Njuguna Mwaura & 2 others vs. Republic Cr Appeal No. 5 of 2008 20 B eKLR***, reviewed its own decision. In ***Godfrey Ngotho Mutiso case*** and emphasized that Courts do not have the discretion in respect to offences which attract a mandatory death sentence.

I am alive to the fact that there is a pending case before the Supreme Court on the death penalty, but at the moment the sentence to suffer death is a lawful sentence. In the circumstances alluded to in this case my view would be the death penalty ought to be imposed in the rarest and exceptional cases. The trial Court has to have a level of discretion subject to the particular facts and aggravating factors to each particular case. I must also recognize that Courts are creatures of the Constitution. Their primary purpose is to enforce the law passed by the people of Kenya through parliament.

Taking all factors into account being mitigation by the accused, the victim impact statement from the family of the deceased, the following circumstances are considered aggravating in this case:

The accused committed the murder in an especially heinous, cruel and depraved manner. It involved assault and serious physical injury by way of strangulation. The accused conduct during and after the murder is telling the circumstances of the killing were horrible. Strangulating and throwing the deceased in a septic tank is unconceivable particularly where the victim is considered a close friend.

Your conduct is at most a fundamental breach of trust. If there was any motive that existed for the killing none has been exhibited to warrant the termination of a human life. The place you chose to dispose off the body after the commission of the crime was remarkably private and which would have the most dramatic mystrey of ever knowing what happened to the deceased.

In all these aggravating factors you are not remorseful nor do you regret the offence. There is no evidence that you suffered from any mental illness that must have contributed to the commission of the offence. I am aware that your defence on abortion did not succeed. I also received the victim impact statement from the deceased mother on behalf of herself and members of her family. At the same time the deceased was a close friend to you. Unfortunately, in this case as evidence shows you turned out to be the one who unlawfully caused her death.

This murder was outrageously horrible. In passing the sentence I am satisfied inherent capital punishment is a legal penalty proportionate to this offence. I stand guided by the decision of the Court of Appeal in ***Joseph Njuguna Case (Supra)*** where the court has restated the law on mandatory death sentence where appropriate.

In the present case aggravating factors and the legal principle in the above case are sufficient for the imposition of the death penalty. In absence of any other law or decision from the Court of Appeal or Supreme Court I am bound by the law as it stands at the moment. I find it difficult to be persuaded by the decision referred to by Mr. Chege learned Counsel for the accused which were decided following the ratio *decidendi* in ***Godfrey Ngotho case (supra)***.

As a result I sentence you Redempta Nthenya Mwanzia, the accused herein to suffer death as provided for under section 204 of the Penal Code.

Dated, delivered, Signed in open court at Kajiado on 15.8.2017.

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R. NYAKUNDI

JUDGE

In the present of:

Mr. Akula for the Director of Public Prosecutions

Mr. Sekento holding brief for Chege for accused

Accused present

Mr. Mateli Court Assistant