



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 77 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWANGI MUNGAI.....1ST ACCUSED

BEATRICE NYAGAKI MUNGAI.....2ND ACCUSED

SENTENCE

David Mwangi Mungai, the 1st accused and Beatrice Nyagaki Mungai, the 2nd accused, were charged jointly with murder contrary to section 203 as read with section 204 of the Penal Code. The murder was committed on 20th June 2013 at Ndenderu Village in Kiambu County. The victim is one Patrick Muiga Gathimba. The two were tried and in a judgement delivered on 9th March 2016 they were acquitted of murder but found guilty of manslaughter. In mitigation, Mr. Wamwayi counsel for the 1st accused told the court that the 1st accused was remorseful of what happened to the deceased; that the 1st accused is a young man aged 29 years and has a family of a wife and two children and that he has been in custody since 2013. Mr. Wamwayi asked the court to exercise leniency in sentencing the 1st accused.

Mr. Jumba for the 2nd accused mitigated that the 2nd accused is remorseful; that she is elderly and has children and grandchildren who rely on her; that for the 3 years she has been in custody the children and grandchildren have been deprived of her care and guidance. Mr. Jumba asked the court to consider the time spent in custody during which time the 2nd accused has had time to reflect on the offence and asks for leniency in sentencing.

I commissioned a report from Probation which was filed on 4th April 2016. I have read the report in respect of each accused person. I have noted that the report in respect of the second accused is favourable in that the relatives had good things to say about her and are ready to accommodate her in the community. However, the report in respect of the first accused reveals that he appeared not honest during the interview and his siblings and some members of the community from his village held the view that the local community were at peace during the time the 1st accused has been in custody. The report also reveals that the 1st accused is not a first offender as stated by the prosecution. He has served term for rape. This fact has been admitted by the 1st accused and his counsel although it was admitted that he had served three years for attempted rape and not rape.

The law allows the court to impose different sentences in a case where two or more people are charged in the same offence. The court must however give reasons for doing so. In **Walter Marando v. Republic [1980] eKLR** the Court of Appeal stated as follows on that issue:

“When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason.”

One may argue that this is discriminatory when the law of this land is clear that it is wrong to discriminate against people on any basis. In **R v. Ball [1951] 35 Cr App Rep 164, 166** which was cited with approval by the Court of Appeal in the **Walter Marando** case above, Hilbery J stated as follows:

“The differentiation in treatment is justified if the Court, in considering the public interest, has regard to the differences in characters and antecedents of the two convicted men and discriminates between them because of these differences.”

In applying the same principle here, I have considered the mitigation by both accused persons through their respective counsels; I have also considered that the 2nd accused is a first offender, is elderly and the probation report said good things about her and that the community and relatives are willing to accommodate her in their midst. On the other hand, the 1st accused has a previous conviction, did not disclose this to the probation officer and it took relatives and members of the community from the neighbourhood of his village to disclose these facts; that he was untruthful and that his siblings, relatives and community said unsympathetic things about him. I am persuaded that I have good reasons to impose different sentences in respect of the two accused persons. In that regard, I hereby sentence the 1st accused, David Mwangi Mungai, to eight years jail term. Given that he has stayed in custody for 2 years and 9 months, I order that he serves the remainder of the 8 years. For the avoidance of doubt, the 1st accused shall serve 5 years and 3 months in jail.

The 2nd accused shall serve a suspended sentence of 2 years. Within that period the 2nd accused shall not commit any offence failing which she will be liable for arrest and to serve the custodial sentence. In addition, the 2nd accused shall be placed under the supervision of a probation officer for 1 year. She may benefit from the counseling and guidance. Orders shall issue accordingly.

Dated, signed and delivered this 19th day of April 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Esther Macharia, for the prosecution

Mr. Wamwayi for the 1st accused

Mr. Jumba for the 2nd accused

Mr. David Mwangi Mungai, 1st accused

Ms Beatrice Nyagaki Mungai, 2nd accused

Mr. Daniel Ngumbi, court clerk