



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 29 OF 2012**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**THOMAS KIPKEMOI KIPKORIR.....1<sup>ST</sup> ACCUSED**

**JOSEPH KOMEN YATICH.....2<sup>ND</sup> ACCUSED**

**SEBASTIAN YANO KOMEN.....3<sup>RD</sup> ACCUSED**

**SENTENCE**

Thomas Kipkemoi Kipkorir, Joseph Komen Yatich and Sebastian Yano Komen, the 1<sup>st</sup> accused person, 2<sup>nd</sup> accused person and 3<sup>rd</sup> accused person respectively, are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 30<sup>th</sup> March 2012 at Kwitu Classical Bar in Eastleigh Section III within Nairobi County they jointly murdered Nicholas Ochieng Odongo, the deceased. They denied committing this offence. They were tried and individually found guilty of the murder in a judgement delivered by this court on 21<sup>st</sup> July 2016. Mitigation before sentence was deferred until 26<sup>th</sup> July 2016.

When proceedings commenced for the court to receive mitigation, there was only Ms Celine Odembo, counsel for the 2<sup>nd</sup> accused person, present in court. Ms Odembo told the court that she had the brief of Mr. Nyangito counsel for the 1<sup>st</sup> accused person and that of Mr. Koech counsel for the 3<sup>rd</sup> accused person and that all the counsels did not wish to mitigate on behalf of their respective clients (the accused persons). This court asked the accused persons to confirm if that is the stand they also wished to take. Each of the accused persons told the court that they did not wish to mitigate before sentence.

Mitigation is part of the trial. Section **329 Criminal Procedure Code** provides that:

**“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.”**

It is a right that is accorded an accused person who has been convicted. It is exercised before the court pronounces the sentence and it is aimed at guiding or informing the court as to the proper sentence to be passed. By its very nature, section **329 Criminal Procedure Code** seems to be allowing discretion on the part of the trial court. This may be the case in certain offences but is not practical in other offences like the capital offences whose penalties are couched in mandatory terms. Much debate has gone into this

issue following the *Godfrey Ngotho Mutiso v R [2010] eKLR* when it seemed that this authority had introduced sentencing discretion in capital offences. However, in *Joseph Njuguna Mwaaura & 2 others v Republic [2013] eKLR* the Court of Appeal was of the view that courts do not have jurisdiction in matters over which other arms of the government have been vested with the jurisdiction to act. That court held the **Ngoto** decision to be *per incuriam* in so far as it purported to grant discretion in sentencing with regard to capital offences. The Court ruled in part of that judgement thus:

**“In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.”**

In the matter before me, the accused persons have waved aside their right to mitigate. Even where mitigation is offered and received by the court, it does not play its intended role in informing the court of the proper sentence to pass in a murder trial just like in any other capital offence trial. The reason for this is obvious. There is only one sentence for murder and it is death as provided under section **204 Penal Code**. This provision is couched in mandatory terms and it fetters this court from exercising any discretion in sentencing an accused person charged with and found guilty of murder.

Consequently, this court has no discretion in this matter and must be faithful to the law. I hereby sentences each of the accused persons, Thomas Kipkemoi Kipkorir, Joseph Komen Yatich and Sebastian Yano Komen, to death as by law provided. In compliance with **section 25 (1) Penal Code**, each accused person shall *suffer death in the manner authorized by law. This court also informs the accused persons of their right of appeal within 14 days of this sentence. Orders shall issue accordingly.*

***Dated, signed and delivered in open court this 27<sup>th</sup> day of July 2016.***

**S. N. Mutuku**

**Judge**

**In the presence of:**

Ms Macharia for the prosecution

Mr. Nyangito for 1<sup>st</sup> accused

Ms Celine Odembo for 2<sup>nd</sup> accused

Mr. Koech for 3<sup>rd</sup> accused

The three accused persons

Mr. Daniel Ngumbi, court clerk