



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 9 OF 2008

JAMES NJIRU JOHN.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTION

RULING ON SENTENCE

The accused person was on 8/12/2011 convicted of the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. Mr. Mugambi mitigated on his behalf saying the accused has no previous records of misconduct. He was a first offender and had been in custody since October 2008 (about 3 years 3 months). To him this was a period of torture as he was uncertain of the outcome of the case. He further said the sentence for murder under the Penal Code is death. But Article 26 of the Constitution provides that the right to life is absolute and so the Penal Code was inconsistent with the Constitution which is the supreme law. He therefore prayed for a lenient sentence.

There is no dispute that Section 204 of the Penal Code provides for a death sentence for one convicted for murder. The operative word is shall. However, in the case of **GODFREY NGOTHO MUTISO VS REPUBLIC CRIMINAL APPEAL NO. 17 OF 2008** the Court of Appeal had this to say on the death sentence under Section 204 of the Penal Code.

“On our own assessment of the issue at hand and the material placed before us, we are persuaded, Section 204 of the Penal Code which provides for a mandatory sentence is antithetical to the Constitutional provisions on protection against inhuman and degrading punishment on treatment or fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a condition of murder is recorded only the death sentence shall be imposed. We declare that Section 204 shall, to the extent that it provides that the death sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution which as we have said, makes no such mandatory provision”.

This Judgment was delivered under the old Constitution. I have been referred to the new Constitution Article 26(1) which provides:-

“Every person has the right to life”

Article 26(3) states

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

This to me means that if the taking away of the right to life is authorized by law, then it ceases to be an absolute right.

The Penal Code is part of the written law and it authorizes death as a sentence. However, from the informed Judgment of their Lordships in the ***GODFREY NGOTHO MUTISO CASE (SUPRA)***, I do find that the accused may be given a chance to mitigate and the court may consider the mitigation alongside all the circumstances of the case and come to the conclusion that a death sentence may not be the only sentence.

I therefore conclude that since the circumstances of each case vary then each case must be considered separately. Considering the case at hand I find that the accused has been in custody for slightly above 3 years. He is a first offender and is a young adult.

However, the brutality with which the deceased was killed cannot just be wished away. Accused says he is remorseful. I hereby sentence him to twenty five (25) years imprisonment.

Right to Appeal within 14 days explained.

DELIVERED, SIGNED AND DATED AT EMBU THIS 8TH DAY OF FEBRUARY 2012.

H. I. ONG’UDI

JUDGE

In the presence of:-

Ms. Matiru for State

Ms. Njeru for Mr. Mugambi for Accused

Njue CC

Accused present in person