

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE 74 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL KIPNGETICH CHEPKWONY.....ACCUSED

RULING

On 30th March, 2012, I convicted the Accused of the murder of the deceased Susan Mukina contrary to Section 203 of the Penal Code, (Cap. 63, Laws of Kenya) and called upon counsel for the accused, and the State Counsel to address me on why the accused should not be sentenced to death in terms of Section 204 of the Penal Code.

Mr. Ombati, learned counsel for the accused submitted that the accused is a first offender. He has been in custody for the last four years. He is a bread winner for his young family, a wife and 2 children.

On his part Mr. Omwega learned Senior Principal State Counsel submitted that the court should take into account the fact that the accused took away a precious life even if he is a first offender, a deterrent sentence should be imposed.

The study of criminal law punishment for crimes, is premised upon the principle that liability ought to match culpability; that having found an accused person, guilty of forbidden behaviour, that is a particular crime or offence, the punishment therefor should fit the crime. It is the general principle of proportion between crime and punishment, a principle of just desert. It is the foundation of every criminal sentence that is justifiable.

Section 204 of the Penal Code (a person who is convicted of murder shall be sentenced to death), is a principle of proportionality as it prescribes liability according to the culpability for the crime of murder. It is a provision that in effect says – punishment that fits crime is punishment in proportion to the culpability of the criminal conduct and it is what the perpetrator or the accused convicted felon deserves. It does not allow the judge any significant discretion in arriving at a sentence. Yet in crimes (other than murder, robbery with violence, and treason) sentences are determined largely by other considerations.

These considerations include the correctional needs of the perpetrator, sometimes the desirability of keeping him away from circulation and the tragic results of his crime. Inevitably these considerations lead to a departure from the principle just desert as the basis of punishment and creates situations of unease and apparent injustice. This should not however be so.

It is indeed correct that there is general agreement that lies at the foundation of society that human life is sacred, but criminal punishment according to the principle of just desert may not be needed to keep the law effective. Since this is the purpose that justifies the punishing in the first place, included punishment (of death) would then not be justifiable, to make the law effective.

However, according to our theory of criminal punishment, it is a matter of not allowing those who break the law to get away with their crime, and punishment is proportional to crime when it is enough, but not more than enough, for that purpose. It has often been suggested in sociological studies that the minimum punishment sufficient to ensure against crime with impunity can be determined by reference to considered judgments in the community.

Taking Kenya as an example, the popular (but not considered) opinion is burn or lynch all perceived offenders – perpetrators of robbery with violence, rapists and sexual deviants. These opinions do not appear in other offences such as murder.

Though reference must be made to what is minimally sufficient in light of culpability to prevent the appearance of impunity, in the eyes of the community, the standard of punishment is an objective one, for it depends not on what most people feel seeing the perpetrator suffer, but rather what is defensible

through reasoned argument. It is not then the bare opinion of some majority that prevails, but a considered judgment that any can arrive at.

In the context of the law of Kenya (S. 204 of the Penal Code – which prescribes the punishment of death) is not justified not only from the point of view of effectiveness of the death penalty but more fundamentally of divergence of that Section with Article 26(1) of the Constitution that guarantees the right to life.

It has been argued that the Article 26(3) permits the imposition of the death penalty by incorporation by reference to Section 204, 296(2) and 43 of the Penal Code – (which prescribe the death penalty). This is, as a matter of interpretation, correct. But this is not the argument here at all. The argument here is about the imposition of the death penalty under those provisions. It is inconsistent with the guarantee to life. It is the duty of the court under Article 20(3)(a) of the Constitution to give effect to all the fundamental rights and freedoms guaranteed under the Constitution.

That being my view of the matter, what punishment then is justifiable and proportionate to the crime of murder, I think a sentence of exclusion from society and time spent in reflection at a correctional institution would be a fair and justifiable sentence which preserves life, as well as ensures the abhors of impunity.

In the circumstances of this case, I would sentence the accused to twenty-five years imprisonment twenty of which he will serve without being eligible to parole.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 27th day of July, 2012

**J. ANYARA EMUKULE
JUDGE**