

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE 97 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KINUTHIA WANJIKU.....1ST ACCUSED

GREGORY MWANGI MUNGAI.....2ND ACCUSED

ISMAEL ONOMO.....3RD ACCUSED

RULING

On 20th day of April 2012, I convicted the three accused with the murder of Viz Tom Okeyo, the deceased, and I invited counsel to address me on the question of sentence.

Mrs Ndeda learned counsel for the accused concurred with the submissions of Mr. Omwega that the accused are first offenders. The accused were brought into court in 2005. They have been in custody for the last seven (7) years. The first accused was sixteen years when his plea was taken, the third accused was seventeen years of age. The accused were remanded in juvenile custody homes. They are very remorseful for the offence.

The second accused's parents are deceased. He dropped out of school as he had nobody to pay for his school fees, and he pleads for mercy. He was a juvenile, he was not tried within twelve months as required by the Children Act, 2001.

Accused III is remorseful. He is now twenty-three years of age. He was married and had a child of six months. He has aged parents who require his assistance. He was a juvenile at the time of his arrest and his case is similar with that of Accused 1. His mother is deceased and his father is diabetic. Counsel cited the case of REPUBLIC VS. NGINGE, that a death sentence is no longer the only punishment for the offence of murder. Counsel asked the court to grant the accused a sentence commensurate with the circumstances of the commission of the offence in this case.

I have considered respective counsel's submissions. The 1st and 3rd accused were aged 16 and 17 years respectively at the time of the commission of the offence. They are now 23 and 24 years of age respectively. The second accused was of similar age. They were all minors at the time of commission of the offence.

Under Section 194(1) of the Children Act 2001, (No. 8 of 2001), proceedings in respect of a child – (by definition is any person below the age of 18 years), accused of having infringed any law shall be conducted in accordance with the rules set out in the Fifth Schedule (to the Act). Rule 12(4) of the Child Offenders Rules, requires that where a child is charged with a serious offence (rule 12(3) of those rules), a case shall be completed within twelve months after the plea has been taken, and in default the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence.

The accused were charged with the offence of murder. They were unable to muster the terms of bail and have grown into adults while in custody. They ought not to have remained in remand beyond six months (rule 10(4)). Under Section 190 of the Act no child shall be sentenced to death if the accused had been tried within twelve (12) months as required under the Children Act, and had been found guilty, none of them would have been sentenced to death.

As I observed at the beginning of my judgment, the accused were unfortunate. The law regarding the use of assessors in trials for murder changed while they were still under trial. There were errors of omission and commission. The use of assessors after the law abolishing their use in murder trials, ought to have been continued in cases where the trial commenced with the use of assessors. That is the requirement of

Section 23(e) of the Interpretation and General Provisions Act, (Cap. 2 Laws of Kenya) – “the repeal by a written law of another written, unless a contrary intention appears shall not affect an investigation, legal proceedings, or remedy in respect of a right ... and the legal proceedings may be continued as if the repealed law had not been made.”

As a result the proceedings had to commence de novo until their completion. The accused have had to endure their time in custody.

Although the accused were minors in age, (being under 18 years of age) in practice, they acted as young adults and were cannon fodder for hire, and got mixed up with the hands of a local gang leader who has never surfaced, and burnt PW1's house together with her 2 children, for whose murder I found the accused guilty and I convicted each of them. The question is what sentence should be imposed upon them?

If they had been tried within 12 months, they could not be sentenced to death as children, that they were not tried within twelve months is an error of the criminal justice system. It has limited facilities, and until recently it has a limited number of judges. It is not the fault of the accused. I would however on the evidence, have convicted them if I had tried them within the twelve months, but what sentence would I have given them? Most probably Borstal Training for at least 2 years, perhaps probation period of not less than 5 years. In the event the accused have been in remand for 7 years. I think they have suffered enough, and hopefully learned that crime does not pay.

I would therefore sentence each of the accused to seven years probation. However because of their having committing the offence when they were minors and having spent seven years in custody, I would order their release forthwith unless there are lawful reasons for their continued detention.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 22nd day of July, 2012

**J. ANYARA EMUKULE
JUDGE**