



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 55 of 2006**

REPUBLIC.....APPLICANT

-VS-

THOMAS GILBERT CHOLMONDELEY.....RESPONDENT

**SENTENCE**

At the outset, it is apparent that on 7<sup>th</sup> May, 2009, this court convicted the accused for the lesser but cognate charge of Manslaughter, contrary to Sec. 202 as read with Sec. 205 of the Penal Code, Cap. 63, Laws of Kenya. While addressing the court, the Director of Public Prosecution, viz, Mr. Keriako Tobiko urged this court to treat the accused as a first offender. Secondly, he correctly stated the position of the law that sentencing is a matter for the sole discretion of the trial Judge. However, he also pointed out that in the exercise of such discretion, the trial Judge must be guided by evidence and sound legal principles on sentencing. He also urged this court to take into account, all relevant factors and exclude all extraneous and irrelevant factors. Besides the above, Mr. Tobiko also urged the court to consider the following basic principles in sentencing like:

(a) Principle of Proportionality

The above requires that the sentence imposed should reflect the seriousness of the offence

(b) Principle of Equality before the law

The said principle requires that sentencing decisions should treat offenders equally, irrespective of their wealth, race, their colour, sex, employment or family status.

Apart from the above, Mr. Tobiko also submitted that I should consider the nature and seriousness of the offence that the accused has been convicted of. He reminded the court that a felony carries a maximum sentence of life imprisonment. In addition to the above, he also urged the court to consider the nature and location of the injury inflicted by the accused. He also reminded me that I had found that the deceased was shot from behind. Besides the above, Mr. Tobiko also asked the court to consider the type and potency of the weapon used by the accused to inflict such an injury ? pointing out that he had used a powerful gun and high velocity weapon. That apart, he also urged the court to take into account, the element of deliberate risk taking on the part of the accused when he shot at dogs that had accompanied the deceased. He also observed that when the accused shot, there was no imminent threat or danger posed to the accused as to warrant him to take the action that he took. Apart from the above, the DPP also observed that if the aim of the accused was to scare the deceased, his colleagues and dogs from his land, then he should have shot in the air. Graciously, the DPP conceded that the accused had personally administered first aid, made arrangements for the injured person to be rushed to the hospital and even offered his own car. Specifically, he stated that the above is a mitigating factor. Mr. Tobiko also conceded that the fact that the accused did **not** have any previous record is also a mitigating factor.

On the other hand, Mr. Ojiambo, who is the lead defence Counsel concurred with the basic principles that were stated eloquently by the DPP. In addition to the above, he urged me to consider the effect of such sentence to the accused person, the family of the deceased and to the society in general. Apart from the above, he also urged me to consider the conduct of the accused, ? prior and after the offence. He also reminded the court about its analysis that showed that the accused had originally gone to look for a suitable site for the residential house for Carl Tundo and that he only carried the rifle in case they chanced a buffalo. Mr. Ojiambo emphasized that the reason for carrying a high velocity weapon was only to deter a buffalo. That apart, he also drew the attention of the court to the fact that it was the accused who

initiated the investigations by calling the police and Kenya Wildlife Service officers. Mr. Ojiambo took issue with the inadequate and incompetent medical intervention at the Pine Breeze Hospital, Nakuru. According to Mr. Ojiambo, instead of the staff establishing an I.V. line, they tried cardiac massage that caused greater bleeding. Besides the above, the defence counsel emotionally expressed the deep regrets and feelings of Lord and Lady Delamare on the loss of Robert Njoya. Apparently, the family of the accused are ready and willing to meet both the material and spiritual needs of the deceased family. Mr. Ojiambo also pointed out the advanced age of the parents of the accused. In concluding his moving mitigating factors, he submitted that there is need for healing on both sides. He also reminded the court that the accused has been incarcerated for 1,097 days.

Sentencing is central in the administration of criminal justice. It is the process stage in the criminal procedure at which a court of law of competent jurisdiction makes an order, after convicting an offender as to the specific penalty to be meted out. The severity of a sentence depends on the circumstances of each case. Regard is usually had to the nature of the crime, the offender and the purpose of the sentence. Those are among the issues that both counsels have eloquently submitted to this court. One extreme view is that offenders do **not** respect the rights and dignity of others and therefore should **not** themselves be accorded any such treatment of dignity and respect. They recommend that offenders should be punished so that society can be protected. On the other extreme is the view that offenders are victims of social, political, economic and psychological forces in society. Therefore, they recommend that sentencing should have the goal of salvaging and rehabilitating the offenders and therefore be treated with compassion and understanding. One of the crucial issues that the learned Director of Public Prosecution has raised is that sentencing is a matter for the sole discretion of the trial Judge. However, that discretion **must** be exercised judiciously.

In his well-researched book – titled “**Sentencing & Criminal Justice.**” 2<sup>nd</sup> Edition, the author viz, Andrew Ashworth stated as follows:

**“Maximum discretion should be left to the court, and any encroachment on this is likely to lead in injustice.”**

On the other hand, when Lord Lane was refusing to allow the continuation of research into Judge’s sentencing practices: Oxford Pilot Study (1984) at pg 64 stated that

**“Sentencing is an art and not a science.”**

I do wish to add that discretion opens the way both to flexibility in response to the fact of cases and to unjustifiable differences in the personal or local approach of judges. Besides the above, both learned Counsels raised fundamental issues. Whereas Mr. Tobiko raised the issue that offenders should be treated equally irrespective of their wealth, race, colour, sex, employment or family status Mr. Ojiambo raised the issue of healing on both sides. Both issues are very close to my heart and I felt touched. The offence before the court was committed in Soysambu farm which is an area around Naivasha. Needless to state, there was unprecedented ugly scenes based on tribal clashes following the last general elections. Different communities are still healing from the above. Similarly, following the killing of Robert Njoya there were ugly scenes reported in the same area. This court understands the under-currents that went with both unfortunate events. However, I believe the Executive is addressing the issues of land and other inequalities. Therefore, it will not be necessary for me to delve into any details.

Having stated the above, I wish to reiterate that the offence occurred in the farm that belonged to the family of the accused. As stated earlier, the accused did **not** have any malice aforethought in killing the deceased. Simply put, the killing was **not** premeditated as the accused never had any grudge whatsoever against the deceased. That apart, the deceased had trespassed on the farm and the learned DPP has acknowledged that the accused is a first offender. He has also acknowledged that the accused made desperate attempts to save the life of the deceased. He did that by trying to rush him to hospital and by giving out his credit card for the deceased to be treated. Though the family of the accused has offered to address the material and spiritual needs of the family of the deceased, this court wishes to decline to comment on the above. The reasons are two fold:

(a) A civil court would be in a better position to assess the loss and quantum of damages related to the death of the deceased. Consequently, it can make appropriate orders.

(b) Courts are likely to be mistaken when they base their leniency purely on financial resources or largesse of the offenders. In the well-known case of **MARWICK (1953) 37 CR APP. REP. 125**

A wealthy member of a golf-club had been fined £500 for stealing two shillings and six pence from a gold club changing room, in circumstances which had cast suspicion and aspersions on the other members. He appealed against this sentence to the Court of Criminal Appeal in England which responded with a rare exercise of its power (since removed) to increase the severity of sentences on defence appeals. Sentencing Markwick to two month’s imprisonment, **LORD GODDARD CJ** remarked that in such a case a high fine

***“would give persons of means an opportunity to buying themselves out of being sent to prison ..... There should be no suggestion that there is one law for the rich and one for the poor.”***

Luckily, this trial has subjected the accused to the due process of the law. He was arraigned and charged in court for a serious offence without any regard to his wealth, status or race. The above proves beyond doubt that the criminal justice system is robust, independent and functioning. I do believe deeply that the process has humbled him. This court has taken into consideration that the accused has been held in custody for slightly over three years since he was arrested. In view of the total circumstances of the case and the guiding principles to sentencing, I hereby wish to impose a light sentence on the accused to allow him reflect on his life and change to an appropriate direction. The upshot is that I hereby sentence the accused to 8 months imprisonment.

Right of Appeal explained.

**MUGA APONDI**

**JUDGE**

Sentence passed in the presence of the accused.

.....DPP

.....

.....

.....for accused

.....

.....

.....(Watching brief for Deceased family)

**MUGA APONDI**

**JUDGE**

**14<sup>TH</sup> MAY, 2009**