



**Republic v Omutanyi (Criminal Case 4 of 2018)
[2025] KEHC 1794 (KLR) (10 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 4 OF 2018
AC BETT, J
FEBRUARY 10, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MOSES AKALA Omutanyi ACCUSED

RULING

1. The Accused was charged and convicted of the offence of murder contrary to section 203 as read with Section 204 of the penal code. The particulars were that on the 28th day of August, 2018 at Buchenya village, Buchenya sub-county within Kakamega County, the Accused murdered Jackline Amelda Indakwa Alias Nerenga.
2. Section 204 of the *Penal Code* provides that a person convicted of murder shall be sentenced to death. However, the mandatory nature of the death sentence has been outlawed by the Supreme Court in the case of Francis Muruatetu & Another v Republic [2017] eKLR in which the Court while retaining the death sentence found that its mandatory nature was unconstitutional and had this to say:-

“

- “ 45. To our minds what Section 204 of the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.



46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the constitution* does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of *the Constitution* are not exhaustive.”

The court therefore proceeded to pronounce itself thus:

“58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the *Penal Code*. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the *Penal Code* unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of *the Constitution*.

3. In his mitigation, through his Advocate, Mr. Getanda, the Accused told the court that he was remorseful and regretted his actions. He stated that he was 50 years old and that together with the deceased they had 3 children who are now wholly dependent on him.
4. He submits that he has been in custody for 7 years and the court ought to consider the period that he has spent in custody in deciding on the appropriate sentence. While conceding that a non-custodial offence is not an option for the offence, he prays for a lenient sentence.
5. On the other hand, the prosecution submits that the Accused was a first-time offender with no previous criminal records. Nonetheless, according to the pre-sentencing report, the community is still hostile towards the Accused. The prosecution hence urged the court to take into consideration the issue of proportionality and consider a stiffer sentence since the accused is still not remorseful and is in denial.
6. A pre-sentence report dated 16th December 2024 was presented to court. According to the report, the accused is the youngest of six siblings who live independently while maintaining a close relationship.
7. According to the report, the Accused’s three children currently live with his sisters since he has a health condition and cannot provide for them.
8. The social inquiry report states that the Accused person denies committing the offence, insists that it was a case of mistaken identity, and still maintains his innocence. The report states that the victim’s family expresses bitterness towards the Accused and is unwilling to consider the possibility of rehabilitation or re-integration into the community. The same sentiment is expressed by the community where the victim and the Accused person come from.
9. The pre-sentence report recommended a custodial sentence subject to the court’s discretion.
10. I have considered the social inquiry report, the accused’s mitigation and the submissions by the state.
11. The Accused is a first offender and still at a prime age. He is a family man with heavy family responsibilities. He suffers from ill health and faces challenges in managing the same. However, he is reported to be in denial.
12. Taking into consideration the fact that the witnesses placed the Accused person at the crime scene, his denial and adamant that he did not commit the offence is a sign that is not remorseful.
13. Under the Judiciary sentencing Policy guidelines, the objectives of sentencing are: -



1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community Protection: to protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
14. The Supreme Court in Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 of 2015, as a guide in sentencing held that:
- “...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:-
- a. age of the offender
 - b. being a first offender;
 - c. whether the offender pleaded guilty;
 - d. character and record of the offender;
 - e. commission of the offence in response to gender-based violence;
 - f. remorsefulness of the offender;
 - g. the possibility of reform and social re-adaptation of the offender;
 - h. any other factor that the Court considers relevant.”
15. In the circumstances of this case, given that the Accused took the life of his wife whom he was expected to protect, a custodial sentence would be appropriate. In the pathologist's opinion, the cause of death was penetrating injury secondary to mixed-force trauma following assault. From the post-mortem report, the assault was aggravated. The deceased had three stab wounds on the forehead, extensive bruising and cut wounds on both forearms and abrasions on both arms among other injuries. The accused person ought to bear the consequences of his inhumane actions.
16. I also note that the Accused being 50 years old has a possibility of being reformed.
17. Taking everything into consideration, I hereby sentence the Accused to 20 (twenty) years imprisonment. In compliance with Section 333(2) of the *Criminal Procedure Code*, the sentence shall be deemed to have taken effect from 1st February 2018 when the Accused was first arraigned in court and committed to custody pending trial.
18. The Accused has a right of appeal limited to 14 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF FEBRUARY 2025.



A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Mr. Getanda for the Accused

Court Assistant: Polycap

