



Republic v Swale alias Bakari Thiswa & 2 others (Criminal Case 35 of 2017) [2024] KEHC 1102 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 35 OF 2017
DKN MAGARE, J
FEBRUARY 8, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

HAMIS NGOVI SWALE ALIAS BAKARI THISWA 1ST ACCUSED

KOMBO ALI NGOVI 2ND ACCUSED

MBUI THISWA MWALIMU ALIAS BAKARI THISWA 3RD ACCUSED

RULING

1. The Convicted Persons were charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the charge were that on the May 3, 2018 at 9.00 a.m at Mikanjuni Village, Kanduni Location, Kinango Sub-county jointly with others not before Court murdered Chindoro Ngovi (the Deceased).
3. After hearing the parties and the submissions, I delivered Judgement on November 21, 2023 where I convicted the 2nd and 3rd Accused Persons with murder contrary to section 203 as read with section 204 of the *Penal Code*. The 1st Accused Person was at large and is still on the run.
4. I ordered for the Probation Reports which were supplied to me on January 18, 2024 in relation to each of the convicts.
5. I have perused the respective Probation Reports. They are both dated and filed on 1 January 8, 2024. The 2nd Convict is 31 years of age. He has a wife and five children and is said to be a contributor to his family's basic needs.
6. The 3rd Convict is 32 years old. He has a wife and 4 children who are in school.



7. The circumstances of the two Convicts are typically the same. The feelings of the victims are documented in the Probation Reports. The respective families are said to have held various meetings and arrived at a resolution to forgive the Convicts.
8. I had also listened to the mitigation on the day of the conviction. Each of the Convicts was remorseful. Each said that he had a young family and was the bread winner and each asked for leniency and forgiveness. This is not unusual for Convicts during mitigation.
9. I think reconciliation as proposed by the Probation Reports has limitations and varies with the circumstances of each case. In this case, the convicts believed that the Deceased was bewitching their brother. There was also reference to feud flowing from land ownership dispute in which they hated their Deceased brother because he was the one whose name was registered in the land title and not them.
10. They violently kill their brother. The heinous act was committed in the presence of the Deceased's wife and children. The Convicts pounced onto and held the Deceased by the neck, legs and hands like chicken before brutally butchering him in the presence of his wife and children. The impact of this murder must have reverberated in the Deceased's family with a long lasting impact, particularly on his children who were amidst the horror.
11. I am consequently guided by the rather persuasive Probation Reports but I have reservations which I hold for the interest of justice and the purpose of Criminal Law must be seen to serve in the society. Rehabilitation and reconciliation as attributes of sentencing must conform to the tenets of fair trial and sentencing guidelines.
12. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR stated as follows:
 - (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 its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of *the Constitution* are not exhaustive.
 - (47) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
 - (48) Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of *the Constitution*; an absolute right.
13. Therefore, this court has to consider the convicts' right to fair trial even post judgement through this mitigation. I must at this point note the factors which should guide the court in sentencing. The Supreme Court has propounded them in the *Muruatetu* Case (supra). 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.
14. I must however consider that the mitigation factors by no way replace judicial discretion as observed by the Supreme Court in the *Muruatetu* Case (supra).
15. In this regard, I remark that the killing of the Deceased was malicious, unjustifiable and based on unwarranted cultural beliefs relating to witchcraft. I am unable to exercise my discretion by adopting the proposal by the respective Probation Reports that both Convicts be subjected to sentence by a Probation Order for 3 years.
16. I have however considered the Reports and which I acknowledge have impacted the quests for my sentencing for the 2 Convicts. I have fervently considered the views of the Convicts' families and the Victims' families. The vici mar minors and their views are not captured. A custodia sentence and a deterrent one at that will suffice. The convicts killed their brother based on superstition and mundane issues. They were merciless. They left indelible marks on the minors who were watching.
17. I proceed to sentence the 2nd Convict to 30 years imprisonment.
18. I also sentence the 3rd Convict to 30 years imprisonment.
19. Both sentences to run from the time of arrest excluding days they were on bond.
20. Right of Appeal 14 days.

DELIVERED, DATED and at MOMBASA ON THIS 8TH DAY OF FEBRUARY, 2024. Sentence delivered physically with some parties virtually through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Aroka for the 3rd Convict

Mr Paul Magolo for Lijoodi for the 2nd convict

Miss Nyawinda for the state.

Court Assistant - Brian

