



Republic v Bwayo (Criminal Case 35 of 2009) [2024] KEHC 4490 (KLR) (3 May 2024) (Sentence)

Neutral citation: [2024] KEHC 4490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 35 OF 2009**

AC MRIMA, J

MAY 3, 2024

BETWEEN

REPUBLIC STATE

AND

JOHN SIMIYU BWAYO ACCUSED

SENTENCE

1. The accused was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. He pleaded not guilty and he was tried. He was convicted as charged and sentenced to the then mandatory death sentence.
2. In 2023, he filed Constitutional Petition No. E004 of 2023 where the death sentence was set-aside and a re-sentencing ordered. This is, hence, the resultant ruling on the sentence.
3. The Court called for a Pre-Sentence Report for purposes of sentencing.
4. This Court is well abreast of the principles on sentencing and the 2016 *Judiciary of Kenya Sentencing Policy Guidelines*. As stated by the Supreme Court of Kenya in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, despite their importance, the guidelines do not replace judicial discretion. This is what the Apex Court stated: -

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.
5. The purpose of sentencing is expounded in page 15, paragraph 4.1 of the *Sentencing Policy Guidelines* as follows: -

Sentences are imposed to meet the following objectives:



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.
6. In sentencing, the Court considers various mitigating factors. Some include: -
- (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.
7. In this case, the Accused is aged 53 years old. He was charged with murdering his brother. The deceased left behind a wife and young children. With the demise of the deceased, the wife of the deceased left for Nairobi to work as a house help to be able to raise up her children. The children are now grown-up.
8. The accused's detailed background has been captured in the Pre-Sentence Report. His attitude to the offence as well as the views of the local community administrators are on record. Mitigations were also tendered.
9. The circumstances under which the offence was committed were captured in the Report as well.
10. Whereas the accused is remorseful of the fatal incident which he blames it on alcohol, the deceased's wife sees it otherwise. She contended that the Accused had on several occasions threatened to kill the deceased. According to her, the Accused intentionally killed her husband.



11. The Accused has been in custody since October 2009. He has by now spent around 15 years in prison. By considering the statutory one-third remission on sentence, if the Accused were to be released now, he would have served a 23-year' imprisonment term.
12. By considering the totality of the above, this Court finds that the accused has been in custody for such a period that he must have undergone appropriate counselling and rehabilitation. This Court would have released the Accused forthwith. However, given the position taken by the family of the deceased, the Accused will have to be placed on probation.
13. Consequently, the following sentence is hereby rendered: -
 - a. Further, to the period already served, the accused shall be placed on probation for 3 years.
 - b. File marked as Closed.
14. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF MAY, 2024.

A. C. MRIMA

JUDGE

Sentence delivered in open Court in the presence of:

Miss Auta, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

