



Republic v Malio (Criminal Case 7 of 2019) [2024] KEHC 7019 (KLR) (13 June 2024) (Sentence)

Neutral citation: [2024] KEHC 7019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA**

CRIMINAL CASE 7 OF 2019

JN ONYIEGO, J

JUNE 13, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ZAMZAM MALIO ACCUSED

SENTENCE

1. Accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*. Particulars are that on 10-06-2019, in Maramutu sub-location, Madogo Division within Tana River County unlawfully murdered one Saumu Mui. Having pleaded not Guilty, the matter proceeded to full trial. At the conclusion of the trial, the court found the accused guilty and convicted her accordingly. The prosecution urged the court to treat her as a first offender.
2. Before sentencing, the court ordered for a pre-sentence report which was filed on 10-06-2024 thus recommending a non-custodial sentence based on grounds that; the victim and the accused were co-wives; the accused is aged 29 years old; the community was not hostile to the accused; the victim’s family is still bitter with the accused; she is the sole bread winner of her two children who are of school going age; her family had given Kes 40,000 to the victim’s family to meet the funeral expenses.
3. In mitigation, she pleaded for leniency claiming that she was remorseful; has two children aged 10 and 12 yrs with the one aged 10 yrs being a special case as he is dumb and deaf hence requiring special attention and care; needs reintegration into society.
4. It is trite that sentencing is at the discretion of the trial court. See *Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003* where the Court of Appeal stated thus;

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence



itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R.* (1989 KLR 306)”

5. Similar position was stated by the court of appeal in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR where it was stated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

6. It is however worth noting that, in exercise of its discretion, a court is duty bound to take into consideration certain guiding principles *interalia*; the aggravating nature of the offence committed; the mitigating factors; pre-sentence report; previous criminal record of the accused; and victim impact assessment report. See judiciary sentencing policy guidelines clause 4.5 of 2023.
7. This court is pretty aware of the objectives of sentencing which are also captured in the judiciary sentencing policy guidelines clause 1.3.1 of 2023 as; retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration.
8. I have carefully considered the circumstances under which the offence was committed and the mitigation on record. I have also considered the sentiments contained in the pre-sentence report which is favourable.
9. However, looking at the manner in which the accused executed the act of murder in this case, the same was inhuman and cruel. There was no justification to burn her co-wife to dead using petrol. This is a clear case where a deterrent sentence is required. However, considering her age and her young children who are victims of circumstances, I will exercise some leniency.
10. This is not a suitable case for probation. Justice demands that she suffers a punishment commensurate to the act committed. Accordingly, accused is sentenced to serve 15 years’ imprisonment.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 13TH DAY OF JUNE 2024.

J. N. ONYIEGO

JUDGE

