



**Republic v Muthoni (Criminal Case E003 of 2021)
[2024] KEHC 11189 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE E003 OF 2021
RM MWONGO, J
SEPTEMBER 23, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ANTHONY KARIUKI MUTHONI ACCUSED

JUDGMENT

1. The Accused, was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on the 26th October, 2020 at Karima sub-location in Mwea West sub-county within Kirinyaga County he murdered Jane Kathambi. On 4th August, 2021 the accused pleaded not guilty to a charge of murder.
2. On 8th July 2021, the accused's file was consolidated with that of three other persons, viz: Charles Kyalo Nduku (File E004/2021; and Joseph Kitemu Muange & Purity Mueni Mutuku (File E009/2021). All were charged with the deceased's murder.
3. However, on 27/7/2023 the proceedings against the other accused persons, whose cases were consolidated (E004/2021 & E009/2021), were terminated and they were discharged.
4. Following the withdrawal of the consolidated cases, the accused changed his plea on 31st October 2023, and pleaded guilty to murder. The matter proceeded for mitigation on 8th April, 2024.

Facts

5. A summary of the facts of the case was submitted by the state on 26th October, 2020. According to the summary, the deceased and the accused were married in 2017 and were blessed with one child Nelly Muthoni in 2019. After making some savings, the accused convinced his wife to move to his home in Marura Village, Mwea.



6. She declined and instead convinced the accused to move to her home area in Mutitu, to start a saloon and barbershop. They relocated to Karama Trading Center and stayed with her parents. The deceased did not open the business as agreed and they disagreed, resulting in their separation with the accused moving back to his home. He demanded the money given to her, and on her refusal, he hatched a plan for her to visit him for an alleged treat at a hotel.
7. He rode her on a boda boda, and pretended it had mechanical problems. He then took the opportunity to clobber her on the head and slit her throat. He dragged her body to a water canal in Mwea Irrigation Scheme. The accused was arrested on 23rd December, 2020, after he confessed to the murder.
8. The Post Mortem report found that the cause of death was external bleeding from assault with a sharp object.

Mitigation and reports

9. The accused's counsel gave mitigation stating: that the accused is 35 years old and is remorseful for the offence. He is a 1st offender, and voluntarily pleaded guilty saving the court precious judicial time. He has maintained good character in prison and during trial. He has been rehabilitated while in prison by completing two fellowships in bible study. Further, he has been in custody since February, 2021 and the sentence should factor the time spent. Finally, counsel stated that the accused has a daughter with the deceased, presently living with the victim's family.
10. The prosecution submits that no reconciliation has been initiated between the accused and the victim's family. The accused has been in custody for only 2 years, and has only had a short period for reform. The prosecution seeks a sentence of 34 years' imprisonment.
11. The Probation Officer's Pre-Sentence Report dated 5th December, 2023 is unfavorable. The victim's family is still bitter with him and requests the court to pass a severe custodial sentence. The community finds him as a threat to their safety and as such they would prefer a custodial sentence for deterrence.

Issues for Determination

12. The only issue for determination is what is the appropriate sentence for the accused.
13. The accused was convicted on his own plea of guilty for murder. Sections 203 and 204 of the [Penal Code](#) under which the accused is charged provide for the offence of murder and the punishment for it. The sections read as follows:
 - “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
14. I have taken into consideration the circumstances of the offence which have been set out by the state without objection.
15. Under the [Judiciary Sentencing Policy Guidelines](#), the objectives of sentencing are set out in Paragraph 4 as follows:
 - “ 4.
 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.

16. In the Supreme Court case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR the mandatory nature of the death sentence was outlawed. It was held to be inconsistent with an accused's constitutional right to a sentence based on the court's discretion upon considering mitigating and aggravating circumstances. Thus, though the death sentence was not outlawed, its mandatory nature is unconstitutional. Murder convicts are now allowed to mitigate before sentencing.

Mitigation

17. In the *Muruatetu Case* (*supra*), the Supreme Court made several observations that are insightful on sentencing. At paragraph 48 the Supreme Court state as follows:

“(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.”

18. Further, the Supreme Court in *Muruatetu* gave the following guidance regarding mitigation before sentencing:

“In sentencing the court will consider mitigating factors such as the following;

- 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. The manner in which the offence was committed on the victim;
- g. The physical and psychological effect of the offence on the victim’s family;
- h. Remorsefulness of the offender;
- i. The possibility of reform and social re-adaptation of the offender;
- j. Any other factor that the Court considers relevant.”

19. In his mitigation, the accused stated that he is remorseful and regrets his action. Further, he stated that, while in custody, he attained life skills and improved his mental wellness.

20. The Probation Officer’s Pre-Sentence Report dated 5th December, 2023 is unfavorable. It indicates that the victim and the community request for a severe sentence if they are to perceive that justice has been served.

21. On its part, the prosecution seeks a 34 years’ sentence of imprisonment.

22. I note that the accused spent the period since his arrest in custody, and it should be considered in sentencing the accused. The accused has been in custody since February 2021 and has remained in custody to date.

23. In the case of *Republic v Isaac Wanjala Murumba* [2021] eKLR it was held:

“In accordance with section 333(2) of the Criminal Procedure Code, the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account.”

24. In the case of *Mwei v Republic* (Criminal Petition 104 of 2020) [2022] KEHC 13045 (KLR) (21 September 2022) (Judgment) the accused was sentenced to 28 years for the murder of his 3-year-old son. It was stated by the court that:

“From the evidence on record, the Petitioner on 29/8/2007 arrived home in a state of intoxication and got into a physical altercation with the wife and in the midst of the fight the Petitioner killed their three-year-old son without any legal justification.

In the end, the death sentence is hereby set aside and the same is substituted with 28 years’ imprisonment. The said sentence shall run from the date of arrest.”

25. I have considered the aggravated nature of the offence and the effect of the same on the family and the community. After luring the deceased, the accused murdered her and threw her in the canal. He was arrested two months later and admitted the offence. It is my view that the appropriate sentence to mete in this case would be a custodial sentence.

26. Accordingly, and instead of the death sentence, I hereby sentence the accused to twenty-eight (28) years imprisonment with effect from the date of his first incarceration.

27. Orders accordingly.

DATED AT KERUGOYA THIS 23RD DAY OF SEPTEMBER, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Mamba for the State
2. Munene for Accused
3. Accused - Present in Person
4. Court Assistant, Murage

