



**Republic v Rutto (Criminal Appeal E015 of 2021)  
[2023] KEHC 1117 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E015 OF 2021  
RN NYAKUNDI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JULIUS KIBIWOT RUTTO ..... ACCUSED**

**RULING**

Coram: Before Justice R. Nyakundi

Mr. Nyamwega & Co. Advocates

M/s Asiyo for the State

1. In the instance case Mr. Julius Kibiwott was convicted by this court by the offence of murder of Eliud Kiptum contrary to section 203 of the Penal Code. It is now the task of this court to exercise discretion to impose the appropriate sentence. The court has taken into account the accused person circumstances, interests of the public, the nature on the seriousness of the offence and the surrounding transactions which culminated in the death of the deceased. The accused is aged 55 years old with family ties of a spouse and 10 children. He has no previous conviction save for the current crime in which he was found guilty and convicted as such. In Kenya the punishment for murder is provided for under section 204 with a commanding statement that any person convicted for murder shall be sentenced to death. I recognise that our jurisprudence over the offence of murder and corresponding sentence has evolved over time. More significantly, the constitutionality of the mandatory death penalty was revisited by the Supreme Court in the case of *Francis Murwatetu -vs- Republic* (2017) eKLR to my knowledge the prime question determined by the court was to the effect that the mandatory death sentence infringes Article 25, 26, 27, and 28 of the Constitution. The decision joined the treatise of valuable jurisprudence from other jurisdiction which have declared mandatory death sentence as being unconstitutional. Base on that decision the death penalty still a lawful sentence is a reserve for the rarest of the circumstances which no other sentence would be considered proportionate to the crime.



Pursuant to this observation I take into account aggravating and mitigating factors of the offence which informs me that this is not a suitable case for non-custodial sentence.

2. The law requires that notwithstanding the specific criteria spelt out in the penal code on the death penalty, it is now the law that judicial discretion governs the imposition of any sentence against a convicted offender. This what the court highlighted in *Veen –vs The Queen* (No. 2) (1987-88) 164 CLR 465 AT 476 per Manson CJ Brennan, Dawson & Toohey JJ- high Court of Australia this is what the court highlighted: “ However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficult in giving weight to each of the purposes of punishment. The purposes of criminal punishment ae various: Protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They ae guideposts to the appropriate sentence but sometimes they point in different directions”.
3. To the facts of this case, weight is to be given to the culpability of the accused, use of a dangerous weapon, the nature of the injuries inflicted and the aspect that the crime falls within the ambit of section 206 (A) and (B) of the penal code. It was not committed at the spur of the moment. After considering all the relevant factors, it is appropriate to depart from the maximum sentence of death and have it substituted with a sentence of 25 years imprisonment with effect from 19<sup>th</sup> December, 2013 to make provision for the tenets under section 333 and (2) of the *Criminal Procedure Code*. The balance is to ensure that the period spent in pre- conviction custody is credited to the accused as part of the final tariff.

14 days Right of Appeal

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

.....

**R. NYAKUNDI**

**JUDGE**

