



State v Mutiso (Criminal Case 5 of 2015) [2023] KEHC 3867 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 5 OF 2015
DO CHEPKWONY, J
MARCH 22, 2023**

BETWEEN

STATE PROSECUTOR

AND

BENSON MUTUNE MUTISO ACCUSED

RULING

1. The accused person, Benson Mutune Mutiso is charged with the offence of Murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#).

The particulars of the offence are that:-

“On 13th December, 2014 at Manyatta Village, Mwaluvanga Location in Kwale County within Coast Region, the accused person murdered Loice Ndunge Phillip”.

2. The matter proceeded for full trial and the accused person was found “guilty” and convicted of the offence of Manslaughter contrary to Section 206 of the [Penal Code](#).
3. Upon convicting the accused person, the matter was referred to the Probation Services Department for a Social inquiry to be conducted on the accused person for a Pre-sentence Report to be filed so as to assist the court in its determination of the sentence to be meted out against the accused person. The Pre-sentence Report was filed and I have read through the findings and recommendations therein. According to the prosecution, the accused has no previous records and should be treated as a first offender.
4. Mr. Tindi mitigated on behalf of the accused person and stated that the accused person is remorseful and pleads for mercy and leniency of the court. He also pleads that the period the accused person has stayed in custody be considered as punishment served since he is 66 years old and a father of children who require him at home.



5. For most offences, courts have the discretion to impose any sentence upto the statutory maximum, depending on the nature of crime, records (character) of the accused, social and economic background of the accused person, public interest, victim impact and many other factors.
6. The offence of Murder is among the few offences that carry a mandatory death sentence as a penalty in Kenya. However, there has been a departure from this by the courts' in this jurisdiction, arising out of the Supreme Court's decision in the case of *Francis Muruatetu & Another v Republic* [2017]eKLR, which recognized court sentence to be imposed for the offence of Murder should be appropriate. In this case, the Supreme Court found that the mandatory nature of the penalty of death as provided for under Section 204 of the *Penal Code* was unconstitutional in the sense that whether or not one is convicted, they should be heard. The Supreme Court felt that a person facing the death sentence deserves to be heard in mitigation as an important cogment element of fair trial because of the finality of the sentence. The Supreme Court then proceeded to state:-

“We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the *Penal Code*. We do this by determining that any court dealing with the offence of Murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise, will render a trial with the resulting sentence under Section 204 of the Penal Code unfair thereby conflicting with Articles 25(c), 28, 48 and 50(1) and (2) of the *Constitution*.

7. It is in compliance with this that this Court called for a Pre-sentence Report on the accused person, which has been presented to court. From the report, Probation Officer has given their view of each on the circumstances of the offence, the accused person's social and economic status and the victim impact statement and community.
8. As captured in the *Judiciary Sentencing Policy Guidelines* at Page 15, the objectives of sentencing are as follows:-
 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 offence.
 3. Rehabilitation: to enable the offender reform from his/her 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.
 5. Community protection: to protect the community by incapacitating the offender.
 6. Denunciation: to communicate the community's condemnation of the criminal conduct.
9. On whether to impose a custodial or non-custodial sentence, the court ought to take into account the following factors:-
 - a. Gravity of the offence
 - b. Criminal history of the offender.
 - c. Character of the offender.



- d. Protection of the community.
 - e. Offender's responsibility to the third parties.
 - f. Children in conflict with the law.
10. In the *Francis Muruateru case*, the guidelines were amended to 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 offender in response to gender-based violence;
 - f. The possibility of reform and social re-adaptation of the offender;
 - g. Any other factor that the court considers relevant.
11. In this case, the accused and the deceased are siblings and the death of the deceased was clearly caused by the long-standing dispute between the accused and his sisters, the deceased included.
12. I have taken into account the circumstances under which the offence was committed, the records of the accused person, mitigation statement by the accused person, relationship between the accused person and deceased alongside the recommendation by the Probation Officer and the proportionality doctrine. It is my considered opinion that a sentence that achieves deterrence, rehabilitation, family and community protection be meted out against the accused person.
13. I thus place the accused person on Probation for a period of three (3) years.
- It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 22ND DAY OF MARCH 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Valerie counsel for the State

Mr. Tindi counsel for the accused person

Mr. Wycliff Wahome for Probation

Accused – present

Court Assistant – Martin/Hamisi

