



REPUBLIC OF KENYA



**Republic v Mbaya (Criminal Case 45 of 2015) [2023] KEHC 3968 (KLR) (2 May 2023) (Sentence)**

Neutral citation: [2023] KEHC 3968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 45 OF 2015**

**EM MURIITHI, J**

**MAY 2, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**KENNETH MUTHOMI MBAYA ..... ACCUSED**

**SENTENCE**

1. By its judgment dated February 23, 2023, the court found that the accused, with malice aforethought, 'killed his lover the deceased on her bed at her house by penetrating her vaginal tract with a machete thereby causing multiple gut cuts that caused her death' and, consequently, convicted him for murder contrary to section 203 as read with 204 of the *Penal Code*.
2. During the sentencing proceedings held on March 27, 2023, the Prosecution urged deterrent sentence and the Accused, through Counsel and personally, mitigated for leniency as follows:

'March 27, 2023

Hon Justice E Muriithi, J.

Accused Present

Mr Ngugi for Accused

Mr Masila for the DPP

Mr Masila

Accused is first offender. I pray that the court considers the circumstances of the case and the injury inflicted on deceased by a dangerous weapon by a panga and what happened thereafter as the accused did flee from the scene and was arrested later.

Presentence report dated March 27, 2023 shows victim left two children who currently do not have a mother to cater for them. The character of the accused as shown in the pre-



sentence report. He was employed administration officer but lost his job for drunkenness at p.3 of the Presentence report. He deserves custodial sentence, all circumstances considered.

Mr Ngugi for the Accused

Accused is remorseful. He has reconciled with the family of the victim. I refer to the Recommendations of the Probation Officer. There is no acrimony between him and the family of the deceased.

The Probation Officer's report that the accused needs no protection from the family of the deceased. Accused has been taking HIV drugs and his health deteriorates further in custody. He is a breadwinner. He has a family that relies on him. He is nearly 40 years and he has a lot to offer the society. He was arrested in 2015 and has been in custody at some points. Accused has shown that he has propensity to reform. We pray for that opportunity.

Accused in mitigation

I have nothing to add but I pledge that I shall start my life if the court grants me opportunity. I will get married and go on with life.

Court

Judgment on sentence on April 27, 2023 at 2.30pm.'

3. The Court has considered submissions of Counsel for the Prosecution and the Defence as well as the Pre-sentence report filed by the Probation officer, which highlighted the accused's non-acrimonious relations with family of the deceased, recommending as follows:

' Summary

The offender is 39 years old having been born in 1984. His father passed on when he was barely 4 years and he was raised by his mother who became a widow in 1988. He went through a formal education and he was employed as an Administration Police officer but lost his job due to drunkenness.

The offender committed the offence when he was 31 years old and according to the family of the deceased, the late Susan Kathambi was 52 years old. The offender and the deceased started cohabiting when the offender was 29 years old. The offender does not have dependants and he has been single. He has been eking living by farming at their home.

The family of the deceased stated that Susan parted her way with her husband and came back to her parents' home. She was shown where to build her own house on the land which she did. She also engaged in making and selling of the local brew where the offender and other revellers frequent. The offender and the late started living together in the house built by Susan. The neighbours interviewed alleged that the deceased was not a person committed to one man and this could have escalated their misunderstanding.

The deceased had two children Nimrod Mwiti and Glory Gatwiri who were grown up on the time when this offence was committed. They were living in Chuka where she was initially married. They were brought up by grandmother in Chuka after their mother left them there. The daughter of deceased one Glory Gatwiri stated that she used to visit her mother and had started supporting her. She says it was unfortunate for her to lose her mother and losing her mother makes her feel bad.



The brother and father to the late Susan said they can only say they have coexisted well with offender before and even after he was released on bond. All the secondary victims interviewed opined that they leave the matter to the discretion of the court.

The neighbours stated that there is no acrimony against the offender. The home and vicinity is conducive and the offender has coexisted well with all in his community. The offender pleads for court leniency.'

4. The accused seeks reconciliation with the family of the deceased, which reconciliation he did not attempt with his girlfriend; he seeks forgiveness and leniency which he did not show the deceased, whatever the grievance he might have had with her; and he seeks a second chance to begin life with a new wife, the same chance in life that he took away from the deceased!
5. If there ever were a textbook situation suitable for the imposition the death sentence prescribed under section 204 of the Penal Code, it would this incident of callous killing of a lover by penetration into her private parts with a panga in an act smacking with obvious disdain, hatred and inhuman treatment. No person should have to suffer such indignity of death at the hands of a lover in such cruel and degrading assault. The circumstances of this offence, in the respectful view of this court, calls for a deterrent measure coupled with the treatment and reformation of the offender who appears to labour under severe deficit in anger control and management. The offender must get his just deserts!
6. As counselled by the leading case of *Francis Karioko Muruatetu & another v Republic [2017] eKLR*, that the death sentence is a maximum rather than a mandatory sentence for murder under section 204 of the Penal Code, the court considers an imprisonment term to meet the justice of the case so that the penal system does not itself appear inhuman in its treatment of offenders by imposition of final and irreversible penalty of death by which no offender is reformed. The justice system in a society based on human rights must show faith in reformation and rehabilitation through penal treatment of offenders.
7. The Court must deprecate the monstrous killing, for whatever justification, of the deceased by a person in the position of her boyfriend from whom, in the normal and ordinary course of things, care, love and affection - and not fatal assault - ought to flow! The Court considers that the appropriate sentence is an imprisonment term sufficiently long to treat and mellow his vicious temperament or psychological disposition to violence, and civilize him into humane respect for the rights and freedoms of other human beings. At 40 years, a prison term of 30 years actual custody, so that the accused is released at seventy (70) years of age when he can still usefully impart his penal lesson to others in the interest of deterrence, meets the justice of the case.
8. For these purposes, the accused who has been in custody for an aggregate of three (3) years, is sentenced to imprisonment for a period of forty-five (45) years, which with one third (1/3) remission under section 46 of the *Prisons Act*, becomes thirty (30) years of actual prison custody.

## Orders

9. Accordingly, for the reasons set out above, the Court sentences the accused to serve imprisonment for forty-five (45) years for the offence of murder contrary to section 203 as read with 204 of the Penal Code.
10. The aggregate period of 3 years of pre-trial detention, before the accused was released on bond which was subsequently cancelled when he failed to attend court and later granted upon review, shall be discounted in computation of the sentence in accordance with section 333(2) Proviso of the *Criminal Procedure Code*.



Order accordingly.

**DATED AND DELIVERED ON THIS 2ND DAY OF MAY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**Mr. Ngugi, Advocate for the Accused.**

**Mr. Masila, Principal Prosecution Counsel for the DPP.**

