



**Republic v Jefwa & 2 others (Criminal Case 33 of 2016)
[2023] KEHC 25026 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 25026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 33 OF 2016
DO CHEPKWONY, J
JULY 6, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALFRED KAZUNGU JEFWA 1ST ACCUSED

JUSTIN KAZUNGU JEFWA 2ND ACCUSED

MATANO KAZUNGU JEFWA 3RD ACCUSED

RULING

1. The accused persons, Alfred Kazungu Jefwa, Justin Kazungu Jefwa and Matano Kazungu Jefwa are charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#), the Laws of Kenya.

The particulars are that:-

“On the 13th day of August, 2016 at Kaloleni Village, Kaloleni Sub-location within Kilifi County, the accused jointly murdered Jefferson Kesi Kazungu”.

2. The case proceeded to full trial whereby the accused persons were found guilty and convicted for the murder of Jefferson Kesi Kazungu.
3. The offence of Murder is among the few offences in Kenya that carry a mandatory death sentence as a penalty. 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 –vs- Republic](#) [2017]eKLR which recognized that sentences to be imposed for the offence of murder should be appropriate, depending on various parameters. In this case, the Supreme Court found that the mandatory nature of the death sentence 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 even if a person is facing the death sentence, he/she deserves to be heard in mitigation as an important element of fair trial because of the finality of the said 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*.”

4. It is in compliance with this that this Court referred the matter to the Probation Officer for a social inquiry to be conducted on each accused person and pre-sentence reports to be compiled and filed in court. The Probation Officer, M/S Rosemary Nyonga conducted the social inquiry on each accused person, compiled and presented pre-sentence reports, all dated April 18, 2023. This report, together with the accused persons’ records from the prosecution and mitigation by the accused person are critical in informing court on the appropriate sentence to be meted out against the accused persons.
5. M/S Ongeti, counsel for the prosecution informed court that she had no records on the accused persons and recommended that they be treated as first offenders.
6. Their counsel, M/S Memia, mitigated on their behalf. She pointed out that the accused persons were brothers and the deceased, their cousin. She told court that the accused persons were praying for leniency since they are first offenders and have families with a mother who is single and ailing. She also stated that the community has been forgiving and is ready to welcome them back. She pointed out that the accused persons have been in custody since 2016 for failure to raise bail. She urged the court to consider a non-custodial sentence for them as they have been rehabilitated. Reliance was placed on the case of *R -vs- Andrew Otieno Owino*, Murder case No 52 of 2020.
7. The pre-sentence reports were presented in respect of each accused person. For the 1st Accused Person, Alfred Jefwa Kazungu, the inquiry was conducted from him, certificates acquired in custody, his relatives and Kaloleni community. The report indicates that he is married with two children and his mother is old and ailing. It is also indicated that the motive behind the offence is succession, and mainly concerning land. The Probation Officer recommended a non-custodial sentence for him since the community was supportive of his rehabilitation and re-integration back there.
8. With regard to Justine Kazungu Jefwa, the 2nd Accused Person herein, the source of information was himself, certificates acquired in custody, relatives and the community at Kaloleni area. He is reported to have been separated from his wife and two children but his mother is old and ailing, who they fear may die of frustration if his son is granted a custodial sentence since she had just buried her husband at the time of their arrest. The circumstances of the offence are similar to the ones presented for the 1st Accused Person. He is reported to have strong ties with the community which is not averse to him being given a non-custodial sentence. The Probation Officer has recommended a non-custodial sentence for the 2nd accused person in view of him being a first offender and having a fixed place of abode.
9. The 3rd Accused Person, Matano Kazungu Jefwa equally had information sourced from himself, certificates acquired in custody like his brothers, he was reported to have good relationship with siblings and the community. He was also recommended for non-custodial sentence.



10. 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.
11. In the *Francis Muruatetu* 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.
12. It will be appreciated that for most offences, the 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 among other factors.
13. I have read through the said Pre-sentence Report and it confirms the accused person's family status and occupation as per her mitigation to court. It also confirms the relationship between the accused person and the deceased prior to his death. And although the Probation Officer has recommended that a non-custodial sentence to be considered in regard to the accused, the inquiry from the community and victim's family is negative. She has been depicted as a violent person, anti-social, un-remorseful and un-apologetic.
14. In this case, the accused persons and the deceased are cousins and from the social inquiry conducted, it appears the underlying issue between their families in land/succession issues. However, that is not a justification for terminating another's life, especially at that prime age, as there are other means available for resolving such disputes.
15. This Court has taken into account the gravity of the offence, the circumstances thereof, the ages and character of the accused persons respectively, social and economic background of the accused persons, all as highlighted in their mitigation statement and pre-sentence reports. It is this Court's considered view that a sentence that achieves reconciliation, rehabilitation, deterrence and retribution be meted out against the accused persons. A sentence of ten (10) years and over would be appropriate but this Court has taken into consideration the period the accused persons have stayed in custody since 2016.
16. The accused persons are each sentenced to serve a period of three (3) years imprisonment. The accused persons have a right to appeal on both the conviction and sentence while the State has the right of appeal on the sentence.



It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF JULY 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

M/S Ongeti Valerie, counsel for the State

M/S Memia counsel for the accused persons

All accused persons

Court Assistant – Mwenda/Hamisi

