



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO. 9 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

BERNARD MWALIA KALITI.....ACCUSED

SENTENCE

1. The accused person **Bernard Mwalia Kaliti** had been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 28th day of February, 2013 he murdered **Felister Muneo Mwalia**. After a full trial, the accused was found guilty of the offence and convicted vide this court's judgement delivered on 25th November 2020.

2. Miss Kamene holding brief for Mr. Mulei for the accused, submitted that the accused was a first offender and was remorseful for the offence. Learned counsel added that the accused has been in custody for the last seven years and should be given a chance to rejoin his family and community members. Finally, counsel submitted that the accused had no intention to kill the deceased and that the circumstances do not amount to the highest level of murder.

3. This court called for a pre-sentence report on the accused, victim's family and the community. The same is dated 28.12.2020. The probation officer Ms. Eunice Kinya made certain findings namely; that the accused is described as a violent man and that he is not a straightforward person; that, the accused had several incidents of violence not only on his wife but other relatives; that, violence towards the deceased and their unresolved marital issues degenerated to threats that led to the death of the deceased; that the accused is not remorseful and continues to accuse the deceased of suicide despite being convicted by the Court for murder; that the deceased's family is still traumatized and bitter with him and they want him to be dealt with according to the provisions of the law; that the accused's family gave a negative report on him but believe that the time spent in remand has taught him a lesson and pleads with the Court to grant him a lenient sentence; that the children of the accused are fearful of him since he threatened to kill them if they revealed the facts of the incident; that according to the local administration it was in the public domain that the offender was very physically abusive towards his wife and first-born son and that they feel that the accused is a security risk to his children.

4. The accused is now up for sentencing. This court will be guided by the objectives of sentencing upon conviction so as to meet either of the following:

i. Retribution: to punish the offender for his/her criminal conduct in a just manner.

ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

v. Community protection: to protect the community by incapacitating the offender.

vi. Denunciation: to communicate the community's condemnation of the criminal conduct.

5. In this case, the undisputed facts are that the accused and the deceased were a married couple with children. It transpired that due to their frequent squabbles, the deceased used to leave for her relations home for refuge but would often be forced back for the sake of her children.

From the evidence on record, the accused was known to be violent and abusive towards the deceased and their first born son and it would appear that the deceased had nowhere to seek refuge and had thus resigned herself to fate. This was confirmed by one of the children who testified herein (Pw2) who stated that on the fateful day the accused arrived in company of the deceased who had injuries on the head and that his parents locked themselves in the house only for his father to later claim that the deceased had hanged herself. The manner in which the deceased met her death was quite tragic. The accused's actions were vilest towards his wife who was the mother to his children.

6. In **Republic v Peter Mukuha Mbai [2020] e KLR Wakiaga J** stated as follows in sentence:

“From the judicial decisions, the following factors must be taken into consideration as sentencing principles: - The sentence must be no more severe than is necessary to meet the purposes of sentencing. The overall punishment must be proportionate to the gravity of the offending behavior, similar offences committed by offenders in similar circumstances must attract similar sentence and the overall sentence must be just and appropriate in light of the overall offending behavior.

While weighing on the nature of gravity of the offence, the court must take into account the intension of the offender, the consequences of the offence, the nature of the weapon used and the offender's history of the offending.”

7. In **Republic v Cornelius Thuku Mbulika [2020] eKLR** the court held:

“The Convention on Preventing and Combating Violence Against Women and Domestic Violence: - defines domestic violence as ‘all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit between former or current spouse or partners whether or not the perpetrator shares or has shared the same residence with the victim. Article 3.b.

The sentence meted out to the convict must therefore be commensurate with the gravity of the crime committed worth the purpose of the punishment being:

i. Exerting a preventive influence on individual not to commit criminal offences

ii. Preventing the perpetrators from committing additional offences and encouraging his/her rehabilitation and expressing the community's condemnation of the criminal offence and reaffirming the value of the law.

This court has said and shall continue to say “that all married persons but women in particular have a right to choose their own destiny and until this message is spread and applied consistently at all levels of the justice system, more women will continue to die in the confines of their homes, where they expect love and comfort and the perpetrators will continue to thumb their nose at the law by evading appropriate sentence and the right to equal treatment guaranteed in our constitution will be but a mirage.”

8. Okwany – J stated as follows in **Republic v Benard Ondigi Riaga [2015] eKLR**.

“I also note that the accused acted in a very cruel and vicious manner against his own wife who he was supposed to protect from any harm. The actions of the accused clearly demonstrate his lack of respect not only for women but also for human life and he must therefore not go unpunished. The reckless actions of the accused led to the early death of a young lady whose age was estimated to be 18 years during the post mortem examination.”

9. In this matter, I have taken into account the fact that the accused is a first offender and that although he denied killing the deceased who was his wife, he appears to have issues in controlling his anger and violent tendencies. One should never kill the person they claim to love so much and if love is lost between them, the accused had the option of letting her leave the matrimonial home but not to kill her for just some small transgressions.

10. I have noted that the accused has been in prison custody for seven (7) years from the date of his arrest as he was not out on bond. He is an old man. He prayed for sentence that he can serve and return home. Pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another Vs R (2017)** the mandatory death sentence was declared unconstitutional and that courts have discretion to consider mitigating circumstances and mete out appropriate sentences on convicted offenders. However, the court could still mete out stiff sentences depending on the circumstances of each case. In the present case, the accused is a first offender and which factor I have taken into consideration.

11. I have taken into account the violent tendencies on the part of the accused. Even though the accused claims to be remorseful, the presentence report indicates that he is still in denial. The report is not favourable for an order of release or even non –custodial sentence due to the fear of the accused's violent nature. His children are reported to be in mortal fear of him. This militates against an order of release. I find that the accused requires a deterrent rehabilitative sentence so as to reform him. The seven years the accused has been in custody will be factored in the sentence to be imposed.

12. Accordingly, having taken into account the age of the accused, the circumstances under which the offence was committed, I hereby sentence the accused **Benard Mwalia Kaliti** to serve a prison term of twenty (20) years imprisonment from the date of arrest namely **01.03.2013**.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021.

D. K. KEMEI

JUDGE