

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 4 OF 2016 [MURDER]

REPUBLIC.....PROSECTUTOR

VERSUS

BOO alias M.....1ST ACCUSED

SIMON WANINA ALINDI alias OKOTH.....2ND ACCUSED

RULING ON SENTENCE

1. On 26.1.2021 this court delivered judgment where it found the two accused persons herein BOO alias M and Simon Wanina Alindi alias Okoth, guilty of the offence of Murder and convicted them accordingly.
2. The court then reserved sentencing until after mitigation and pre-sentence reports to be filed by the Probation Officer on each of the accused persons.
3. In his mitigation, the first accused who is a first offender pleads for leniency and is remorseful. He is advanced in age, 63 years and is married with two wives and ten children. The first wife died. He is the sole breadwinner for his family. Some of the children are school going. He prays for non-custodial sentence stating that he has a problem with his lungs and requires to be attended to at Kakamega or Eldoret Referral Hospitals. In addition the 1st accused person states that he has a hearing impairment in his left ear and that as a result, he has issues at the G.K. Prisons as he cannot take instructions due to hearing impairment. He claims that some of his children have dropped out of school due to his incarceration as he was their sole bread winner.
4. In the pre-sentence report filed on 8.2.2021 by Mr. David O. Odumba, Probation Officer, the 1st accused is said to be aged 63 years, and a village elder. He is a first offender and is HIV positive. He has 13 children 9 from his first wife who is deceased and 4 from his second wife who is alive. Some are in school others are seeking for employment.
5. The victim's mother seeks for deterrent sentence and claims that her son was killed because she is a widow and that there was interference with witnesses as they recorded statements but never testified. The community speaks well of the 1st accused who is their village elder and retrenchee of the defunct Kenya Posts Telecommunications Corporation. He has never been in conflict with the law and is said to be a responsible person.
6. On the part of the 2nd accused Simon Wanina Alindi, it was submitted in mitigation that he is 63 years old and married with 5 children. He prays for forgiveness and leniency as his children depend on him. He also takes care of two orphaned children belonging to his late sister. Two of his children are in college and university while one is in Form 2 at Lenana High School. He also cares for his 92 year old mother who is sickly and on drugs supplied by the accused. His family commend the accused to be of good character and that there were no differences with the deceased or his family. The victim's mother prays for deterrent sentence to avenge for her son's death.
7. The prosecution prays for deterrent sentence as the accused took the law into their own hands and killed the deceased instead of arresting him and handing him over to law enforcement agencies.
8. I have considered the touchy mitigation by the accused persons, the circumstances under which the offence was committed leading to the death of the deceased who is alleged to have stolen a bed. The accused persons were law abiding citizens who were given responsibilities by the community to be village elders. Regrettably, they did not know their boundaries with regard to the handling of suspects in the community. The accused ought to have known that every person has the right to live and suspects of offences are to be arrested and taken to the police station not to be administered mob injustice or to be thrown to the mob for chastisement.
9. The deceased, even if he was a thief did not deserve to be killed, live and let live. Punishment for **Murder Under Section 204 of the Penal Code is death**. However, this is not mandatory sentence in view of the **Supreme Court of Kenya decision in Constitution Petition No. 15 and 16 of 2014 – Francis Karioko Muruatetu and Another Versus Republic [2017] eKLR**. The said decision confers on this court discretionary power to mete out appropriate sentence having regard to the mitigation and circumstances under which the offence was committed.
10. Sentencing is therefore in the discretion of the trial court. Furthermore, there is no evidence that severe penalties deter the would be offenders. Having considered all the above, I am persuaded that the accused persons who are in their 60s with multiple dependants and health issues deserve a non-custodial sentence to enable them be counselled and be rehabilitated. For the above reasons, I hereby sentence each of the two accused persons BOO and Simon Wanina Alindi to serve Probation for a period of three (3) years each.
11. Right of appeal explained.

12. Orders accordingly.

Dated, Signed and Delivered at Siaya this 2nd Day of March, 2021

R. E. ABURILI

JUDGE