



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 78 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWITI NDATHO.....ACCUSED

SENTENCE

1. By the Judgment of this Court (Lesiit J.) of 23rd October 2014, the accused person was found guilty for the offence of Murder contrary to Section 203 of the Penal Code, convicted pursuant to section 322 of the Criminal Procedure Code and sentenced to suffer death. He had initially filed an appeal at the Court of Appeal but later withdrew the same. The Court of Appeal directed that the matter be brought back to the High Court for sentence re-hearing and re-sentencing.

2. The accused was found guilty for the murder of a close relative in his home, in broad daylight and in the sight of other family members. The attack was precipitated by a boundary dispute which moved the accused to cut the deceased with a panga, inflicting deep cuts on the head. The number of cuts inflicted on the deceased were numerous and vicious. The doctor who testified for the Prosecution gave evidence of the grave nature of injuries not only on the head but also deep cut wounds on both hands with dismemberment of the 3rd, 4th and 5th fingers on the left hand with the thenar eminence cut off, and deep cut wounds on the thigh and legs. The accused was ruthless in his attack.

Re-sentencing

3. The court has discretion in sentencing for the offence of murder as with other cases as held by the Supreme Court in the case of **Francis Karioko Muruatetu & Another v. R Petition No. 15 and 16 (Consolidated) (2017) eKLR**, which prompted the Court of Appeal's order for resentencing herein.

4. The objectives of sentencing as set out in the **Kenya Judiciary Sentencing Policy, 2016** (see para. 92 of *Muruatetu*) are as follows:

“Sentences are imposed to meet the following objectives:

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 offences.

3. Rehabilitation: To enable the offender reform from his 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. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct.”

5. When the matter came before the Court for resentencing hearing, Counsel for the accused in mitigation urged that the accused was a first time offender and that he has been in custody for 11 years and has undergone rehabilitation. He highlighted the contents of the report from the prison department dated 12th April 2021. He prayed for the release of the accused.

6. This Court has had a chance to peruse the contents of the report from Officer in Charge, Meru Main Prison. It is stated that for the almost ten (10) years that the inmate has been in custody from the time of his arrest, he has been transformed and rehabilitated in many ways and THAT:-

(i) He regrets his actions and he is very remorseful for what he did.

(ii) He has pledged loyalty to his country through community policing that no crime will occur unreported within his vicinity.

(iii) He has learnt the hard way and known the bitter consequences of crime and transgressing against the law.

(iv) He is a staunch Christian faithful who always gives valuable counsel to other inmates both in spiritual arena and life skills. Since his jail term David has fully embraced the correctional core value of reformation and rehabilitation hence considered a person who can integrate well with the outside world.

(v) During his stay in prison, he acquired the following credentials:-

a) Certificate of completion by the prisoner's journey.

b) Certificate of Phillips Act 8 Bible Study Program.

The officer affirms his belief that David would be a good and productive citizen of he were to return to the society.

7. This Court has considered the report, the fact that the accused was a first time offender and the discretion of the Court pursuant to the *Muruatetu* case. The conduct of the accused depicts one such who is remorseful. He has been in custody for about 11 years now. While the offence was heinous, and committed without provocation, this Court considers the peculiar circumstances of the case, one being that there was a land boundary dispute between the deceased and the accused, and the resentencing after the accused has spent a long period in custody during which the prison authorities confirm the accused's reform and suitability for rehabilitation into Society.

8. In not very dissimilar circumstances, in *Stephen Kinoti v Republic Misc Criminal Application No. 17 of 2018 (2019) eKLR*, A. Mabeya J. substituted a death sentence with one for 20 years for an accused who had been convicted for robbery with violence pursuant to the *Muruatetu* case.

9. In view of the foregoing, this Court substitutes the death sentence for the more serious offence of murder herein with one for thirty (30) years imprisonment, which allows the accused to leave prison upon serving for deterrence an actual custody time of 20 years and released thereafter for rehabilitation into the society, the progress towards which the Prison authorities have confirmed.

Orders

10. Accordingly, for the reasons set out above, the court sentences the accused to imprisonment for thirty (30) years for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The sentence shall take into account the period of pre-trial detention from the time he was first arrested awaiting trial.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF MAY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. B. Nandwa, Prosecution Counsel for the DPP.

Mr. Mutegi, Advocate for the Accused.