



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 33 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KIOKO MALUNGU.....ACCUSED

SENTENCE

1. The accused herein, **James Kioko Malungu**, was charged with the offence of murder contrary to section 203 as read section 204 of the **Penal Code**. It is alleged that the accused, on the 21st day of September, 2012 at Kyaani Village, Kyaani Sublocation in Machakos District within Machakos County, murdered **Eunice Mbula Kioko**.

2. After hearing, this court found that the deceased met his death as a result of an unlawful act or omission on the part of the accused person. However, the court was unable to find that the death of the deceased was caused by malice aforethought on the part of the accused. Accordingly, the accused was found guilty of manslaughter.

3. In mitigation, it was submitted on behalf of the accused by **Mr Kamollo**, his learned counsel, that he was remorseful in respect of the event that led to the death of his wife. It was submitted that the accused is a father of 4 children 3 of whom are minor school going children. Further, the accused has recently remarried and that his family wholly depends on him for upkeep. He therefore pleaded for non-custodial sentence as he had reformed from being a drunkard to being a responsible person. The court was invited to consider the probation report which was favourable to the accused.

4. On the part of the prosecution, it was submitted by **Mr Ngetich**, learned state counsel, that the accused may be treated as a first offender. Based on the Probation Report, the Court was urged to impose a deterrent sentence noting that a life was lost.

5. According to the Probation Report, the offence emanated from unresolved marital problems, lack of conflict management and resolution skills, poor anger management and lack of self-control and the drunken state of the offender. According to the report, the accused is remorseful and regrets committing the offence. He attributes his woes to alcoholism. It is stated that over the years he has been emotional to the extent that he sheds tears whenever his children ask him what transpired.

6. It is reported that the children have long forgiven the accused who took care of them after the death of their mother and as a result two of them have complete school and he has supported them to initiate income generating activities. They pleaded with the court to impose a lenient sentence to allow him take care of them particularly the last two children to pursue their education.

7. The family of the deceased reportedly hold no grudge against the accused who has been assisting them and they wish that the court shows leniency to him so that he can continue taking care of his children as they are not able to take care of them.

8. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of **section 329** of the **Criminal Procedure Code** which provides:-

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

9. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

10. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

11. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

12. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, as a guide in sentencing held that:

“[71]...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(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 offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

13. Loss of life is a very serious matter. In this case it is clear that the accused and the deceased were close and apart from the fact that the accused was rather temperamental, there were no serious differences between the two.

14. As appreciated by the Supreme Court in **Muruatetu Case** (supra):

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 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."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

15. The accused has, since the death of the deceased been responsible person towards his family as well as the family of the deceased. To my mind the accused herein require therapy rather than punishment and ought to be placed on probation in order for him to undergo guidance and counselling since the two families seemed to have reconciled.

16. In the circumstances of this case, the main objective of sentencing has been largely achieved and keeping the accused in custody will not serve any useful purpose. To the contrary it will be detrimental to the accused and his family. The fact that he lost his wife courtesy of his action clearly weighs heavily on him as revealed in the probation report and no sentence heavier than that can be imposed by this court.

17. Having considered the circumstances of this case, on the authority of **Republic vs. Sarah Mutete Matheka [2018] eKLR**, I direct that in order for the accused to undergo anger management therapy he ought to be under the supervision. Accordingly, the accused is hereby placed on probation for three (3) years. Should he fail to comply with the directions and instructions given to him, he is reminded that he will serve the remainder of his term in custody.

18. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH JUNE, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Langalanga for Mr Kamollo for the accused

Mr Ngetich for the State

CA Geoffrey