



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 63 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MJD.....ACCUSED

RULING ON SENTENCE

1. The accused **MJD** was convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code for the murder of **FVO** on the night of 10th/11th July, 2014 at **ALPHA HOUSE**, Juja Area within Kiambu County.

2. The court is now called upon to pass out an appropriate sentence herein taking into account the Supreme Court decision in the case of **FRANCIS MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** in which the Supreme Court of Kenya while retaining the death sentence found that its mandatory nature was unconstitutional and for the purposes of this sentence had this to say: -

“45. To our minds what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the Constitution are not exhaustive.”

3. The court therefore proceeded to pronounce itself thus:

“58. 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 article 25(c), 28, 48 and 50(1) and (2) (g) of the Constitution.

MITIGATION

4. With the Supreme Court decision in mind the court called upon the convict to mitigate. On his behalf Mr. Nyangweso submitted that the offence was committed at the time when the accused was very young and not in control of his life. He sought for a non-custodial sentence so as to be accorded a second chance in life. The accused was very remorseful for what had happened and stated that no human being had powers to reverse what had happened save to apologize to the family of the deceased on what had happened.

5. On behalf of the State, Ms Ogweni submitted that that the deceased was only nineteen (19) years at the time of her death and that there was no justification for the accused to cause her death. It was submitted that non-custodial sentence was not justified in the circumstances of the offence and life imprisonment was sought since the victim family had not healed from the death.

PRE-SENTENCING REPORT

6. It was stated therein that the accused was the 1st born in a family of four who had been brought up in the Adventist Faith. At the time of the offence he had enrolled for a Diploma in Information Technology course at [particulars withheld]. At the time of the offence the accused used to abuse drugs and substances and would drink and party all night long under the influence of his peers.

7. It was stated further that the accused runs a you tube channel where he posts funny animated clips and his music production. He used to attend [particulars withheld] CHURCH Nairobi until 2015 when he stopped. On the home front, it was indicated that the family sought leniency for the same on account of his young age.

8. On the circumstances of the offence it was stated that the convict and the deceased were friends since high school. He convinced the deceased to enroll for a course at JKUAT where they were staying together. On the material day they had a disagreement over suspicion of unfaithfulness and was infuriated that the deceased reportedly had another man in her life. He admitted having set the room on fire and locked the deceased inside.

9. On the attitude towards the offence it was stated that the events of that night was still rife and that the death of a girlfriend he loved so much traumatized him causing him lack of sleep. His life has never been the same. He therefore sought forgiveness from the deceased family and a second chance in life.

10. On the victim impact statement, it was stated that the deceased was their favourite child and her death had left a big, hard to fill gaps

11. which had affected her parent's health and psychologically affected her siblings. They prayed for justice on behalf of the deceased.

12. When called upon to comment on the presentencing report, Mr. Okeyo for the State submitted that all throughout the trial, the convict denied committing the offence, thereby submitting the family of the victim to torturous moment following all through the trial, which portrayed the convict as an unreliable person who should not benefit from non-custodial sentence. He contended that the family of the victim insisted on justice and that the father of the deceased upon hearing of the news of her death went berserk and has not recovered to date. He submitted that by having the convict serve full sentence, that will serve as rehabilitation.

13. Mr. Nyangweso, for the convict, submitted that the convict who was known to the family of the deceased, should be given an opportunity so as to seek reconciliation with and forgiveness for them. He contended that the family of the convict had also gone through pain during the period of the trial and having committed the offence while young, being imprisoned at this stage shall not be of benefit to him.

DETERMINATION

14. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -

- 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/her 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.***
- 5) ***Community protection: to protect the community by incapacitating the offender.***
- 6) ***Denunciation: to communicate the community's condemnation of the criminal conduct.***

15. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors:-

- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
- b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
- c) Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
- d) Protection of the community:- where the offender is likely to pose a threat to the community.
- e) Offenders responsibility to third parties:- where there are people depending on the offender.
- f) Children in conflict with the law:- non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied

that a custodial order is the most appropriate.

16. The Supreme court in the Francis Muruatetu case at paragraph 17 amended the guidelines in respect of re-hearing sentence for the conviction of murder charge 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 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.*

17. In this matter, though the accused and the deceased were young at the time of the offence, they deemed themselves old enough so as to enjoy “the fruits of adulthood.” Though not married, they were staying together in a room that was being paid for by the parents of the deceased. And as I stated in the judgment, they became lovers yet not exclusively to each other.

18. The accused ought to have known that even though the deceased had given him both her heart and her body, she retained the right to say no at all the time and to get out of that relationship if and when the same so wished and all that the accused was supposed to do, was to keep the memory of the good times and let her go on with her life.

19. It must be stated for the record purposes that the offence in this case was gender based violence. It was violence against the deceased, who was a girlfriend of the accused, who in his testimony before the court and in the pre-sentencing report admitted that in addition to the deceased, he was seeing other girls on the side, but could not take it when the deceased turned tables on him, by hooking up with her ex-boyfriend who was visiting from Dubai. He must have been such a selfish lover.

20. I have said before and will continue to say that all 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, or in houses, 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. See the Case of **REPUBLIC v CORNELIUS THUKU MBUGUA [2020] eKLR.**

21. In the case of **REPUBLIC v RUTH WANJIKU KAMANDE [2018] eKLR** the Judge had this to say to young people.

“³⁰ I want young people to know that it is not cool to kill your boy or girlfriend. Even where you feel disappointed or frustrated don't do it. Instead it is cool to walk away and thereafter forgive.”

22. In DANIEL ONYONDI MOI v REPUBLIC [2019] eKLR the Judge had this say: -

“Regina's vessel of life will never have sailed in this sea of existence that we know. It is drowned by the storms caused by the accused person's inhuman action.

Why? because the accused could not accept the fact that Regina could not accommodate him as she was still in a relationship with the father of her children.

He could have noted this and just walked away. But instead decided if she could not be with him then she would not be.

Courts must send the strongest message marital/relationship disputes cannot, should not/should never be resolved through killing or causing any harm to the other party. The sanctity of love and the family must be protected by people understanding that there are better ways to resolve disputes. If it is not tolerable, then it is better to walk away and forget the relationship. Our society must revive its revulsion to any form of violence. Our society must have no tolerance to domestic violence and gender based violence. The message must be heard loud and clear. Killing girlfriends will not be tolerated by this society. Killing wives will not be tolerated by this society. Killing boyfriends and husbands will not be tolerated.”

23. I cannot say it better that the two Judges have stated. I have therefore taken into account the age of the accused and deceased and the fact that they were both too young at the time and as stated in the judgment experiencing freedom away from the watchful eye of their parents and the way the accused executed the offence and his attempt thereafter to cover up include taking away the deceased mobile phone and come to the conclusion that a custodial sentence mixed with non-custodial sentence will be the most suitable sentence herein so as to send a clear message to all that it is not cool to kill for love however entitled or disappointed one feels.

24. In the case of REPUBLIC v ANTONY MWEMA MUTISYA [2020] the court has this to say as regards similar circumstances:-

“34. Young men and women must appreciate that your girlfriend or boyfriend is not your property. He or she has the right to say no at any stage of the relationship and where according to her, she has seen the light whether before embarking on the journey or in the course of the journey to Damascus and feels that you are not the rib that was meant for him or her, you must accept that decision and move on however painful the decision might be. While one may use the art of persuasion to try to change another's mind, he/she have no right to resort to violence to quarantine or lock him or her down. Instead what one can do to avoid harming others through violence is to sanitize oneself from the temptation to cause harm to a person who finds his or her company unwelcome and to keep one's social distance until such a time that he/she had had passion temperature normalized or he has vaccinated himself against such temptation.

35. To adopt a system of contact tracing by setting out to harm innocent person... ought not to be circumstanced in any justice system. Unless the above guidelines are adhered to one runs the risk of being isolated for a very long time.”

25. In passing an appropriate sentence to the convict and taking into account the fact that the life of the deceased may not be replaced and have taken into account the following cases: -

1) ALEXANDER MBEVO MUTEMI v REPUBLIC [2020] eKLR wherein the Court of Appeal substituted death sentence with a custodial sentence of 30 years' imprisonment in respect of murder of a girlfriend.

2) REPUBLIC v JOSEPH OTIENO OWINO [2020] eKLR where the accused was sentenced to twenty (20) years imprisonment for killing his wife where the Judge had this to say:-

“13. In this matter, I have taken into account the fact that the accused was a first offender and that although he denied killing the deceased who was his wife, he appears to have been so emotionally attached to the deceased, that he decided that if the deceased refused to get back to him then she must die. Emotional attachment is not necessarily love as love is kind and patient. 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 go. Live and let live.

.....

15. I have taken into account the lost love on the part of the accused and the need warn the youth in particular of the need to control their emotions while trying to love

26. I have taken into account the age of the accused at the time of the commission of the offence and as submitted by his Advocate, in the foolishness of the youth and his conduct during the trial. I have further taken into account his mitigation and cry for a second chance in life, balance against the cry of the parents of the deceased whose only mistake was to love at a young age and the need of the accused to be

rehabilitated into perhaps an ambassador against the effect of engaging into pre-marital sex at a young age and whereas custodial sentence will serve the purposes adequately, this is a case where mercy and justice ought to kiss each other.

27. I have noted that not being able to face up to what he had done, the convict attempted to cover up the dreadful crime and got his friends to stand up for him during the trial, creating a scene as if there was an electric fault in the flat, which led to the fire, only that the said fire was too selective to burn only the bed where the deceased body was found. It must have been a very painful death if the deceased had not been killed before being set on fire.

28. Though not playing the part of God, I would give the convict the benefit of doubt, that he has learnt a lesson or two during the six (6) years period of trial, which I hope has been his wilderness experience, which I have taken into account while computing the sentence, noted from the presentencing report that he is currently a you-tuber posting funny animated clips and a music producer, which he can have use of as an ambassador for change among the youth.

29. I would therefore sentence the convict to a term of ten (10) years to be served as follows: -

a) Seven (7) years imprisonment as a deterrence and retribution

b) Three (3) years thereafter on probation for further rehabilitation and placement of the same back to society.

30. The convict is entitled to a right of appeal both on conviction and sentence while the State is entitled to right of appeal on sentence.

31. And it is ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Nyangweso for the Accused

Accused present

Court Assistant Gitonga