



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D. K. Kemei J.)

CRIMINAL CASE NO. 24 OF 2017

REPUBLICPROSECUTOR

VERSUS

COSMAS MUTINDA MUIAACCUSED

RULING ON SENTENCE

1. The accused herein **Cosmas Mutinda Muia** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. On 3rd February 2021, the court found the accused person guilty of the murder of **Maria Mwelu Muoki** and convicted him. The court called for the pre-sentence report from the Probation Office. A copy of the report dated 23rd February 2021 was filed in court on 6th May 2021.

2. According to the probation officer's report, the accused person was born in 1995. He is a single man reported to be of good health. The report indicated that the accused person had no previous convictions but during an inquiry, the accused person was under punishment in prison for misconduct of being in possession of a phone, 50 rolls of bhang and a packet of roaster cigarette. The probation officer found out that the accused spends his free time drinking alcohol with friends, smoked cigarette and was a suspected drug peddler. It is indicated in the report that the family of the accused initiated reconciliation arrangements with the family of the deceased a few days after the incident but which was not successful on the ground that there was no marriage between the accused and deceased. According to the probation officer, the offence was committed due to poor anger management and lack of self-control as the disagreement with the deceased was over a phone call the deceased had received from another person whom the accused suspected might have had something between that person and the deceased. It was noted by the probation officer that the accused fled the area and later tricked by a friend leading to his arrest. The report also indicated that the accused's conduct in failing to assist the deceased after the incident depicted him as an uncaring person.

3. The probation officer indicated that the accused's family gave a positive report while the deceased's family members were saddened by the death and were left in shock. The deceased's family members are still bitter. The deceased's siblings call for justice for the deceased while the extended relatives feel compensation process replaced the deceased. The deceased's family members vouched for a lenient sentence. According to the probation officer, the community youth called for a lenient sentence while the elders called for justice for the deceased. The local administration gave a negative report and it was of the opinion that a lenient sentence would send a negative message to the youths.

4. Finally, the probation officer was of the view that while the family members are engaged on compensation process based on Kamba customs, the accused person exhibits no remorse and blames his woes on alcoholism. Again, while in remand he was punished for offences as a result of engaging in illegal business of raising money for upkeep while in prison hence a display of don't care attitude by the accused. According to the probation officer, the accused is a first offender but has a history of petty offences like stealing farm produce. That the accused person engaged in indiscipline while in prison by peddling drugs.

5. Mitigation on behalf of the accused person was led by Mr. Langalanga. Counsel submitted that the accused is aged 24 years and that his parent is a single mother; That the accused has been in custody since November 2017; that the accused is remorseful and seeks leniency; that the accused has engaged the deceased's family to compensate them pursuant to the Kamba customs. It is urged by counsel that custodial sentence is not rehabilitation. That the accused person reformed while in prison. It is urged by counsel that the accused did not have an intention to commit the offence. That there is no hostility between the community and hence counsel implored the court to adopt a lenient approach and grant a non-custodial sentence.

6. Mr. Mwangera counsel for the prosecution submitted that the court should take into consideration that the deceased left behind her 6 months old child who has been left in the care of relatives. According to the learned prosecutor, life has been lost and the circumstances leading to the death must be considered. According to the prosecutor, the period spent in custody must be taken into consideration.

7. I have considered the mitigation presented on behalf of the accused, the report prepared by the probation officer as well as the submissions by counsel for the prosecution.

8. The accused has already been convicted for the offence of murder pursuant to section 204 of the Penal Code. It is provided under the section that:-

“Any person convicted of murder shall be sentenced to death.”

9. The punishment for murder is therefore death. However, following the decision of the Supreme Court in the case of **Francis Kariuki Muruatetu and Another –Vs- Republic [2017] eKLR** the death penalty was declared to be unconstitutional in the following terms:-

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”

10. The finding by the Supreme Court paved way for courts to receive mitigating circumstances from convicts before passing the appropriate sentences. The factors to consider include the following:-

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, 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) Whether the convict is a first offender;**
- (c) Whether the offender pleaded guilty;**
- (d) Commission of the offence in response to gender based violence;**
- (e) Character and record of the offender;**
- (f) Remorsefulness of the offender;**
- (g) The possibility of reform and social adaptation of the offender;**
- (h) Any other factor that the court considers relevant.**

11. It is imperative to note that the probation officer’s report is not binding to the court but persuasive as it has not been subjected to cross-examination in court. However, the same cannot be ignored as held by **Odunga J** in **Republic v Antony Mwema Mutisya [2020] eKLR** that:

“.....in undertaking a resentencing the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore important that not only should a report be availed to the court concerning the position of the victim’s family and the offender’s family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so is not necessarily fatal to the sentence.”

12. The findings in the report are that the accused blames alcoholism for his action. The accused ran away after committing the offence of murder. The accused seems not to be remorseful for his action. He smokes cigarette, bhang and drinks alcohol as per the pre-sentence report. According to the report, the local administration gave a negative report on the accused’s character. The deceased’s family is bitter despite a compensation process being initiated. On the other hand, the accused’s family gave a positive report about the accused.

13. According to the report, the reports from the prison indicate that the accused has not learnt a lesson since he has been punished for being in possession of bhang, cigarettes, phone and has engaged in the illegal business of raising money for upkeep in prison which is an indication that he doesn’t care despite having been convicted for murder. It is noted that the accused has been in custody since November 2017.

14. In **Republic vs Gabriel Mari Gakui [2021] eKLR** where the accused was single man aged 30 years and known to abuse alcohol, not remorseful and ran away to his sister’s house, in Juja area, **Kasango J** sentenced the accused to **20 years** imprisonment.

15. **Lesit J** in **Republic vs Ruth Wanjiku Kamande [2018] eKLR** while maintaining death sentence where the accused had stabbed the deceased 25 times held that:-

“It is important to say that in my view that discretion to pass a sentence other than death in capital offences should only be

exercised in the deserving cases. I do not find this a deserving case. I think to pass any other sentence than the one prescribed would turn the accused to a hero. 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."

16. The circumstances leading to the demise of the deceased appear rather tragic since the deceased who was barely 19 years old and with an infant aged six months had her life suddenly cut short by the actions of the accused herein. The accused just snuffed out the life of the deceased just because she refused to reveal the identity of a certain person who had just called her. The accused claims that he first slapped her but then went ahead to strangle her. The nature of the injuries inflicted on the deceased left no doubt that the accused intended to cause grievous harm or death to the deceased. The deceased's six month old child has had to be placed with some relatives for support. The action of ending the life of the deceased was unwarranted and that the loss of life has had an impact on the family of the deceased. As pointed out in the pre-sentence report, the conduct of the accused in abandoning the body of the deceased at the roadside and fleeing from the area as well as failing to reform while in prison is a clear indication that the accused is not a proper candidate for a non-custodial sentence. It is only a custodial rehabilitation that suits him in the circumstances.

17. Taking into account the period spent in custody as well as the pre-sentence report, I am of the view that a sentence of twenty (20) years imprisonment is appropriate in the circumstances. Consequently, the accused is hereby ordered to serve Twenty (20) years imprisonment from the date of arrest namely 13/11/2017.

It is so ordered.

Dated and delivered at **Machakos** this **8th** day of **July, 2021**.

D. K. Kemei

Judge