



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL CASE NO. 4 OF 2019

REPUBLIC PROSECUTOR

VERSUS

EZEKIEL LOKATUKONACCUSED

RULING ON SENTENCE

1. The convict was convicted on the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on 26th day of March, 2019 at Lorugun location in Lima sub county within Turkana County murders **ZIPPORRAH EKAL ALETAI**.
2. The court is now called upon to pass out an appropriate sentence herein.
3. The starting point is the Supreme Court decision in **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.”

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.

4. In compliance with the said decisions the court called for pre-sentencing report and invited the convict to mitigate.

PRE-SENTENCING REPORT

5. In the report dated 4/6/2021, it was stated that the accused claimed that he had no intention of harming or killing the deceased, who was his wife but acted in self-defence, because she was armed with dangerous weapon, which she could have used to harm him as well. It was contended that the accused found the deceased at home drunk chopping a roasted goat meat using kitchen knife. When he asked her, why she opted to buy roasted meat for herself instead of cooking food for the whole family, the deceased responded in anger and an altercation ensued, which resulted into a physical confrontation with the deceased threatening to stab him using the knife she was holding, with the deceased stabbing him twice at the back and in defending himself, stabbed her at the back causing her to fall down.

6. It was contended that the accused who was described as a very soft person who could not be angry even when intimidated by other children, by the Village Elder, who further stated that he had never been involved in any criminal activity and always involved in church activities, was a first offender and remorseful.

7. It was contended that he was the sole bread winner of his family and that the home environment was conducive for his rehabilitation and could therefore benefit from non-custodial sentence.

8. On the victim impact statement, it was stated that the family of the deceased could not be reached since they lived in a remote area where there was no network coverage.

MITIGATION

9. In mitigation it was stated that the accused was a first offender and of middle age wo should be considered for non-custodial sentence.

DETERMINATION

10. 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.***

11. 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) **Offender's 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.

12. The Supreme court in the **Francis Muruatetu case** at paragraph 71 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.

13. In this matter, the convict and the deceased were married and therefore, this is a case arising out of gender based violence. As stated in the Judgment, the convict and the deceased had lived together as husband and wife and therefore the convict ought to have known her better.

14. 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**.

15. In sentencing the convict, I have taken note of the cases of: -

a) **REPUBLIC v JOSEPH OTIENO OWINO [2020] eKLR**, where the accused was sentenced to twenty (20) years imprisonment for killing his wife.

b) **REPUBLIC v SAMSON KALAMAI LEBENE KBT HCCR CASE NO. 2 OF 2017** where the court sentenced a husband who killed his wife following a domestic quarrel to imprisonment for five (5) years to meet the justice of the case, rehabilitation and deterrence of the accused and assuagement of the deceased's family.

c) **REPUBLIC v JOHANA MUNYA MWENI [2018] eKLR** where the victim was subjected to domestic violence by the offender as a result of their union lacking a child was sentenced to serve 35 years imprisonment.

16. Having taken into account the circumstances leading to the commission of the offence herein the recommendation by the Probation Officer and the fact that the accused was a first offender, I am of the considered opinion that a sentence combining both custodial and non-custodial sentence will achieve the objective of both deterrence and rehabilitation.

17. Having taken further into account the doctrine of proportionality in sentence, I have come to the logical conclusion that a sentence of seven (7) years will meet the justice of this case, to be served as follows:-

(a) Five (5) years with effect from 24/4/2019 imprisonment to act as deterrence and retribution.

(b) Two (2) years thereafter on probation for rehabilitation and placement of the convict into society.

18. The accused has right of appeal both on conviction and sentence while the State has a right of appeal on sentence and it is ordered.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 7TH DAY OF JULY, 2021

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J. WAKIAGA

JUDGE