



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T LODWAR

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MOSES LUCKY EVERESTE.....ACCUSED

RULING ON SENTENCE

1. The convict was charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which were that on the 12<sup>th</sup> day of November 2017, at Kakuma Refugee Camp in Turkana West Sub County of Turkana County, murdered **NIYONZIMA JOSHUA**.
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.”*

4. 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”*

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

MITIGATION

6. In mitigation, the convict through his Advocate on record Mr. Pukha submitted that he was of middle age and a first time offender. He was remorseful for his action and had been in custody since 2017. It was contended that during that period of time, the same had learned his lesson and was now a member of prison church and sought for forgiveness and to be taken to therapy, counselling and guidance.
7. The convict sought to be repatriated back to his home county upon completion of any sentence noting that while in prison, he had sat for his class eight examination.
8. Mr. Tanui for the State submitted that there was no criminal record on the convict which should therefore be treated as a first offender.

## **PRE-SENTENCING REPORT**

9. It was stated that the offender fled his county in 2017 due to civil wars in Goma Region and was aged 27 years. On the circumstances of the offence:- he alleged that he was left at home with the deceased who was feeling unwell while his mother went to the market when he fell down and sustained serious head injuries. He rushed him to the nearest hospital where he was pronounced dead.

10. On the attitude towards the offence; whereas he accepts responsibility over the offence, he maintained that he did not intentionally participate in the loss of life of the innocent boy.

i) Victim's attitude towards the offender: The mother of the deceased was later transferred to Nairobi by UNHCR to a safe place for residence before being relocated to USA under the resettlement programme by UNHCR. She expressed her loss of her son with sorrow and regrets, maintaining that the offender may have had unknown motives to kill her son.

ii) Community attitude towards the offender: no much information was received concerning the offender

11. In conclusion and recommendation, it was stated that the offender accepted responsibility of the charges and pleaded for leniency. The offender according to the mother of the deceased had on several occasions threatened to take the life of the child. It was therefore recommended that the offender serve custodial sentence as a way of extending an institutionalized rehabilitation programme to the offender.

## **DETERMINATION**

12. 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.

13. 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.

14. 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.*

15. In this matter, the offender had married the mother of the deceased in a come-we-stay arrangement knowing very well that she had a child from previous relationship. He had promised to love both and pretended to do so until he turned against an innocent child who did not know of what was happening between his mother and the accused.

16. The killing of the deceased was uncalled for and therefore the court must pass a sentence which reflect the community attitude towards uncalled for killing. If the accused did not want the deceased in his life, he had the option of leaving his mother. It is also clear that the convict's account of the circumstances of the offence is at variance to the evidence on record thereby confirming that he is not remorseful for his unlawful act.

17. I am therefore of the opinion that a custodial sentence of twenty (20) years is appropriate to reflect the convicts blame worthiness and to act as a deterrence to men who take women with children out of a previous union with the promise to love, then only to turn against them and it is ordered.

18. Upon completion of his sentence the convict shall through the aid of UNHCR be repatriated back to his home county for resettlement.

19. The convict has right of appeal on both conviction and sentence while the State has right of appeal on sentence.

**DATED, SIGNED AND DELIVERED AT LODWAR ON THIS 7<sup>TH</sup> DAY OF JULY, 2021**

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**J. WAKIAGA**

**JUDGE**