



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram D. K. Kemei –J

CRIMINAL (MURDER) CASE NO. 9 OF 2018

REPUBLICPROSECUTOR

VERSUS

WAMBUA KIMEU.....ACCUSED

SENTENCE

1. The accused herein, **WAMBUA KIMEU**, was charged before this court with murder contrary to section 203 as read with section 204 of the **Penal Code** the particulars being that on 9TH September, 2014 at Ngaatini Village, Mbaani sub-location in Mwala sub-County within Machakos County, he murdered **MBITHI MULI**.

2. The accused was taken through a full trial and was subsequently found guilty and convicted for the offence pursuant to the Judgement of this court dated **13th May, 2021**.

3. Pursuant to the above provisions of the law, the accused is automatically subject to be sentenced to the mandatory death sentence. However, I am alive to the fact that pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Anor V R (2017) eKLR**, which found that the mandatory death penalty regime was unconstitutional meaning therefore that this court would have to align itself with the findings in the said case.

4. The prosecution is represented by Mr. Mwangera, whereas the accused is represented by Mr. Muthama. Both Counsels for the parties ably presented their oral submissions on mitigation and sentencing on 15th July, 2021. On record is also a probation officers report dated 4th June, 2021.

5. Mr. Muthama submitted that the accused was a remorseful first offender. It was submitted that he is remorseful of his actions and that the accused had been in remand since 2018. It was submitted that the family of the deceased and the accused had reconciled and that the court ought to consider giving him a non-custodial sentence. It was submitted that the accused has a family of three children attending school and he ought to be allowed to reunite with them.

6. Mr. Mwangera submitted that the court ought to consider the circumstances that led to the death of the deceased. Counsel submitted that a life was lost and that the deceased's ten children have been made orphans. It was reiterated that the accused has been in custody since 2018 and that the pre-sentence report be considered as well as the aspect that both families are engaged in reconciliation.

7. A perusal of the probation officer's report indicated that the accused is a **43-year-old** who attended school up to class seven but did not proceed further due to social and financial constraints at the family level. It was reported that the convict used to depend on casual jobs as a fruit broker where he earned approximately **Kshs. 10,000/=** per month and that he used to spend his leisure time by taking alcohol and chewing muguka, smoke cigarettes and bhang. It was reported that the victim's family appreciate that the reconciliation process is underway and plead with the court to grant him a lenient sentence. It was reported that no compensation has taken place yet.

8. In sentencing the convict, the following factors/reasons are considered: -

*a) The case of **Francis Karioko Muruatetu & Anor v R (2017) eKLR**.*

b) All the mitigating factors submitted by both counsel for the prosecution and the accused. Both counsels presented convincing arguments which have ably guided me to pass an appropriate sentence against the accused.

c) The Judiciary Sentencing Policy Guidelines, particularly paragraph 23.7.

9. For special emphasis, I have also considered the following factors: -

- a) *The convict has already been convicted of murder.*
- b) *From the facts of the case and the way the deceased was killed, the accused person was said to have viciously attacked the deceased outside his gate and that the deceased later passed on while undergoing treatment.*
- c) *There are no established previous records of the convict.*
- d) *The attempts at reconciliation are ongoing but yet to be settled.*
- e) *The convict is stated not to exhibit any remorse as he still has a don't care attitude and that the reconciliation efforts are initiated by others which has nothing to do with him.*
- f) *The convict has been in remand since 2018 before conviction which period I have taken into account in passing a sentence against him.*

10. In the result and for the reasons given hereinabove in this ruling, the convict deserved the death sentence. However, owing to the legal authorities cited hereinabove, this court has a wide discretion in determining a sentence to pass against the convict. Paragraph 4.1 of the Judiciary Sentencing Policy Guidelines is to the effect that a balanced sentence strives to attain the reformative, preventative, deterrent, denunciative, community protection and retributive objectives of punishment. In the difficult search for an appropriate and balanced sentence, the factors may not have equal weight but the weight attached to each factor must be appropriate and then on a balance of all the factors in mitigation and aggravation, the court must determine whether the defendants can adequately be sentenced with a non-custodial sentence, payment of a fine, or forgiveness of the defendants.

11. It is noted that the deceased herein was walking past the accused's gate when the accused attacked him claiming that the deceased was planting some witchcraft paraphernalia in his compound. It is instructive that none of the alleged paraphernalia was recovered at the scene so as to back the accused's claims. The deceased was just an innocent passerby and did not deserve to die. It is reported that his family is now destitute. Even though reconciliation efforts are being worked out by both families, the accused is reported to be unresponsive as he still exhibits no remorse and further that prior to the incident he had been abusing drugs and was violent. This then calls for deterrent sentence. I find a custodial sentence is merited in the circumstances.

12. Accordingly, therefore, I make a finding that the convict in this case deserves an appropriate sentence of imprisonment. In **Jonathan Lemiso Ole Keni v Republic (2018) eKLR** where the appellant shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment. In **John Ndede Ochodho alias Obago v Republic (2018) eKLR**, the Court of Appeal upheld a sentence of 30 years in a case of murder where the appellant assaulted the deceased several times causing his death. Thus, taking into account the time that the convict spent in remand before conviction, I would have sentenced the convict to Thirty (30) years imprisonment, but I must factor the said period the convict spent in remand before conviction which is since 2018.

13. The upshot of the foregoing is that, I sentence the accused to **Twenty-Seven (27) years** imprisonment from the date of conviction namely **13th May, 2021**.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE