



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 52 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

ANTONY MWANGI MUCHIRI.....1ST ACCUSED

GEOFFREY KAMAU MUIRURI.....2ND ACCUSED

JOHN JOSEPH KAMAU.....3RD ACCUSED

SIMON NJUGUNA GACHINGA.....4TH ACCUSED

SENTENCE

1. The convicts **ANTHONY MWANGI MUCHIRI, GEOFFREY KAMAU MUCHIRI, and JOHN JOSEPH KAMAU** were on 9th day of October, 2019 convicted of murder of **NJIRAINI THUO** alias **TOSTI** contrary to Section 203 of the Penal Code.

2. This court is now called upon to pass what it considered most appropriate, adequate and justifiable sentence in line with **Section 204** of the Penal Code as read together with the Supreme Decision in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** wherein the Supreme Court had this to say:-

“[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.

.....

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

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[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[69] Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment. (Emphasis added)”

MITIGATION AND PRESENTENCING REPORTS

3. In compliance with the Sentencing Policy Guidelines and the Supreme Court decision above, the court called for pre-sentencing reports on all the convicts and allowed them to offer mitigation. On behalf of the 1st convict, in mitigation Mr. Opolo submitted that he was aged 46 years with a seventeen (17) year old child and unemployed wife to whom he was the sole bread winner. He was a first offender, who had not been involved in any brush with the law. He was remorseful and noted that he had spent five (5) years in remand before being released on bond. He therefore sought non-custodial sentence.

4. On behalf of the second Convict, Mr. Ongaro submitted that he was a first offender having had a good history. It was submitted that upon his release on bond, he reunited with his family of four children in class seven, class six and class five, with the last born breastfeeding. He was remorseful and sought lenient sentence.

5. On behalf of the 3rd convict, Mr. Kihanga submitted that he was shocked at his conviction and was remorseful of the circumstances leading to his conviction. It was stated that he was a young man full of potential, who supported his family and mother aged 65 years. He had been in custody for six years before being released on bond and therefore sought non-custodial, since as per the Muruatetu case, the courts was moving away from deterrence to corrective sentence.

6. On behalf of the State, Mr. Okeyo submitted that the convicts were first offenders but that there was no evidence that the deceased provoked them and therefore there was no reason why they had to end his life. He sought for a stiffer sentence to act as deterrence to would be offenders.

7. On the pre-sentencing report;- for the 1st convict it was stated that at that time of his arrest, he was working with a car hire company. Upon his arrest his wife went back to her family and when he was released on bond he entered into a second marriage. He maintained his innocence and stated that he only introduced the deceased to a customer.

Home Front: His family were desirous of his release having observed positive changes in him upon his release on bond. They sought for a non-custodial sentence on his behalf.

Victim impact statement: The family maintained that he died at the time when his children needed him most and after his death two of them had to drop out of school. They proposed a harsh sentence.

Recommendation:- It was stated that he had a good social support system that was vital to his rehabilitation.

8. On the 2nd convict:- it was stated that he ran away from home in Baringo and went to Gilgil, where he was employed as a herds-boy before moving to Naivasha, where he was engaged in charcoal trade as at the time of his arrest. He was married with four children. On his attitude to the offence – it was stated that he failed to understand how he was connected to the offence.

Home Front: He was re-united with his wife upon his release on bond, having been separated before his arrest. He was the breadwinner for his family, in addition to taking care of his ailing parents. They sought for a non-custodial sentence.

9. On behalf of the 3rd convict; it was indicated that he was born to a single parent and that this childhood was full of hardships. He maintained that his arrest was as a result of mistaken identity.

Home Front: he had been known to be of good conduct and obedient, having been accommodated by his aunt at Ruiru GSU Recce Camp while out on bond, they sought for lenient sentence for another chance to enable him rebuilt his life.

10. The sentencing objectives as per the Judiciary Sentencing Policy Guidelines are:-

- 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. Imposition of sentence is a Judicial function which is to impose a sentence upon each offender that is appropriate to the offence and the offender. In passing a sentence the court must ensure that the same is consistent with a rational, civilized and human objectives as set out herein above. It should take into account the gravity of the offence and the blameworthiness of each offender. The court must at all time take account factors and circumstances concerning the offence, the offender and aggravating or mitigating factors. Punishment severity should as a rule be proportionate to the seriousness of the offence and similar offenders who commit similar crime should receive similar sentence.

12. In this case, the deceased was a taxi driver who was in the course of his duties as such, when he was as per the evidence before court,

called by the 1st convict on phone for some job assignment and that was the last time he was seen alive. As per the Evidence of **DR. PETER NDEGWA**, the same died of asphyxia due to manual strangulation at the hands of the three convicts. The motor which he was driving was later on found and connected with one Chrispine Muthenya, a GSU officer who disappeared into thin air at the time of the trial, having earlier been arrested and through whom the convicts were connected with this murder.

13. From the evidence tendered in court, this crime was authored by the 1st convict, who then roped in the 2nd and 3rd to execute his plot, of getting the deceased out of the picture so as to sell the car he had in his possession. In addition to the offence of murder, there was also the element of robbery with violence, meted out against the deceased, who was then killed and thrown by the way side. His death was therefore executed out in the process of robbery, which is a factor to be taken by the court while passing an appropriate sentence.

14. Having taken into account the evidence on record, the mitigation and presentencing report, I have come to the conclusion that the best objectives to be served in sentencing the convicts, is a combination of retribution, deterrence and denunciation, which can only be served through appropriate imprisonment terms. I have taken into account the roles played by the petition and hold that the 1st convict holds greater responsibility and should therefore be sentenced to a term exceeding that of the 2nd and 3rd convicts who joined him after he had the deceased and the car.

15. I would therefore sentence the 1st convict to an imprisonment term of twenty five (25) years less five (five) years served in remand custody. He shall therefore serve twenty years imprisonment. The 2nd and 3rd convicts shall be sentenced to an imprisonment term of twenty (20) years less five (5) years in remand custody. They shall both serve a term of fifteen (15) years imprisonment from the date of this Judgment.

16. This to my mind will send a clear signal that crime does not pay and that whoever takes away the life of a citizen of the Republic of Kenya must be ready and willing to pay for it. The convicts' actions, more so that of the 1st convict who was a friend of the deceased must be condemned in the strongest term possible by an appropriate sentence.

17. The convicts are entitled to a right of Appeal on both conviction and sentence while the prosecution has right of appeal on sentencing and it is so ordered.

Dated, signed and delivered at Nairobi this 13th day of February, 2020.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Kihanga for Opolo for the 1st Accused

Mr. Kihanga for Kariu for the 2nd Accused

Mr. Kihanga for the 3rd Accused

All three Accused persons present

Court assistant- Karwitha ````