



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 37 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

LUCAS GITHUKA GATIBA.....ACCUSED

SENTENCE

1. The convict was found guilty of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** of the murder of **LG**. What the court is called upon now to determine is what constitute the most appropriate sentence thereon.

2. The starting point in his Judicial Function is **Section 204** of the Penal Code as read together with the Supreme Court of Kenya decision in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** where the Supreme Court found that the mandatory nature of death penalty was unconstitutional and 'out of sync with the progressive Bill of Rights' in Kenya's 2010 Constitution (see paragraph 64 thereof). The trial court was therefore mandated to conduct presentencing hearing to determine whether the death penalty is deserved in each and every case.

3. In compliance with the Supreme Court determination and the provisions of the Judiciary Sentencing Policy Guidelines, the court called for pre-sentencing report and allowed the convict to offer his mitigation.

PRE-SENTENCING REPORT

4. It was stated therein that the convict aged thirty five (35) years was a mason at Kiganjo area in Thika at the time of his arrest having been a hawker and matatu tout before then. He was married to the mother of the deceased who took off after arrest.

a) Attitude toward the offence: it was stated that the convict on the material day came home while drunk and took the child from his mother so as to give her time to prepare supper and he fell asleep while holding the baby, who fell down. He was stated to be very remorseful and regret the circumstances leading to the death.

b) Accused family view: they described him as law abiding before the offence and had kept in contact with him throughout the period he had been in custody.

c) Community view: The mother of the deceased stated that they had lived a quiet life prior to the murder and that she had forgiven the convict. She had since moved on and did not object to the convict being granted non-custodial sentence provided he does not seek reconciliation or re-union with her.

MITIGATION

5. In mitigation the convict stated that he was remorseful and had been in remand since 2013, where he had reconstructed his life and had learned to manage his anger, which led to the offence, having gone through Bible Study and stopped drinking alcohol and sought non-custodial sentence.

6. In response the prosecution stated that he should be treated as a first offender. It was stated that though there were no strong mitigating factors on sentencing, the same should be treated as a first offender.

SENTENCING OBJECTIVES

7. As per the Judiciary Sentencing policies and Guidelines the sentencing objectives upon conviction are as follows:-

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.

8. In this matter, I have looked at the circumstances leading to the commission of the offence herein and in particular the fact that the convict was at some stage in a relationship with the sister of the mother of the deceased, who testified before me as PW2, whose presence in the life of the convict and his wife might have fueled the animosity which led to the subsequent death of the deceased and find that the convict is a suitable candidate for rehabilitation. His mitigation and the pre-sentencing report support rehabilitation objective.

9. I have further taken into account the fact that the convict had been in remand custody for the last seven (7) years, which to my mind, in view of the circumstances herein, is an appropriate and adequate punishment and would therefore sentence him to a probation period of three (3) years during which he should undergo further rehabilitation and to be resettled in society on condition that he does not interfere with the life of the mother of the deceased who has since moved on and it is ordered.

10. The probation order is conditional upon the convict not interfering with the life of his former wife failure to which he shall serve an imprisonment period of ten (10) years from the date of the judgment.

11. The convict has a right of appeal on both conviction and sentence whereas the prosecution has a right of appeal on sentence.

Dated, signed and delivered at Nairobi this 12th day of February, 2020.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Kimani for Mathenge for the Accused

Accused present

Court assistant- Karwitha