



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 21 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

1. JAMES MUHIRI MWITA

2. PETER MUCHUMBE MWITA

3. NMJ.....ACCUSED

SENTENCE

1. The accused persons herein were charged with the information of murder. They were tried. The first and second accused persons were found guilty and convicted of the offence of murder on 22/11/2019. The third accused person was also found guilty of murder but since he was a minor this Court did not enter a conviction in line with **Section 189** of the **Children Act, No. 8 of 2001**.

2. The matter was set for mitigations. Each of the accused persons tendered their mitigations. The first accused person stated that he intended to take care of the family of the deceased since the wife of the deceased was ailing and the deceased left behind very young children. The second accused person prayed for leniency. He urged this Court to note that he had been injured a day before he was arrested and that the injury was yet to heal. He also pledged to assist the family of the deceased. The third accused person pleaded for leniency and an opportunity to proceed on with his secondary education. He stated that he was in Form 1 when the incident occurred.

3. The prosecution vehemently prayed for a severe sentence. It was submitted that the deceased was physically-challenged and that the accused persons had no mercy on him at all. The prosecution wondered how the accused persons will aid the family of the deceased in view of the manner in which they ruthlessly and grisly terminated the life of the deceased in public purview. The State prayed for a death sentence on the first and second accused persons.

4. I have considered this matter with a keen eye. The circumstances under which the accused person committed the offence were well captured in the judgment. As stated therein the accused person acted in such a beastly manner by terminating the life of the deceased, who was physically-challenged, in public. There were more than 700 people who witnessed the daylight brutal murder.

5. The accused persons warned the members of public from taking part in the ordeal which they described as a private family affair. They warned any non-family member from intervening unless one was ready to face their wrath. They jointly pounced on the deceased with sharp items until they were so sure that the deceased had died.

6. As the accused persons had accomplished their mission in terminating the life of the deceased and were on their way back home they met the police vehicle on the way. They flatly told the police officers who were inside the vehicle to go and collect the body of the deceased as they were done with him.

7. The most disturbing thing in this matter is the manner in which the murder was executed. Apart from taking the law into their own hands, the accused persons committed the offence in broad day light and in the presence of the whole village. They clearly portrayed an impression that one can commit an offence of such magnitude in the presence of all those people without any regard to the law.

8. The aforesaid events sent out very wrong signals. They were indeed a catalyst for others to commit crimes at will. Worse still, the first and second accused person took along the third accused person; a minor who was in Form 1.

9. Are we prepared, as a country, to give way to lawlessness? Should people who force things to happen in their way even in total disregard of others' safety reign? What message did the manner in which the murder was executed send to the young people who also witnessed the deceased butchered in broad daylight to death? Further, if the third accused person voluntarily took part in a crime of such magnitude and in the manner in which the crime was executed, what else is he not able to do in this world?
10. The accused persons left the entire village polarised. If the reason for the commission of the crime was the land dispute then one wonders how many such disputes are in Kenya today. If all land disputes in Kenya are to be sorted out by murdering the opponents then are we going to have a country shortly? The answer is unwaveringly NO!
11. In this matter the deceased had even filed the land case in court and it was scheduled to be heard in a couple of weeks' time. Clearly the accused persons acted in a manner to curtail the hearing of the land case. They were visibly not for the law at all.
12. There are serious aggravating factors in this case. The appropriate sentence can only be a deterrent one. The right message must be sent not only to the community and the country but to the whole world that crime does not pay. That sentence cannot be a non-custodial sentence as recommended by the Probation Officer in his Pre-Sentence Reports.
13. I highly doubt if the accused persons truly meant what they said in their mitigations. How will they assist the wife of the deceased whom they also wanted to kill had she not escaped? Are the accused persons aware of the trauma they caused to the wife and young children of the deceased who witnessed the incident? Are the children of the deceased truly able to embrace the accused persons? I do not think so.
14. According to Certificate of Birth No. [.....] the third accused person was born on 09/09/2004. He was 14 years old at the commission of the crime.
15. The manner in which Courts may deal with minors who are guilty of commission of serious crimes was recently re-discussed by the Court of Appeal in **Kisumu Criminal Appeal No. 52 of 2015 Duncan Okello Ojwang vs. Republic (2019) eKLR**. My Lordships had the following to say: -

Section 191(1) of the Children Act sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judicial discretion in determining the manner in which to deal with a child offender. Section 191(1)(j) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the Penal Code. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the Children Act. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigation and aggravating factors should also be considered. This Court while faced with a similar case in *Richard Mwaura Njuguna & another v Republic* [2019]eKLR observed thus:

“It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue is the High Court case of *Daniel Langat Kiprotich vs State* [2018]eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Nguni, J. expressed the dilemma faced by courts in such situations. He expressed:

This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to a borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost - adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn”.

Earlier on this Court in the case of *J M K v Republic* [2015]eKLR had observed

“....A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In *of Nyeri Criminal Appeal No. 118 2011 (JKK -v- R, (2013)eKLR*, this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also *Republic -v- S. A. O., (A MINOR)* [2004]eKLR and *Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot -v- R*).

The Court went further and held that:

“The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the President. No legal

provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The Children Act prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhaps the probation department to take the appellant through the rigours of coming into terms with his mistake and poor judgment which have consequences such as a loss of liberty.”

We are in total agreement with the above sentiments and observations. Accordingly we find that committing the appellant to a borstal institution as prescribed under Section 6(1) of the Borstal Institutions Act is not foreseeable in view of the appellant's current age. The appellant is no longer a minor. Instead, we are inclined to impose a sentence of 10 years imprisonment which we think is commensurate with the appellant's culpability.

16. The third accused person is now 15 years old.

17. I am alive to the Sentencing Policy Guidelines in Kenya. I am also clear on the mitigating factors applicable in a case as this one. Having carefully considered the Sentencing Policy Guidelines, the mitigations, the manner in which the crime was committed and on the basis of the foregone decision I am convinced that the third accused person is also unfit for a non-custodial sentence.

18. The totality of the foregone is that the following sentences do hereby issue: -

a. The first accused person, James Muhiri Mwita *alias* Nyabobe and the second accused person, Peter Muchumbe Mwita *alias* Muchumbe, are hereby sentenced to suffer death pursuant to Section 204 of the Penal Code, Cap. 63 of the Laws of Kenya.

b. The third accused person, NMJ *alias* O, now aged 15 years old shall be committed to a Borstal institution for the most possible term (being a maximum of 3 years in view of his current age) and on attaining the age of majority he shall be committed to prison to serve a further seven (7) years. The sentences shall run consecutively.

c. The Probation Officer is hereby ordered to find a suitable Borstal Institution in Kenya for the placement of the third accused person within 7 days.

d. Mention for further orders on 18/02/2020. In the meantime the third accused person shall be held in a separate and conducive cell at the Migori Police Station.

19 Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of February, 2020

A. C. MRIMA

JUDGE

Sentence delivered in open Court and in the presence of:

No appearance for **Mr. Muniko**, Counsel for the Accused persons.

Miss Achieng for **Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.