



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 14 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

NIMO IBRAHIM MOHAMUD.....ACCUSED

SENTENCE

1. The court found accused guilty of murder and convicted her accordingly. Thus the matter is coming for sentencing after the mitigations were tendered and the probation officer report on the accused was filed.

2. The court has considered the mitigations tendered and the report (P.O.R). The factors generally to consider in sentencing include –

- a. The maximum penalty of the offence.**
- b. Current sentencing practices.**
- c. Nature and gravity of an offence.**
- d. The offender’s culpability.**
- e. Whether crime was motivated by hatred or prejudice.**

3. Not forgetting that consideration is also given to disproportionate and unjustified disparities in respect to sentences imposed to offenders who committed same offence in more or less similar circumstances and undue preferences of custodial sentences, inspite of existence of numerous non-custodial options which are more suitable in some cases. See Judiciary Sentencing Policy Guidelines.

4. Item 6 para 6.1 on page 17 of Judiciary Sentencing Policy Guidelines still records penalty for murder to be death. However, the Supreme Court in the **Francis Karioko Murwatetu case (2017 eKLR)** changed narrative to the effect that the mandatory aspect of death sentence is unconstitutional. Thus death penalty is the maximum penalty for murder offence.

5. It set out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- age of the offender;**
- being a first offender;**
- whether the offender pleaded guilty;**
- character and record of the offender;**
- commission of the offence in response to gender-based violence;**
- remorsefulness of the offender;**
- the possibility of reform and social re-adaptation of the offender;**

- any other factor that the Court considers relevant.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory.

They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016.

6. Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

“Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the lower courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it”

7. The Supreme Court decision in **Muruatetu & Another (Supra)**, affirmed the decision of the Court of Appeal in **Godfrey Ngotho Mutiso v R C.A. No. 17 of 2008**, and the High Court in **Joseph Kaberia Kahinga and Others v The Attorney General [2006] eKLR** which stated thus;

“We are in agreement and affirm the court of Appeal decision in Mutiso that whilst the constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High court’s statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offenders’ version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty. If mitigation reveals an untold degree of brutality and callousness..., ‘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 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 individualize the circumstances of an offence or offender may result in the undesirable effect of ‘over punishing’ the convict...’ ‘The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution...”

8. The Supreme Court then made it clear exactly how the mitigation of the accused person should be applied by the court before the accused is sentenced. The Court stated that;

‘It is during mitigation, after conviction and before sentencing, that the offenders’ version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty.’

9. It is true that pursuant to **Muruatetu** case, supra the courts now can exercise discretion when considering and passing sentence. I am in agreement with **Lesiit J** that discretion to pass a sentence other than death in capital offences should only be exercised in the deserving cases. See **Republic vs Ruth Wanjiku Kamande [2018] eKLR**. This is not a deserving case.

10. Thus this court will consider on murder penalty where the accused circumstances lie. The court notes the accused is a first offender and has 2 school going children. She is aged 36 years and a single mother. However the way the murder was committed was very brutal, vicious and deceased must have experienced a lot of pain.

11. The accused still denies that she was involved in the murder thus she could not explain the justification for the commission of such a painful death.

12. Of course she knew she was single mother with 2 school going children and aged 31 or so when she committed the crime. The maximum penalty of murder is death but being a first offender the court would not award maximum penalty but a proportionate penalty befitting the circumstances of commission of the instance offence.

13. The court also considers she was in custody for about 2 or so years before being bonded.

14. **Thus the court sentences her to serve 15 years imprisonment from date herein.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 5TH DAY OF FEBRUARY, 2020.

.....

C. KARIUKI

JUDGE