



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MARSABIT
CRIMINAL CASE NO. 03 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

KOSICHA KANCHORA GURA.....ACCUSED

S E N T E N C E

The accused was convicted of the offence of murder. Mr. Lesaigor, Counsel for the accused filed written submissions in mitigation for the accused. Counsel maintain that the accused is both elderly and sickly. He suffers from hypertension. Due to the recent detention, his situation has worsened. He is remorseful and had intended to visit the deceased's family. Due to tension between the Borana and Gabra communities, he could not make his visit. This is in line with the Probation officer's report.

It is further submitted that the accused is a family man. He has two wives and eight (8) children. The first born is 18 years old while the last born is a few months old. He is a Police Reservist and law abiding citizen. He is the sole bread winner of his family and his elderly mother. Counsel urged the Court to grant the accused a non-custodial sentence. Counsel relies on the case of **FRANCIS KARIOKO MURUATETU & ANOTHER –V- REPUBLIC (2017)eKLR**. It is submitted that the death sentence is not mandatory. Murder convicts are now allowed to mitigate prior to sentencing.

Counsel maintain that the deceased was armed with a rifle and there was a great degree of provocation. According to the Probation officer's report, the community is willing and ready to compensate the deceased's family and reconcile the two families. According to the medical report dated 24.1.2020 by Dr. Morris Mugambi, Medical Superintendent, the doctor states: -

Despite being on medication for long, he has occasionally been diagnosed with unstable blood pressure. This can be attributed to the environmental condition within the prison facility, i.e. Poor nutrition, poor drug adherence, and psychological stress Given his condition the patient require a condusive environment away from the aggravating factors for proper monitoring and control.

Mr. Lesaigor contend that given the accused's medical condition, it would be inhuman and contrary to the Provisions of Article 28 of the Constitution on human dignity to put the accused in prison. His medication requirements will cause undue burden on other offenders and Prison officers who will be taking care of him. The accused is a first offender. His mother is over ninety (90) years old. Counsel relies on the case of **Republic –V- Catherine Ndunge Muthoka (2019) eKLR** where the issue of interest of a convict's children was considered. Justice Odunga observed as follows:-

“While I appreciate that the court need to send a strong message to the society that the conduct of the accused is deplorable, Article 53(2) of the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child. This Court should not be seen to be sacrificing the interest of the children in order to appease the spirits of the society.”

Mr. Ochieng, learned prosecution Counsel, relies on the Probation Officers’ report and urged the court to grant the sentence it deems appropriate.

Under the Judiciary sentencing Policy guidelines, the objectives of sentencing 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 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. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.*
- 5. Community Protection:** *to protect the community by incapacitating the offender.*
- 6. Denunciation:** *To communicate the community’s condemnation of the criminal conduct.*

At paragraph 7.17, the guidelines provide that where the law provides for mandatory minimum sentences, the Court is bound by those provisions and must impose the sentence provided by the law. The guidelines were prepared long before the **Muruatetu case (Supra)** was decided. Some of the factors to be considered under the guidelines are the gravity of the offence, Criminal history of the offender, the character of the offender, protection of the community and offender’s responsibility to third parties.

I have seen the medical report by Dr. Mugambi dated 29.11.2019 as well as the handwritten notes attached to the report. The notes makes reference to the accused kidneys and other organs but the explanation is not very clear. According to the report the accused was 58 years at the date of report. He suffers from unstable blood pressure. There is the Probation officer’s report dated 9.12.2019. According to the report, the issue of long standing history of hypertension is stated. The accused is illiterate and cannot speak English or Kiswahili. He is from the Gabra Community while the victim was from the Borana community. The report does not recommend a non-custodial sentence due to the tension between the two communities.

The main issues being raised in mitigation is the accused’s remorsefulness and his health condition. I was able to see the accused from the date he was charged until when he was convicted of murder. The accused was convicted on 26.11.2019. A pre-sentencing report and a victim impact assessment report were to be filed. The victims’ family were not contacted. On 20.1.2020 the accused was not presented in Court as he was hospitalized. The court was told by the prosecution that the accused had developed a serious medical condition. He could not pass urine.

Under the sentencing guidelines on elderly and sick offenders, it is provided under paragraphs 20:25 and 20:26 as follows:

20.25 There is no special consideration for terminally ill and elderly offenders. However, as with the case of offenders with disability, the consideration is whether in view of the illness or age, the sentence is rendered excessive. There are two dimensions worth considering. First

whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody. Further, whether the conditions in custody would be termed inhuman bearing in mind the offenders' state. Second, whether the offender's condition is one that would cause undue burden on other offender 'sand/or prison officers taking care of him/her. *(emphasis added)*

20.26 Article 57 of the Constitution affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.

As indicated hereinabove, I had the advantage of seeing the accused during the hearing and after the conviction. Truly, his health has drastically changed and within the three months he has been in custody, he has become a shell of his former self. He is 58 years old and cannot be held to be very old but his physical appearance present a picture of an elderly man due to his medical condition. I do find that the accused's illness will cause him to experience undue hardship while in custody. The prison officers will have to pay great attention to the accused while serving his sentence in prison.

In the **Muruatetu case (Supra)**, the Supreme Court made several observations. Some paragraphs of that judgement are very helpful to the lower Courts when it comes to sentencing. At paragraph 48 the Supreme Court states as follows:-

[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.

Paragraphs 49, 50, 53, 59, and 71 states as follows:

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[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 over punishing the convict.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.

[71] 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:

- (a) age of the offender;*
- (b) being a first offender;*
- (c) whether the offender pleaded guilty;*
- (d) character and record of the offender;*
- (e) commission of the offence in response to gender-based violence;*
- (f) remorsefulness of the offender;*
- (g) the possibility of reform and social re-adaptation of the offender;*
- (h) any other factor that the Court considers relevant.*

The Muruatetu case outlawed the mandatory nature of the death sentence. However, it did not outlaw the death sentence. Given the circumstances under which the offence was committed, I do find that the death sentence or life imprisonment is not the appropriate sentence to impose. I do equally find that a long period of incarceration in prison will not serve any of the objectives of sentencing as provided under the sentencing guidelines. The circumstances of the case show that the accused can be rehabilitated and become a law abiding person. It is true that a life was lost. In both cases of murder and manslaughter, a life is usually lost. The difference is malice aforethought. The mitigation by the accused clearly captures most of what the Supreme Court provided as a guide. The accused is elderly, he is a first offender, he is remorseful and can be rehabilitated and accepted back to the society. He is willing to reconcile with the victims' family.

Counsel for the accused referred to the case of **Catherine Ndunge Muthoka (Supra)** where the two counts of murder were reduced to manslaughter and the convict was sentenced to five (5) years probation. Counsel also referred to the case of **Republic –V- Elizabeth Mugogwa, Nairobi Criminal case No.15 of 2015 (2018) eKLR** where the charge of murder was reduced to manslaughter and the convict was sentenced to three (3) years probation. In the case of **Republic –V- Sarah Mutete Matheka, (2018) eKLR**, the accused was convicted of manslaughter and sentenced to three years Probation

The circumstances of the case are that the deceased and his other Police reservists were in a vehicle travelling from Shur area towards Marsabit. The deceased and his colleagues were armed. Their vehicle was shot at at a first road block. They too responded by shooting at their attackers. They were confronted by a second road block and shooting ensued. The accused was positively identified as one of those who were in the second road block. Its not clear what was the cause of the shooting. The accused has been convicted of murder. An outright non- custodial sentence is not ideal. The accused although seriously sick, needs to undergo some form of rehabilitation while in prison. Sending him straight on probation will not serve the other objective of sentencing – retribution. The accused should know that a life was lost and the deceased's family, although not contacted, expects some form of revenge or retribution against the accused.

The mitigation circumstances of the case does not call for a long period of incarceration in prison. The accused is indeed sickly. He has eight children as per the Probation officer's report and apart from one, all of them are below the age of 18 years. It is quite unusual given his age but that is the reality of the matter. The children will definitely suffer as he is the sole bread winner. I do hereby sentence the accused to serve five (5) years. Two of the five (5) years to be served in prison and thereafter to be released on Probation for the three (3) remaining years. The sentence shall run from the date of conviction on 26.11.2019 since the accused has been in custody from that date. This is in line with Section 333(2) of the Criminal Procedure Code as well as Section 12 of the same Act.

Dated, signed and Delivered at Marsabit this 4th day of March, 2020

S. CHITEMBWE

JUDGE