



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**HIGH COURT CRIMINAL CASE NO. 20 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MWELA MUHINDI.....ACCUSED**

**SENTENCE**

1. The convict was on 12<sup>th</sup> day of June, 2019 found guilty and convicted of murder contrary to **Section 203** of the **Penal Code** as read with **Section 204** thereof. This court is now called upon to pass out an appropriate, adequate and justifiable sentence therein.
2. The starting point herein is the Supreme Court determination in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** wherein the Supreme Court had this to say of **Section 204:-**

*“[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.*

.....

*[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)”*

3. In compliance with the said judgment and the provisions of Sentencing Policy Guidelines, the court called for pre-sentencing report and the mitigation of the convict. In mitigation, the convict through Ms Ajiambo, his Advocate, stated that he was very remorseful for what had happened as he did not intend to do it. He stated that he came from a humble background with four school going children and had separated from their mother. He was sickly with no previous criminal record. He sought non-custodial sentence on account of his medical report and to be given a chance to look after his children.

4. Mr. Okeyo for the prosecution submitted that, though the convict was a first offender, the court should take into account the fact that the victim was thirteen years old who could not have provoked him. Since a young life was lost, he sought for a deterrence sentence to act as a lesson to would be offenders.

#### **PRE-SENTENCING REPORT**

5. It was stated that the convict attended class seven level of Education and moved to Githurai 45 with a friend, where he engaged in casual work at construction sites including at Kenyatta University. He was married but later on separated with his wife. He had four children, two who had completed primary education, while two others were still in school. He did not admit commission of the offence and claimed that he was wrongly implicated by the deceased's mother. He was HIV Positive on medication.

6. On **VICTIM ASSESSMENT REPORT** it was reported that the parents of the victim were not interviewed.

7. **CONCLUSION:** It was stated that the convict was fifty-two (52) years old who had been in custody for four years since his arrest and that his wife and children took off to unknown destination after he was incarcerated. He pleaded for leniency due to his HIV Status.

8. The objectives of sentencing as per the judiciary sentencing policy guidelines 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.*

9. To achieve these objectives while passing sentence, the court must take into account the principles of proportionality, the punishment must not be more or less than is merited in view of the gravity of the offence and the same sentences should be imposed for same offences committed in similar circumstances. It must be noted that the Supreme Court decision in Muruatetu (supra) signaled an approach towards indeterminate sentencing where sentencing must now be individualized with the sole objective of passing a fair and just sentence.

10. In this case, the victim was aged about thirteen years, school going and a friend of the daughter of the convict. From the evidence tendered before me, it is clear that the same knew the convict very well, as on the material day, she indicated to her friend who went with her to the shop, that the convict wanted to see her. The convict on the other side stated that the victim had approached him to discuss some issue. What this court does not understand, is what would an adult of his age discuss with a child of the victim's age?

11. There is evidence that the deceased was a victim of sexual assault who met her death as a result of resisting the act or to destroy evidence thereon. The convict therefore breached the trust the deceased had placed upon him and any sentence meted out must take into account this fact. The deceased did not need to die simply because she was a girl whose body and innocence the convict violated. There is the evidence of the chief who though not called had indicated that the convict was a known pedophilia.

12. Having taken into account how the crime was committed, the relationship between the convict and the deceased, I have come to a conclusion that a sentence incorporating rehabilitation, incapacitation and deterrence is the most appropriate and justifiable sentence herein and shall therefore sentence the convict to a term of **twenty two (22) years** to be served as follows:-

*a) **The first five years during the period when he was in remand custody to be considered served.***

*b) **The next fourteen (14) years imprisonment to act as a deterrence to would be offenders and to incapacitate the convict so as to immobilize the same and stop him from committing further offences and for further rehabilitation while under the Prison Rehabilitation Program.***

*c) **Three (3) years thereafter on probation for integration into society.***

*d) **The convict is entitled to remissions if any on the first twenty years and it is ordered.***

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of May 2020 through Google Teams.

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**J. WAKIAGA**

**JUDGE**

**In the presence of**

*Ms. Onunga for the State*

*Mr. Farah for Mr. Oundo for the accused*

*Accused person present*

*Karwitha*

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*Court*

*Assistant*