REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 38 OF 2011

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

ANTONY MWEMA MUTISYA.....ACCUSED

SENTENCE

1. The accused **Antony Mwema Mutisya** was charged with two (2) offences of murder and attempted murder. In the first count it was alleged that on 20th May, 2011 at Administration Police Camp, Mulala, Nzauni District in Makueni County, the accused murdered **Quedaline Nduku Mueme** contrary to **Section 203** as read with **Section 204** of the **Penal Code** Laws of Kenya. In the second charge it was alleged that on the same date at the same place he attempted to murder **Mary Nyakio Mwangi**, contrary to section 220(a) of the ***Penal Code***. The particulars were that the accused attempted to unlawfully cause the death of the said **Mary Nyakio Mwangi**, an administration police officer, by setting on fire a house she was sleeping in.

2. The accused pleaded not guilty to both charges. After hearing the case, **Makhandia, J** (as he then was) wrote a judgement which was delivered by **Dulu, J** on 14th December, 2012 convicting the accused in both charges and the sentence was delivered by **Mutende, J** in which the accused was sentenced to suffer death in respect of the first count and was sentenced to serve 10 years imprisonment in respect of the second count, the latter of which was held in abeyance in light of the death sentence.

3. According to the findings of this court, the accused appeared at the house of **Mary Nyakio** in Mulala where she was sleeping with her daughter, the victim in the first count. That daughter was also the accused's daughter born out of a relationship between the accused and the victim in the second count. The accused roused the victim in the second count through the window and was recognised by her. After talking briefly, the accused poured some liquid through the window, ignited it and the house was engulfed in a big blaze after which he ran away. As the fire raged, a gas cylinder in the house exploded and intensified the flames. Although the victim in the second count attempted to flee from the burning house with the deceased daughter, who was said to have been 2 years old, she was unable to do so due to the raging fire and as a result suffocated in what she termed as petrol fumes. As a result, the deceased dropped down and perished in the inferno while the victim in the second count managed crawl to the door, managed to open it and ran to escape from the fire with severe burns.

4. In Machakos Misc. Criminal Application No. 60 of 2017, the accused sought an order for resentencing based on the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. R (2017) eKLR**. In that case the court expressed itself as hereunder:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
>
> **[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.**
>
> **[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.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] 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 offender's 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 sentence, if mitigation reveals an untold degree of brutality and callousness.

[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."

5. On 29th January, 2020, pursuant to the said decision of the Supreme Court, this Court set aside the sentence imposed on the accused person herein and directed that a resentencing hearing be undertaken. This was based on the position of the Supreme Court in the said **Francis Karioko Muruatetu & Another vs. R** (supra) as read with the Court of Appeal's decision in **William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR**, that the Petitioners had a right to move this court to reconsider their sentence.

6. It is important to point out that a resentencing hearing or any other sentencing hearing for that matter is neither a hearing *de novo* nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in those proceedings the accused is not entitled to take up the issue of the propriety of his conviction. He must proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition of sentence and on the appropriate sentence in the circumstances. Similarly, the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper. While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purposing of imposing the sentence, it is not proper for the court to set out to analyse the evidence as if it is meant to arrive at a decision on the guilt of the accused.

7. That the possibility of reform and social re-adaptation of the offender is to be considered in sentence re-hearing, in my view implies that where the accused has been in custody for a considerable period of time the Court ought to consider calling for a pre-sentencing report and possibly the victim impact report in order to inform itself as to whether the accused is fit for release back to the society. In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not, hence the necessity for considering a pre-sentencing report.

8. As appreciated by the Supreme Court in ***Muruatetu Case*** (supra):

"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,* where the High Court held that the objectives include: *"deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."* The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

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."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

9. In my view where the accused has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, to direct that an inquiry be conducted by the probation officer and where necessary a pre-sentencing and victim impact statements be filed in order to enable it determine whether the accused has sufficiently reformed or has been adequately rehabilitated. This is so because the circumstances of the accused in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the accused had sufficiently reformed to be released back to the society. It may well be that the conduct of the accused while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

10. In ***Muruatetu Case***, the Supreme Court relied on the case of **Vinter and others vs. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10)** in which the Court held that:-

"111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated."

11. I must however state that the said reports being reports which are not subjected to cross-examination in order to determine their veracity, are just some of the tools the court may rely on in determining the appropriate sentence. They are therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the reports and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting out its sentence. To rely on the said reports as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the same ought to be treated with great respect, it is another thing to accept them hook, line and sinker. They however ought not to be simply ignored unless there are good reasons for doing so.

12. In other words, the court appreciated that the circumstances under which the initial sentence was imposed may change as one serves out the sentence. Accordingly, in undertaking a resentencing the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore important that not only should a report be availed to the court concerning the position of the victim's family and the offender's family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so is not necessarily fatal to the sentence.

13. In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.

14. According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

"[71] 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.

15. In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

16. In its decision the Court referred to Article 10(3) of the Covenant stipulates that— "*[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*" In my view where the accused has spent a considerable period of time in custody, it may be prudent for the Court while conducting a sentence re-hearing, in order to determine whether the accused has sufficiently reformed or has been adequately rehabilitated to direct that a pre-sentencing report be compiled. This is so because the circumstances of the accused in custody may have changed either in his favour or otherwise in order to enable the Court to determine which sentence ought to be meted. It may be that the accused had sufficiently reformed to be released back to the society. It may well be that the conduct of the accused while in custody may have deteriorated to the extent that it would not be in the interest of the society to have him released since one of the objectives of sentencing is to protect the community by incapacitating the offender.

17. Similarly cited was the decision of the Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes)** (unreported, 2 April 2001) where **Byron CJ** was of the view that:

> **"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."**

18. It was in light of the foregoing that I directed that a probation officer's report be prepared and filed and the said directions were duly complied with. In the said report, the Probation Officer found that the accused was 39 years old having been born on 12th February, 1981. He was described by his community members as an industrious person who interacted well with them. He was said to have been very religious and active in church matters during his youthful years though he was associated with abuse of drugs such as alcohol, bhang, miraa and cocaine. He was also pronounced to be violent and brutal person especially when under the influence of drugs. His conduct in prison was also found to have been questionable as he continued sending threatening and abusive messages to the victim and her family. This, it was reported to have led to intervention by the prison authority According to the report, the accused was known for causing chaos both at his work place and that the victim due to his physical abuse of the victim in the second count.

19. On her part the victim in the second count was still very bitter with the accused due to the loss of her daughter, property and disfigurement resulting from the said burns sustained in the incident which resulting in her incurring high medical bills which she was still footing alone through loans as the family of the accused showed no sympathy towards her and never bothered to condole with her following the death of the deceased daughter. What made her even more bitter was the conduct of the accused in sending her abusive and threatening messages while in prison mocking her condition resulting from her disfigurement. According to the report as a result of the said threats, she is still traumatised and lives in fear and could not even disclose her current address.

20. Naturally, the family of the accused gave a positive report about him and described him as an industrious resourceful person who related well with them and had no issue with anyone in the family. They prayed for leniency on behalf of the accused. It was however reported that the accused's family had not initiated any reconciliatory steps with the family of the second victim and was reported as not having supported the second victim or even attended the funeral of the deceased. They have not even consoled her or even visited her but instead used to mock her during her court appearances. Therefore, the level of hostility between the two families is still high and remains emotive.

21. It was however reported that during his incarceration, the accused undertook certificate in computer application stage 1, certificates in intensive training (theory & practical) and certificate of completion prison fellowship. It was reported that the accused had a clean record having not offended against prison discipline which was worth emulating by his fellow inmates.

22. In his mitigation, the accused stated that he is remorseful and his character has improved while in prison having taken counselling. He denied sending threatening messages to the victim and her family. He begged for forgiveness from the State and the victim's family and stated that there were reconciliatory steps in progress between his family and that of the victim. According to him, he is now a reformed person and has been rehabilitated through the prison system in matters relating to violence, drug abuse and has learnt that crime does not pay. He has also learnt the value of patience hence is not a case for rejection being sorry for the loss of the innocent life of his daughter while injuring the victim in the second count. He therefore prayed for an opportunity to contribute to the society by educating the youth that crime does not pay. He therefore prayed for the reduction of his sentence to the period served or for a non-custodial sentence.

23. **Mr Ngetich**, the Learned Prosecution Counsel, while urging the court to treat the accused as a first offender adopted the report of the probation officer.

24. I have considered the circumstances in which the offence was committed and the effect on the family and the community of the same. It is clear that the deceased, an innocent soul aged 2 years died a painful death committed in a very brutal and heartless manner. The crime was not one that was committed in the heat of the moment. Rather it was planned by the accused in that he travelled miles away from his station in Siaya in the then Nyanza Province to Makueni in the then Eastern Province, purchased the fuel and prepared himself to douse the deceased and the mother. The pleas by the mother of the deceased fell on deaf ears. It is clear as indicated in the Probation Officer's Report that the offence was as a result of inability by the accused to accept rejection, lack of self control, poor anger management, being insecure and lack of alternative conflict resolution mechanisms.

25. I associate myself with views of **J. Ngugi, J** in **Benson Ochieng & Another vs. Republic [2018] eKLR** that:

> **"Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:**
>
> **a. Circumstances Surrounding the Commission of the Offence: The factors here include:**
>
> **i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.**
>
> **ii. Was the offender armed with a gun?**
>
> **iii. Was the gun an assault weapon such as AK47?**
>
> **iv. Did the offender use excessive, flagrant or gratuitous force?**
>
> **v. Was the offender part of an organized gang?**
>
> **vi. Were there multiple victims?**
>
> **vii. Did the offender repeatedly assault or attack the same victim?**
>
> **b. Circumstances Surrounding the Offender: The factors here include the following:**
>
> **i. The criminal history of the offender: being a first offender is a mitigating factor;**
>
> **ii. The remorse of the Applicant as expressed at the time of conviction;**
>
> **iii. The remorse of the Applicant presently;**
>
> **iv. Demonstrable evidence that the Applicant has reformed while in prison;**
>
> **v. Demonstrable capacity for rehabilitation;**
>
> **vi. Potential for re-integration with the community;**
>
> **vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.**
>
> **c. Circumstances Surrounding the Victim: The factors to be considered here include:**
>
> **i. The impact of the offence on the victims (if known or knowable);**
>
> **ii. Whether the victim got injured, and if so the extent of the injury;**
>
> **iii. Whether there were serious psychological effects on the victim;**
>
> **iv. The views of the victim(s) regarding the appropriate sentence;**
>
> **v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;**
>
> **vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and**
>
> **vii. Whether there has been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."**

26. What are the circumstances of this case? In this case the ccircumstances surrounding the commission of the offence were that he accused's action led to the death of his own daughter due to reasons which the innocent angel had nothing to do with. It would seem that the accused's attitude was that it was either him or the second victim would not enjoy her future with any other man. The mode of inflicting injury was one that was intended to take the lives of both the victims. It was only by miracle that the second victim cheated death. His action was directed at multiple victims. Though the accused says that he is remorseful, that remorse does not seem to have been shown at the time of the offence during the trial and even after since it is reported that even while undergoing trial and while in prison, both the accused and his family continuously threatened and/or mocked and abused the second victim showing no remorse or sympathy to her situation by seemingly reveling in her condition. In fact, it was not until 15th June, 2020 that a letter was purportedly written by the Secretary of New Ethanga Mbaanthi Clan indicating that the clan is entitled to pay the expenses of the accused. That letter however did not indicate what steps if at all the clan had taken in that direction. Whereas the accused indicated that he has undertaken courses while in prison, the said courses are not related at all to anger management hence one cannot determine to what extent if at all he has reformed since the second victim and her family are still apprehensive that he might revenge against them if released at this stage.

27. As regards the circumstances of the victim, the deceased was the accused's daughter while the second victim was his girlfriend. While this was a crime of passion, the accused, a law enforcement officer, ought to have known better than to take the law into his own hands. The impact of his actions were that one person, a child aged 2 years perished in an inferno while the mother was left with permanent burn injuries which severely disfigured her appearance requiring corrective surgery. According to her the said scars are a constant reminder of what happened to her. It is clear that the second victim is still traumatized and lives in constant fear of her life. Although she has not expressed her views regarding the appropriate sentence and though she is reportedly not been contemplating harming the accused or avenging his actions, she is justifiably apprehensive of her safety should the accused be released. This was clearly a gender based violence crime against two members of vulnerable groups, one of whom was a child who had nothing to do with the differences between the accused and the complainant. She however paid the ultimate price under very painful circumstances for the said differences.

28. I have considered all the foregoing factors. The antecedents of the accused however do not portray him as an antisocial person save for the incidents of substance abuse. It is not indicated that he is a repeat offender. His death sentence was commuted to life by the President. While the offence committed was clearly grave, the court is cognisant that in imposing the sentence, the issue whether or not an accused is a repeat offender must be considered and where possible to give the accused hope and opportunity to reform, the sentence ought to be one that gives him optimism that if he genuinely reforms, he might get his freedom back.

29. As expressed in the case of **Vinter and others vs. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10)**:-

> **"112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment."**

30. However, whatever sentence the court decides to impose it must be commensurate with the offence committed and must be one that is capable of sending a clear signal to the accused and the public particularly those who may be inclined to commit similar offences that their actions will be met with appropriate penalty. Unless this is done, the public might lose confidence in the justice system and resort to self-help means in order to mete what in their view is the appropriate sentence.

31. In the case **R vs. Scott (2005) NSWCCA 152 Howie, Grove** and **Barr JJ** stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

32. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

> **"… One of the main purposes of punishment…Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."**

33. In **R Harrison (1997) 93 Crim R 314** it was stated:-

> **"Except in well- defined circumstances such as youth or mental incapacity of the offender…Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."**

34. Young men and women must appreciate that your girlfriend or boyfriend is not your property. He or she has the right to say no at any stage of the relationship and where according to her, she has seen the light whether before embarking or the journey or in the course of the journey to Damascus, and feels that you are not the rib that was meant for him or her, you must accept that decision and move on however painful the decision might be. While one may use the art of persuasion to try to change another's mind, he/she have no right to resort to violence to quarantine or lock him or her down. Instead what one can do to avoid harming others through violence is to sanitise oneself from the temptation to cause harm to a person who find his or her company unwelcome and to keep one's social distance until such a time that

he/she has had his/her passion temperature normalised or he has vaccinated himself against such temptations.

35. To adopt a system of contact tracing by setting out to harm innocent persons such as the victim in the 1st count simply because of her association with the victim in the second count ought not to be countenanced in any justice system. Unless the above guidelines are adhered to one runs the risk of being isolated for a very long time.

36. Bearing all the foregoing in my mind, I find that the accused ought to be released just as yet. Accordingly, I resentence him to 40 years in prison in the first count. I however do not interfere with the 10 years imposed upon him in respect of the second count. The said sentences will run concurrently. In computing the sentences, the 9 years he has served will be taken into account. Of course depending on his behaviour while serving the said terms, he would be eligible for remission.

37. It is so ordered.

38. This Ruling is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Sentence read, signed and delivered in open Court at Machakos this 16th day of July, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Accused vide Skype.

Mr Ngetich for the State

Miss Kamau for Mrs Wambua for the family of the victim

CA Geoffrey