



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 14 OF 2011

REPUBLIC.....PROSECUTION

VERSUS

MUEMA MWAU KIMWELI.....1ST ACCUSED

VINCENT SILA JONA.....2ND ACCUSED

KYALO MUSYOKA.....3RD ACCUSED

RULING ON SENTENCE

Introduction

1. The accused persons **MUEMA MUSAU K.MWAU**, **VINCENT SILA JONA** and **KYALO MUSYOKA** were found guilty and convicted of murder contrary to **section 203** of the **Penal Code** as per the judgment of this court dated 1/10/2018.
2. The sentence for the offence is provided under **section 204** of the **Penal Code** which sentence is death.
3. I have considered that the State is treating the accused persons as first offenders having obtained a report to that effect from the probation officer dated 22.10.2018 and 22.11.2018 respectively.
4. I have considered that the 1st accused is a young person. The 1st accused argued that he was 21 years of age when he committed this offence. I also took into account that he has been in custody for 7 years now. The 2nd Accused was 31 years when arrested and has been in remand for 7 years whereas the 3rd Accused was 20 years when arrested and has been in remand for 7 years.

Submissions

5. The 1st accused submitted that he has learnt several lessons while on remand and is a pastor and choirmaster. He says he has a young family and his wife left him after the incident. He prays for a lenient sentence.
6. The 2nd accused submitted that he became a born again Christian. He says that he has attended several Theological Courses and proceeded to present 5 certificates from Discover Bible School dated 11.12.2013, Prison Fellowship International that is undated, Malachi Dads that is undated, Voice of Prophecy Bible Correspondence School dated 22.10.2016 and a Baptismal Certificate from Machakos Central SDA Church dated 20.7.2013. Also presented was a Proficiency Certificate in Post Literacy in Reading and Writing and Numeracy from the Ministry of Education dated 6.9.2013 and another one by Kenya National Examinations Council for KCPE as a private student. I have taken into account all these certificates. The accused prays for a non-custodial sentence.
7. The 3rd Accused submitted that he maintains his innocence and has been in remand for 8 years. He has one sibling and one parent who depend on him. He prays that all these factors be taken into consideration in sentencing.

Analysis

8. I have taken into account all the factors given in the mitigation statements by the accused persons. I also considered that the State has treated the accused persons as first offenders. I also took into account the statement attributed to the family of the deceased in which they

state that the culpable persons should be punished.

9. The 1st accused was a young person aged 21 years at the time of this offence, the 2nd Accused was 31 years when arrested and the 3rd Accused was 20 years when arrested. The deceased was over 60 years of age at the time the accused persons cut short her life.

10. I have considered the circumstances of the offence and find that the 1st accused was a hardworking and resourceful person. The facts of the case show that the 1st accused is a brother to the servant of the deceased and a phone that belonged to the deceased was found with him and he had no receipt to support possession thereof.

11. The 2nd Accused had a number of certificates and seems keen on study. The circumstances of his involvement stem from a confession that he made admitting the commission of the offence while in cahoots of the 1st and 3rd accused and another who escaped from lawful custody.

12. The 3rd accused on the other hand is described as living in a home with lack of paternal leadership and supervision. The circumstances of the case is that after the murder of the deceased, the perpetrators locked her body inside her kitchen and that the neighbours only discovered it after it had decomposed.

13. From the facts, I am unable to state why the deceased in this case had to die in the manner she did, however the fact that the deceased was locked in a room after being killed, the perpetrators were well aware that it would be long for her body to be found for she is described as a person who kept to herself.

14. The court also considered how the murder was executed. The accused persons hit the deceased with a mortar on her skull and chest ribs. The body was said to have been found lying in a pool of blood.

15. There is no doubt in my mind that the 1st and 3rd accused were not remorseful for this offence, however the 2nd accused expressed remorse.

16. The Supreme Court in the case of **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR** sets 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:

- (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.**

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 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 subordinate 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”.

17. I have taken into consideration all the factors necessary in assessing the appropriate sentence to mete upon the accused persons in this case as set out in the above case. All these factors have been elaborated within this ruling. I must however mention that it has not escaped my mind that the offence in this case was a gender - based violence. It was a violence against the deceased person by virtue of being a woman who had no man to her side. She was an elderly woman who lived alone and could not therefore defend herself under the prevailing

circumstances.

18. The Supreme Court decision in **Muruatetu & another** supra, the justices of the Supreme Court, affirming 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** of 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...’

19. The court has set out certain principles which should guide courts in sentencing, which I have applied in this case. The Supreme Court then dealt with the importance of re-sentence hearing and reception of mitigation from the accused person, among others. The Court has made 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.’**

20. I have taken into account what has been presented by the accused persons in this case, as their version of the events. Is the version of the events of the material day heavy with pathos that would necessitate this court to consider an aspect that may have been unclear during the trial process?” Pathos means **‘anguish, bleakness, despair, tragedy, sadness’**. The accused persons have not set before court anything that can lead to a finding that there was an aspect of the case which remained unclear at the trial which their mitigation has illuminated. The events of the day were clear. Conversely the accused persons have not alleged that they acted out of any despair or anguish or bleakness or sadness or tragedy of any kind. The evidence tendered and further confirmed in the confession by 2nd accused indicated that the accused persons had not been provoked by the deceased who was just a harmless elderly lady.

21. I find that the accused persons deliberately hit the deceased with clear intention to cause her pain, suffering and death going by the manner in which they executed the injuries and by the choice of the areas of the body that were hit with the mortar. I have taken into account that the accused committed the offence outside the house and dragged the body inside the house and even locked it. The body was later discovered by neighbours after it had decomposed. She must have died a very painful death.

22. The pre-sentence reports for all the three accused persons indicate that the accused persons are young men who appear to have dabbled into the world of crime when they committed this offence and appear to rue the day they were roped in by the deceased’s houseboy who happened to be a younger brother to the 1st accused and who is reported to have escaped from lawful custody. The community members condemned the murder of the deceased and that the family of the deceased have been affected and traumatized.

23. In terms of sentence, the sentence for murder is the death penalty. It is true that pursuant to **Muruatetu** case (supra) the courts now can exercise discretion when considering and passing sentence. It is noted that the deceased was an elderly lady living alone and was viciously attacked by the accused persons and placed her body inside her kitchen which they locked from outside. The deceased did not deserve to die. Hence I find the vile and wicked act of the accused persons deserve nothing but severe punishment. This court will take note of the period the accused persons have been in custody. Several courts have given varying sentences following the Muruatetu case (supra). For instance Majanja J in **Nelson Miriti Gikunda & 2 others =Vs= Republic [2018] eKLR** resented the Petitioners to sentence of 25 years imprisonment. The learned Judge relied on decisions of the Court of Appeal in **John Ndede Ochola alias Obago =Vs= Republic [2018] eKLR** and **Jonathan Lemiso Ole Keni =Vs= Republic [2018] eKLR** where sentences of 25 and 30 years imprisonment respectively were upheld. I am guided by these authorities.

24. Taking into account the mitigating and aggravating factors and also factoring the time accused persons have been in remand, I hereby sentence each accused to imprisonment for a period of twenty five (25) years from the date hereof.

Orders accordingly.

Dated and delivered at Machakos this 16th day of January, 2019.

D.K. KEMEI

JUDGE