



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 28 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ALICE MORAA OMWENGA.....ACCUSED

SENTENCE RULING

1. On 14/06/2018, in a Judgment dated 28/05/2018, Alice Moraa Omwenga (“Accused Person”) was convicted of the offence of killing Edward Omwenga (“Deceased”) with malice aforethought. The trial was conducted by Justice Maureen Odero who wrote the judgment, and on whose behalf I read it. However, Justice Odero had been transferred out of the station so it was incumbent on me to carry out the sentence hearing.

2. To this extent, the Court held a sentence hearing on 07/06/2018. The Prosecutor and the Defence Counsel addressed the Court during the hearing. The family of the Deceased indicated to the Court that they did not wish to address the Court directly.

3. One of the issues taken up by Mr. Kobe, the Defence Counsel during the Sentence hearing is on the constitutionality of section 204 of the Constitution. Section 204 still reads that the mandatory penalty for murder is death. Mr. Kobe was of the view that the section is unconstitutional. He argued that one must read that section in light of Article 2(5) and 2(6) of the Constitution together with Article 20 of the Constitution. The statute, he argued, must be read to be in conformity with the Constitution and, especially, the Bill of Rights. If one reads Section 204 of the Penal Code to be in conformity with Article 24(2)(c) of the Constitution, Mr. Kobe argued, one must reach the conclusion that the death penalty is unconstitutional in Kenya. This is because, Mr. Kobe argued, one must also invoke Articles 26 and 28 of the Constitution – on the right to life and human dignity respectively – to reach the conclusion that one cannot derogate from the essential core content of a right. The death penalty, Mr. Kobe implied, derogates from the essential core content of the right to life and the right to human dignity in Articles 26 and 28 of the Constitution.

4. To support his arguments, Mr. Kobe relied on a famous decision by the Hungarian Constitutional Court – Decision 23 of 1990 “On Capital Punishment.” In that case, the Hungarian Constitutional Court found that capital punishment definitionally imposes a limit on the essential content of the right to life and human dignity (guaranteed under Article 54 of the Hungarian Constitution) and is, thus, not compatible with Article 8(2) of the Hungarian Constitution. Article 8(2), like our Article 24(2)(c) of the Constitution precludes any limitation on the essential content of fundamental rights.

5. This is an attractive argument. However, in light of the circumstances of this case, I do not wish to reach it and pronounce myself on the constitutionality of section 204 of the Penal Code in light of Articles 26 and 28 of the Constitution when seen against the categorical limits placed by Article 24 of the Constitution. This is for two reasons. First of all, I do not need to resolve the constitutional question presented because it is not necessary for me to resolve the controversy before me. Second, and related, the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* has already decided on the constitutionality of the mandatory nature of section 204 of the Penal Code. In that case, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

6. To this extent, the maximum penalty upon conviction for murder is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances. In the present case, I do not intend to impose the death penalty. Hence, under the salutary doctrine of constitutional avoidance, since I do not need to reach the constitutional question to resolve the case before me, the resolution of the constitutionality of section 204 in light of Articles 24, 26 and 28 of the Constitution will await a properly pleaded case whose resolution will be necessary to resolve the controversy.

7. To return to the case at hand, briefly, the facts as they emerge from the judgment, are as follows. The Deceased was the Accused Person’s husband. In the night of 17/03/2013, the Deceased was murdered in his house. His niece, Rebecca Moraa Marunga, found him dead on his bed with injuries on the head and left eye. A pathologist later concluded that the cause of death was cardiogenic shock due to injury to heart muscles with blood loss due to penetrating sharp force trauma to the chest. After considering the evidence in the case, the Court concluded that it was the Accused Person who had assaulted the Deceased. The Court also concluded that the fatal assault was done with the necessary premeditation to make it murder.

8. It is based on these facts that the Accused Person stands convicted of murder.

9. In mitigation, Mr. Kobe raised three points. First, that the Court should consider the best interests of the children left behind by the Accused Person and the Deceased in fashioning appropriate sentence. The Accused Person has four children – the youngest being 12 and the eldest 16 years old. With the paternal grandparents dead, the children need their mother, Mr. Kobe urged the Court.

10. Second, Mr. Kobe told the Court that the Accused Person is remorseful.

11. Third, Mr. Kobe asked the Court to recall that sentencing is about reforms.

12. On his part, Mr. Omutelema asked the Court to treat the Accused Person as a first offender. He asked the Court to take into account that the Deceased was a spouse and that the death has had a severe impact on the family. He did not recommend any particular sentence.

13. I have considered all the factors relevant to sentencing in this case.

14. Committing premeditated homicide is, obviously, a serious crime – one which the society must, through the sentence the Court imposes – denounce loudly and clearly. However, as I alluded to above, even in the terrifying realm of premeditated murder, there are gradations. Death sentence, even if still constitutional under the *Francis Karioko Muruatetu* Doctrine, is reserved for the highest level of murder convictions – for example, where the Accused Person acted with particular level of depravity, cruelty or torture; where they targeted particular vulnerable group or social class that deserves particular protection; or where the murder was a result of particularly intricate planning born out of a depraved heart.

15. I do not think we have present here factors that take this to the highest level of depraved heart murder. The Court has already found that the legal element of pre-meditation was present sufficient to make the homicide here murder as opposed to manslaughter. However, there are some mitigating circumstances. They include the following:

- i. The Accused Person is a first offender;
- ii. The Accused Person will remain the single parent of four children – all minors;
- iii. The homicide did not occur in the midst of commission of another felony or during flight from the commission of another crime; and
- iv. The expressed remorse of the Accused Person.

16. After considering all these factors, I am persuaded that a custodial sentence of fifteen (15) years will be an appropriate sentence for this homicide and I hereby sentence her to imprisonment for that period.

17. Orders accordingly.

Delivered at Nakuru this 15th day of January, 2019.

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JOEL NGUGI

JUDGE