



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 4 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PMM.....ACCUSED

SENTENCE

On the 24th January 2019 the accused person PMM was found guilty of murder contrary to section 203 as read with s. 204 of the Penal Code after the court found that the prosecution had established that on 9th January 2012 in Nyeri County, he, PMM, murdered Dedan Thitu Mburati.

In mitigation Ms. Lucy Mwai submitted that the accused was a widow aged 45 years whose wife died in 2008. They had a daughter, who was currently in secondary school in form three. The accused was arrested on 9th January 2012 and the child was taken away by the maternal family. He remained in custody upto 1st December 2015 and had been trying to build bridges with his daughter which would be seriously frustrated if he was given a custodial sentence. He also had old parents in their 70s. He is HIV positive and requires constant hospital visits. He is a first offender. She pleaded that all these facts be taken into consideration in the sentence.

The state on its part through Mr. Magoma submitted that the offence was very serious and an innocent life was lost where the bread winner of that family was removed from his family. He urged the court to mete out the mandatory sentence.

In her rejoinder Ms. Mwai pointed out that sentencing was a balancing issue: justice for the accused, the victim and the family.

The presentence report I asked for was filed on 4th February 2019 by the Mr. Peter Ndung'u Probation officer Mukurweini.

The victim impact statement indicates that the deceased had a wife and five children. His wife died in 2013, out of stress related complications. The children were shared out among relatives including the deceased elderly mother; the youngest living with an Aunt, the (3rd and 4th born) other youngest living in a children's home in Murang'a, and the two elder girls in high school. The loss of a son, a father and a brother is greatly felt.

The members of the community though described in vague terms as no one was mentioned specifically are said to state that it would be difficult for the accused to integrate if released, yet he has lived among them in the last three years while on bond.

The report indicates that the deceased and the offender had no known grudges as they hailed from the same area and knew each other very well. Offender is remorseful recalling the circumstances of the offence and the fact that it was more in self defence than anything else.

In the Sentencing Policy Guidelines Booklet, the former Chief Justice Dr. Willy Mutunga stated

These guidelines recognize that sentencing is perhaps one of the most intricate aspects of the administration of trial justice. It acknowledges that sentencing impacts not just the individual offender but also the community, and indeed the entire justice system. They also seek to enhance the participation of the victim, and generally infuse restorative justice values in the sentencing process. Significantly, they champion the national value of inclusivity by promoting community involvement through use of non-custodial sentences in suitable cases.

And Justice Msagha Mbogholi is quoted therein saying that sentencing is one form of;

The exercise of judicial authority as reflected by Article 159 of the Constitution. The sentencing process, which entails the exercise of judicial discretion, must be in accord with the Constitution, as embodied in the Judiciary's overall mandate of ensuring access to justice for all.

According to s. 204 of the Penal Code the penalty for a conviction of murder is the death penalty. That is what the state would like to see imposed on the accused person. The mandatory nature of that penalty has been done away with by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where the Court held that mandatory death penalty for murder as provided for under s. 204 is unconstitutional. The court said:

“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 an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.

That has given the court to the discretion to deal with each murder case in accordance with its peculiar circumstances. The common thing about murder cases is the fact of death. The circumstances of each are never exactly the same. Each murder trial has its own DNA so to speak.

In determining a sentence I must therefore take into consideration the circumstances of this specific case, of the offence, the offender, the victims, the community in the backdrop of what is expected to be achieved by the sentence.

The court is also guided by the principles found in the policy guidelines;

First the aggravating circumstances- the accused stabbed the deceased and he died, leaving his family without a bread winner.

Mitigating circumstances; the extreme provocation by the deceased, which created a simmering anger in the accused. However, the fact that the accused did not act in the moment set to speak removed this case from the exclusion in s. 208 of the Penal Code, which provides for manslaughter in cases of provocation. However, the fact remains that the deceased did and said things that provoked the accused's anger.

The accused is also a first offender and has expressed remorse for what happened.

I have considered the mitigation of the accused, the views of the secondary victims, the pre-sentence report. I have also considered that this started as a bar brawl and unfortunately led to the death of the accused's village mate.

Murder is a peculiar offence as the primary victim is not there to hear the apologies and either accept or reject them. It leaves a permanent blank in the family and the community, and its effects can be felt for generations to come unless society also works to heal them.

Now, with the opportunity of offenders getting back to the community when the wounds of the death are not so completely healed, it behooves us to ensure that the sentencing process encompasses the challenges posed by this. Article 159 of the Constitution mandates courts to uphold the its purpose in the exercise of judicial authority, and article 10, to uphold promote its values which include respect for human dignity, equity, social justice, inclusiveness, equality, and human rights.

In the circumstances of this I the accused person is sentenced to 10years imprisonment. However, taking into consideration the period he spent in custody the sentence will run from the date he was placed in custody to today less the period he has been on bond. I.e. from 9th January 2012 to 9th February 2016, and from 24th January 2019 to 8th February 2019.

During that period, he is to undergo the appropriate anger management counselling.

The court is also aware of his need for medical care, and the prison authorities are directed to ensure that the accused is availed his ARVs as required.

To assist in the healing process between the two families the Probation and After care services in conjunction with the Prison authorities to set in motion victim offender reconciliation.

Right of Appeal 14days

Dated, delivered and signed in open court at Nyeri this 8th February 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Ms.Kiu for state

Accused present

Gathiga Mwangi for Ms.Mwai for Accused

Accused is sentenced to serve 10 years imprisonment less the 4 years, 11 months and 16 days he has been in custody. The sentence is therefore 5 years, 10 months and 14 days imprisonment.

Right of Appeal 14 days.

Mumbua T Matheka

Judge

8/2/19