



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**CRIMINAL CASE NO. 69 OF 2014**

**LESITT, J**

**REPUBLIC .....PROSECUTOR**

**V E R S U S**

**ANDREW NJENDU GIKERA.....ACCUSED**

**RULING ON SENTENCE**

1. The accused **ANDREW NJENDU GIKERA** was found guilty and convicted of murder contrary to **section 203** of the **Penal Code**.
2. The sentence for the offence is prescribed under **section 204** of the **Penal Code** which provides for a mandatory sentence of death.
3. I have considered that the state is treating the accused as a first offender having no previous record. This court will therefore treat him as a first offender.
4. The defence counsel Mr. Kariuki urged that he is 32 years old and that when the offence was committed, he was 27 years old.
5. The learned defence counsel Mr. Kariuki submitted that the accused is at his prime when he is most useful to the nation and his family. Counsel urged that the accused is a single parent to an 11 year old boy who looks up to him and that he and the son are close. Counsel further stated that the accused as a father has been meeting all his son's needs both psychological and emotional including picking and dropping the boy from school despite his busy schedule. Counsel argued that it is in the best interest of the minor that his father brings him up personally.
6. Mr. Kariuki stated that the accused is remorseful that unfortunately he was not able to protect the deceased from the assailants. In addition the learned counsel stated that the accused has a clean record and has been court abiding and a person of good character. The Counsel asked the court to set a non-custodial sentence and urged that the accused promised that he will abide by all the conditions the court may set. Counsel urged the court to be led by the **Supreme Court Case of Petition No.14 and 15 of 2016** where the Supreme Court held that a court could give an alternative sentence other than that of death.
7. Before considering the sentence, I requested for a pre-sentence report from probation who filed one on 4<sup>th</sup> March 2019. I have considered the report which contains the accused family background, personal history, marital status, health, circumstances of the offence, attitude towards the offence and the victim impact statements.
8. I have taken the findings within the probation report into account and the sentiments expressed by the family of the accused and the family of the deceased. From the report both families confirm that the accused and the deceased were separated in 2012 after living together for 2 years. The deceased family stated that the deceased had refused to take the accused back. The report states that the son of their union was living with the deceased until the time of her demise.
9. The Supreme Court in the **Muruatetu** case, supra 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”.**

10. I am well guided by the above authority.

11. I have considered that the accused is a first offender. I have considered the mitigation by the defence. I have considered that the accused is a young person. I have also considered the period the accused spent in custody during the pendency of this trial, in total a period of 2 months.

12. I considered the unique circumstances of this case. The accused and the deceased had separated following the deceased took care of the child. It is clear from the evidence that few days to the murder the accused hired a vehicle that ferried the deceased from work and to burial preparations meetings. The accused lied to PW 3 about the ownership of the vehicle. The accused used the same vehicle to pick up the deceased from work on the fateful day of 18<sup>th</sup> July 2014 the day she met her death.

13. I find that the accused was not remorseful for his actions. In addition, the accused was not being truthful about what transpired during the incident that led to the death of the deceased. He could not account for his movement from Limuru to the Thika lodging where he landed on the same day of the incident. Having considered the evidence adduced in this case it is clear that his action to leave the murder scene was an attempt at a cover-up.

14. According to both families in the Pre-sentence report, I find that the accused committed a crime of passion because the deceased refused to take him back, a very unreasonable cause of taking life. The offence was also a gender-based violence. It was violence against the deceased person by virtue of being a woman.

15. It was submitted that the accused person has a son and that it is in the child's best interest to have him released in order to bring him up. I find that the accused did not have the best interests of the child at heart at the time he committed this offence. He was being selfish and brutal. It is in bad taste for the accused to say that his son has chosen him over the remaining members of the family, after he, with his hands caused his son's mother's death. The court shudders at the thought of such a remark being made to justify a non-custodial sentence when the real cause of the situation was a murderous act perpetrated by the offender.

16. The deceased family described the deceased in their Victim Impact Statement as a young, soft spoken and humble girl. The probation report also mentions that she was loved by both the family of the accused and her own family.

17. I appreciate the Muruatetu Case, supra. It is a guiding judgment from the Supreme Court. It gives the discretion to determine which sentence is appropriate having regard to all the factors affecting sentence including the unique circumstances of the case and of the accused. I have exercised that discretion.

18. Having taken into account all the facts of the case I find that a non-custodial sentence is not suitable and ought not to be considered. I find the accused was mean, high handed and heartless in the manner in which he committed the murder of the deceased. He pretended to be supportive of the deceased after she lost a family member only to use that as an opportunity to have her company. The accused did not even wait for the deceased to bury her dead.

19. Having taken all these factors into account, I will sentence the accused to imprisonment for a period of 25 years.

20. He has a right to appeal against both the conviction and sentence within 14 days from today.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MARCH, 2019.**

**LESIT, J**

**JUDGE**