



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT MACHAKOS

#### CRIMINAL CASE NO. 2 OF 2014

**(Coram: Odunga, J)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARY MUENI MUASYA.....ACCUSED**

#### SENTENCING

1. The accused herein, **Mary Mueni Muasya**, was convicted of manslaughter contrary to section 202 as read with section 205 of the **Penal Code** on 26<sup>th</sup> November, 2018. The particulars of the offence she was charged with were that on the night of 20<sup>th</sup> and 21<sup>st</sup> day of December, 2013 at Yumbani Village, Kakuswi sub location, Kitela Location in Mbooni East District within Makueni County, she murdered **JMM** (hereinafter referred to as “the deceased”). The deceased was the accused’s husband.

2. In finding her guilty of manslaughter this court found that:

**“whereas the retaliation may be deemed to have been out of proportion to the attack, this was not an ordinary case where one was dealing with a normal person. The deceased was mentally unstable and one could not tell how he would react to the actions of the accused. This may have led the accused at the spur of the moment to apply more force than would not be justified in the ordinary circumstances. In these circumstances it cannot be said with certainty that the accused did not feel that she was in immediate danger or peril arising from a sudden and serious attack by the deceased. Though the danger the accused apprehends, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means, in Beckford vs. R [1988] AC 130, Lord Griffiths stated (at p.144) that:**

**“a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.”**

**Here there was a lethal weapon in the hands of a violent mentally unstable person who had threatened to kill the accused and her children. This taken together with the past conduct of the deceased towards the accused and the children in my view was sufficient to constitute provocation.”**

3. The mental instability of the deceased was confirmed by his own father who was however quick to add that the mental instability was not that serious.

4. Under section 205 of the **Penal Code** the maximum sentence for manslaughter is life. Before sentencing the accused this court requested the probation office to provide pre-sentencing report. This court also requested for a victim impact report of the deceased family. Both reports were provided.

5. The probation officer by her report confirmed the mental instability of the deceased who at one time trekked from Nairobi to his home, a journey which took him seven days, amongst other incidences. Instead of seeking medical help, his parents instead sought the services of a witch doctor under the belief that those signs were those of a person destined to become a witch doctor himself. According to the report, the deceased was always noisy, nagging and violent. According to the report, at the time of the incident, the accused was four months pregnant a condition which could have contributed to her reaction due to hormonal imbalance. She however was remorseful and pleaded for leniency.

6. According to the report, the accused has four children aged between 19 years and 4 years old under the care of her maternal grandparents and her 19-year-old son. She is well talked of by community members both from her maternal and marital home as a hardworking, patient and understanding, good-hearted person who coped with the deceased for 6 years despite his mental status. The parents in law and the deceased brother however expressed discomfort at her release for apparently no good reason save for the intention to take over the children. They were however ready to accept the court’s decision. This is contrary to the other relatives of the deceased. Her family is however ready

to take her in, in case she is rejected by her in laws.

7. It was however recommended that the accused requires counselling in order to address anger management issue and trauma she has undergone in order to reintegrate her peacefully in the community. The Report therefore concluded that the accused's case was suitable for community rehabilitation/non-custodial sentence and recommended probation subject to the discretion of the court.

8. As appears from the probation officer's report the victim impact statement made by the deceased's father was however not positive towards the accused.

9. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of **section 329** of the **Criminal Procedure Code** which provides:-

**“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”**

10. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J 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.”**

11. 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.”**

12. In **R vs. 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.”**

13. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, as a guide in sentencing held that:

**“[71]...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.***

14. Loss of life is a very serious matter. It is highly unlikely, from the probation officer's report, that the accused will in these circumstances commit a similar offence. The accused has young children who are under the care of her undoubtedly aged grandmother and her teenage son. The family requirements must be taking toll on both the said grandmother and the son. The community on the whole empathises with the accused and is ready to welcome her back to the fold. In my view the fact that the deceased, the accused husband and the father to the accused's children, lost his life in the hands the accused, is a much heavier sentence than this Court could ever hope to impose on her. She will forever to live with that psychological trauma that her children's lack of a father arose from her own action for the rest of her life.

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

**“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.”**

16. The accused were arraigned in Court on 27<sup>th</sup> January, 2014 and has been in custody for more than 4 years. I have taken into account the foregoing factors. To my mind the accused herein require therapy rather than punishment and ought to be placed on probation in order for her to undergo guidance and counselling.

17. Whereas the feelings of the family of a victim is a factor to be taken into consideration, other factors are equally important otherwise the court would be placed at the mercy of the family of the victims even where the accused does not deserve a custodial sentence. Yes, the victims must have their say in court but that does not mean that they must have their way. To say that as long as the family of the victim opposes the release of the accused, the accused ought not to be released no matter the circumstances, would be tantamount to the court abdicating its role of doing justice to the victim’s family. A court of law exists to do justice in accordance with the law and ought not to sacrifice that duty at the altar of tranquilising the emotions of the victims where such action is not warranted.

18. In my view keeping the accused in custody will not only be detrimental to her but also to the welfare of her children and her ageing grandmother. If the parents of the deceased genuinely desire to be reunited with their grandchildren, it is my view that they ought to forgive the accused and welcome her back to the family as rejecting her is unlikely to yield the desired results. In fact, it may achieve quite the opposite. Having considered the circumstances of this case, I direct that the accused will be under probation for a period of one year during which period she will undergo counselling and therapy.

19. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 6<sup>th</sup> day of March, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Muumbi for the accused**

**Mr Machio for the State**

**CA Geoffrey**