



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 60 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**POO.....ACCUSED**

**RULING ON SENTENCE**

1. POO was charged with causing the death of AMM on the night of 8<sup>th</sup> and 9<sup>th</sup> June 2015 at [particulars withheld] Phase V Estate within Nairobi. [name withheld] died of ligature strangulation. The circumstances under which she died are captured in the judgment of this court that was delivered on 7<sup>th</sup> March 2019. In the same judgment this court found P guilty and convicted him of murder. Consequently, the case was scheduled for sentencing. Upon request, this court called for a pre-sentencing report and victim impact statement from the probation office.
2. The report gives the accused's family background, personal and employment history and marital status. Most of the information contained in the report confirms the evidence of the accused given in his defence. He however maintains his innocence and denies committing the offence. The report from the probation officer discloses that some of the relatives of the deceased did not recognize the relationship between the accused and the deceased as that of man and wife. The siblings of the deceased are calling for a punitive sentence while the parents of the deceased intimated that they have forgiven the accused.
3. During the mitigation and sentencing hearing Mr. Nyaberi made lengthy submissions that portray the accused as having had an illustrious career as a businessman with a heavy responsibility. It was submitted that the accused is aged 44 years old, is a college graduate with a degree in Hotel Management and who was involved in consultancy services before his arrest. It was submitted that he founded Nairobi Bar School in 2013 situated within the Central Business District (CBD) Nairobi and that the school currently hosts about 80 students and 9 tutors, 8 of who are on permanent basis.
4. Several documents were tendered including several statement signed by tutors; statements signed by several alumni of Nairobi Bar School; a letter from the Bishop of Redeemed Gospel Church Komarock on the character of the accused; a contract on consultancy services between the accused and National Industrial Training Authority and what the accused referred to as a parental responsibility agreement between him and the parents of the deceased in which he undertakes to take care of the minor child (SO) born of the deceased and the accused. The accused has also attached Mpesa statements meant as proof that he takes care of the minor child.
5. The purpose of the several statements is to show that several people and their families depend on the accused as an employer or have every reason to thank him for having positively impacted into their lives as the proprietor of Nairobi Bar School. The accused is also said to support several children's homes in Nairobi and Kisumu. It was further meant to show that placing the accused on custodial sentence would negatively impact on all the people who in one way or another depend on the accused.
6. This court was referred to various areas of the Sentencing Policy Guidelines that are relevant. This court was asked to consider factors that should be taken into account in determining whether to impose a custodial or non-custodial sentence. Specifically this court was referred to Sentencing Policy Guideline 7.19 (2), (4) (5) and (6) in respect of the offender's criminal history, character, danger to the community and responsibilities to third parties. This court was invited to consider the accused person as an offender with unique needs as provided in Sentencing Police Guideline No. 2.4.9 due to the heavy responsibility he carries. I have read the Sentencing Policy Guidelines and have understood the same.
7. This court was asked to give effect to the law and develop it by exercising its discretion, including invoking the Community Service Orders.
8. This court was also urged to consider that the accused is HIV positive and asked not to impose a custodial sentence as this would worsen the health condition of the accused.

9. This court was asked to consider that the accused regrets the actions leading to the death of the deceased and that he is very remorseful. The court was also asked to consider that the accused is a first offender.

10. On the other hand the prosecution opposed the production of the bundle of documents containing statements of the tutors and former students as well as the letter from the Bishop on accused's character. It was submitted that the information contained in those documents amount to evidence and ought to have been tendered during the hearing to enable cross-examination of these witnesses. It was submitted that admitting these statements at this stage after judgment has been delivered amounts to introduction of new evidence and this is prejudicial to the prosecution case. This court was urged to decline admitting to the court record these documents.

11. It was further submitted by the prosecution that the parents of the deceased have not entered into any agreement on parental responsibility with the accused and that what is purported to be an agreement is just a letter stating that the accused is willing to raise the minor. It was submitted that the Mpesa transactions were done by the accused on his volition.

12. The prosecution submitted that even though courts have in various cases imposed non-custodial sentences including Community Service Orders, each case should be considered on its own circumstances and merit. The Prosecution Counsel urged that this court considers imposing a deterrent sentence.

13. In response Mr. Nyaberi submitted that the sentencing and mitigation hearing is a grey area and that he had so informed the court before he filed the documents. He submitted that he could not have filed the information on the antecedents of the accused during the hearing stage.

14. Ms. Mweu for the family of the deceased informed the court that the accused has issued threats to the family of the deceased in a bid to force them to swear affidavits in his favour. The accused has denied doing so.

15. I have considered the issue of threats to the family. As I directed, it is not possible to determine the truth of the alleged threats without evidence of investigations into those allegations. If this court were to take the alleged threats into account at this stage without proof of the same this would be prejudicial to the accused.

16. Mitigation before sentencing is a requirement of the law. Section 216 Criminal Procedure Code provides that: ***The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.***

17. Section 329 of the Criminal Procedure Code also provides that: ***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.***

18. In **Francis Karioko Muruatetu & another v Republic [2017] eKLR** the Supreme Court stated as follows on the issue of mitigation:

***“Therefore, from a reading of these Sections, it is without 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 an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.”***

19. To my understanding what is envisaged in the above sections I have quoted is a sentencing and mitigation hearing where the court receives evidence to guide it on the proper sentence to impose. I have noted by the Supreme Court, the sections are couched in permissive terms meaning that the discretion of the court is called for. However, the nature of this sentencing and mitigation hearing has not been clarified. Is it one where parties are to call evidence subject to cross-examination or it is to be done by way of submissions?

20. In my considered view, the hearing envisaged here can take any nature as the court may direct after consultation with the parties. However, care must be taken to avoid a situation that may seem to re-open the trial afresh. At this stage, the accused person has already been found guilty and has been convicted. The only matter pending is the sentence to impose. Care should be taken that only matters that are necessary to guide the court in sentencing should be presented as evidence.

21. To my mind, this means that if parties wish to have the hearing proceed by way of submissions and the court is in agreement with them, then each party should be allowed to know what the opposing party will be submitting to enable the party prepare depositions in response to the issues raised. In other words no party should take advantage over the other and surprise them. If the hearing takes the form of oral evidence, which I think may not be appropriate unless when extremely necessary, then the other party should be at liberty to put any questions to the person giving the oral testimony to clarify any issues that may arise. The court should however be cautious that no party suffers prejudice.

22. Having said that, it is my view that the information presented in court by way of submitted statements and in other forms has not been verified. However, all that the information attempts to show is how philanthropic the accused is and the responsibility he shoulders. In my view this information does not prejudice the prosecution and the family of the deceased given that this court has the duty to ensure that justice is served. Of course the manner in which this information was presented means that none of it has been verified and therefore its value is questioned.

23. I have taken into account the HIV status of the accused. It is not lost to me that medical care for people living with this condition has improved tremendously in this country and therefore, no patient should suffer whether in custody or not unless they have no access to doctors or they neglect the doctors' advice.

24. I have considered the probation report and I have understood the same. I have taken into account that the accused does not have previous criminal records. I have taken into account the accused's background, his personal and family history and the circumstances surrounding the death of the deceased. Although the accused has told this court through his lawyer that he is remorseful for the events leading to the death of the deceased the information he gave the probation officer is different. In the report presented in court by the probation officer, the accused maintains that he is innocent. This seems to contradict his remorsefulness as indicated in his mitigation.

25. That a life was lost is a fact. Nothing said or done will bring that life back. Although the accused maintains that the deceased was married to him, the information from the family of the deceased is that their relationship had not been formalized. The evidence on record shows that the deceased was entertaining another relationship with N. This is a pointer that her relationship with the accused was not running smoothly. The accused admitted that they argued on the day the deceased died. He stated that he confronted her after she denied him his conjugal rights. But, in my view, whatever the issues both had should not have led to her death. There are better ways of resolving problems than killing the other person.

26. For justice to be served, this court considers that a custodial sentence is appropriate. Having taken into account all the factors of this case, it is my considered view that a custodial sentence of twenty (20) will years serve the purpose. I therefore sentence the accused to serve 20 years in prison. He is hereby informed of his right of appeal within 14 days from today's date. Orders shall issue accordingly.

**Delivered, dated and signed this 23<sup>rd</sup> day of May 2019.**

**S. N. Mutuku**

**Judge**