



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO 24 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

STANLEY KARIUKI WALUGORO alias KARISH..... ACCUSED

SENTENCE

1. The convict **STANLEY KARIUKI WALUGORO alias KARISH** was on the 20th day of February, 2019 convicted of murder of **JOSEPH MUTISO MUTUKU** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. What the court is now called upon is to exercise its judicial mind on what constitutes an appropriate, proportionate, adequate and just sentence herein.

2. The starting point in this judicial exercise and function is **Section 204** of the **Penal Code**, the punishment section, as read against the Supreme Court decision in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR, Petition No. 15 & 16 of 2015 (consolidated)**, where the court had this to say of the Section:-

“[48] 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 appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[52] We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”

3. In compliance with the Judgement of the Supreme Court in **FRANCIS KARIOKO MURUATETU** (supra) and the Judiciary Sentencing Policy Guidelines and Regulations, the court called for Pre-sentencing report and allowed the convict to make submissions in mitigation.

PRE-SENTENCING REPORT

4. It was stated that the convict was born of a single parent who picks plastic and scrap metals at Dandora in Nairobi for a living. The accused dropped out of school at class four and at the time of the incidence was a casual labourer at Juakali section around City Stadium. He was a single parent of two children. Though he sought leniency, he denied the commission of the offence and stated that he was only arrested by the police to assist in investigations only to be charged with the offence.

5. On community ties it was indicated that the convict was known to be a good person, hardworking and never involved in any criminal activities in the area. On the Victim Impact Statement it was stated that the deceased was a garbage collector at Dandora, married with two children. The convict and the deceased were friends.

MITIGATION

6. On behalf of the convict, Mr. Oduor submitted that he was a single father with young children. He was of good conduct without any previous criminal record and should therefore be given a second chance. On behalf of the prosecution, Mr. Naulikha submitted that since the convict took away the life of another person, he should have been prepared to lose his life too and therefore death sentence was recommended.

7. The sentencing objectives as per the Judiciary Sentencing Policy Guidelines 4.1 are:-

- 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/her 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.**
- 5. **Community protection: to protect the community by incapacitating the offender.**
- 6. **Denunciation: to communicate the community’s condemnation of the criminal conduct.**

DETERMINATION

8. I have looked at the circumstances under which this offence was committed, the deceased had allegedly stolen the accused’s empty crates of beer and the accused was out to recover the same and administered justice as they do in Mukuru Kwa Njenga where they were residing and that is what led to the death of the deceased. I have taken into account the probation officer’s report on the convict and his past record and has come to the conclusion that whereas life was lost the same can still benefit from rehabilitation so as to be a productive member of society.

9. I have taken into account the fact that the convict has been in remand custody for a period of five (5) years since his arrest and has been adequately punished for the crime committed. To enable him be rehabilitated further, I have come to the conclusion and hold that a non-custodial sentence on probation would be the most appropriate, just and adequate sentence herein.

10. The convict shall therefore serve a probation period of three (3) years during which he shall be settled into the community so as to take care of his children who are now with their maternal grandmother. The four years he has been in remand custody will serve as restoration to the family of the deceased and it so ordered.

11. The convict has right of appeal both on conviction and sentence while the prosecution has right of appeal on sentence.

Dated, delivered and signed at Nairobi this 17th day of July, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Oduor for the accused

Accused present

Court Assistant - Karwitha