



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 59 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BENSON NDEGWA KAMAU.....ACCUSED

SENTENCE

1. **BENSON NDEGWA KAMAU** alias “**Ben**” was convicted on the information of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The court now is called upon to pass a just and appropriate sentence taking into account the Supreme Court Judgment in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR, Petition No. 15/16 of 2015** where the court held that the mandatory nature of death sentence provided for under **Section 204** of the **Penal Code** deprives the court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.

2. The court in the **Muruatetu** case proceeded to set guidelines which the court must take into account as mitigating factors as follows:-

- 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.*

3. The objectives of sentencing has been captured by the Judiciary of Kenya in The Sentencing Policy Guidelines as follows:-

- 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.*

4. Upon his conviction the convict in mitigation submitted through his Advocate on record that he was a first offender and a father of two school going children. He had been in custody since 2015 which the court should take into account as stipulated in **Section 333(2)** of the **Criminal Procedure Code** which has been stated in the **Sentencing Policy Guidelines 7.10**, that failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. The convict therefore sought non-custodial sentence since while in prison he had learned how to control his anger.
5. On behalf of the State it was submitted that though the court should treat the convict as a first offender, since the deceased died a very painful, untimely and unwarranted death in line with **Muruatetu case**, he should be sentenced to death. It was submitted that for every offence there is a team of victims who seeks justice to be done.
6. In compliance with the Supreme direction and the Bond/Bail Policy Guidelines, the court called for Pre-sentencing report where it was stated that the offender together with other boys were taken up by some lady who gave them food in return of which they ran errands for her, which according to members of community included ferrying *chang'aa* to customers within the larger Dandora and its outskirts. He cohabited with two ladies at different periods but they both walked out of these relationships due to excessive violence.
7. It was stated that he admitted committing the offence as a result of anger and influence of alcohol. He stated that on the material day he had bought the deceased drinks and she had agreed to go with him to his place only to decline when it was time to leave causing him to hit her with a beer bottle. He pleaded for leniency.
8. On the Victim Impact Statement it was stated that the deceased was married with two children currently in Form Two and Class Eight respectively. At the time of her death she had separated from her husband but had reconciled and was in the process of going back to him. The children of the deceased were currently staying with their father who was unknown to the offender. He feels that the offender killed his wife in a ruthless manner which should be taken into account by the court.
9. In conclusion it was stated that the offender was twenty six (26) years old at the time of sentencing and had lived in Dandora throughout his life. He never enrolled in school but took off from home at an early age to stay with a group of boys being beyond parental control and preferring to live a care free life, stealing and harassing members of the community and was constantly in and out of police station. His family distanced themselves from him and the community feels that he should be kept away.
10. As stated in the Judgement and confirmed in the Pre-sentencing report, the convict had spent his money on one **Mary Njeri** with intention of having sex with her at the end of the day. The deceased being a caring lady felt that the girl was being taken advantage of and stopped the accused from going away with her. The convict could not take it anymore and turned his anger against her and not only that, he turned his anger against **PW3** too, who was lucky to have survived.
11. Was the death of the deceased called for? I don't think so! Whereas the accused had spent his money with intention of having sex with one of the girls at the bar, and whereas the deceased may have interfered with his intentions, being a person who was known in the said bar, there were more better ways of settling the dispute than resorting to violence. The girl "**Njeri**" was already drunk and she did not want to go away with the accused. There were more better ways of the convict recovering his investment, might be next time, she was after all a service girl at the Pub where he was a regular customer. The convict's anger was not only directed at the deceased but also at **PW3** who was known to him. The action by the deceased cannot be classified as provocation at all. The convict's action was not called for and unreasonable in the circumstances.
12. I have taken into account the principle of proportionality and has come to the conclusion that the undue sympathy to the convict in the circumstances of this case will lead to more harm to the justice system, as it will make members of society feel that women are tools for sex, who have no power to say NO to any man who has spent money on them. I support the clarion call - "*my body my choice*" to all ladies and now men a "**NO**" should mean a "**NO**" not "*may be*".
13. Having regard to the nature of this offence, the manner in which it was executed, which is akin to an offence of gender violence in nature, the age of the convict and his past character as indicated in the Pre-sentencing report and is of the considered opinion and hold that the convict needs reformation which can only be achieved in the confines of prison, while at the same time sending a message to society in general that women or men for that matter are not objects for sex sold and dished out at the cost of bottles of beer.
14. Taking into account the fact that the convict has been in custody for a period of five (5) years and is aged twenty six (26) years, an imprisonment for a period of twenty five (25) years is a just, adequate and proportionate sentence herein to serve the two objectives set out herein and accordingly sentence the convict to an imprisonment for a period of twenty five (25) years from the date herein.
15. The convict has a right of appeal both on conviction and sentence while the State has a right of appeal on sentence and it is so ordered.

Dated, delivered and signed at Nairobi this 16th day of July, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Oduor for the accused

Accused present

Court assistant – Karwitha