



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO 55 OF 2015**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**GODFREY MUCHANJI OJIAMBO.....ACCUSED**

**SENTENCE**

1. The convict **GODFREY MUCHANJI OJIAMBO** was on the 28<sup>th</sup> day of March, 2019 convicted of murder of his wife **EUNICE OMENDA MATANGA** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The court is now called upon to pass an appropriate, proportionate and just sentence.

2. The starting point herein is **Section 204** of the **Penal Code**, the sentencing section, as read in line with 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 said directions of the Supreme Court and the Sentencing Policy Guidelines and Regulations, the court called for Pre-sentencing report and allowed the convict to mitigate. In mitigation the convict through Mr. Masara Advocate submitted that he was a first offender who had been married to the deceased for a period of seventeen (17) years with seven (7) children in secondary and Primary schools who received parental guidance and care from him. He pleaded with the court to tamper justice with mercy by giving him a non-custodial sentence to enable him start his life afresh.

4. On behalf of the State Mr. Naulikha submitted that the victim suffered constant abuse in the hands of the convict as stated in the Pre-sentencing report. The court was urged not to ignore the fact that the victim suffered a painful death in the hands of someone she loved. He therefore sought for a death sentence.

**PRE-SENTENCE REPORT**

5. It was stated in the report that while in custody the offender went through counselling and graduated with a certificate in Theology. It was

stated that he was under influence of alcohol at the time of the commission of the offence having disagreed with the deceased who went away for a week. He was remorseful and pleaded for leniency. On the Victim Impact Statement it was stated that the deceased was 26 years old, hard working who managed to build her matrimonial home and few rental houses in Soweto Kibera. The children were learning to cope with the loss of their mother and had forgiven their father whom they occasionally visited in prison. Her family reported that the marriage was very unstable due to the offender's drinking habits and constant accusation of infidelity but that the two families had reached out to each other with view to restoring broken social ties following the death.

6. In conclusion it was stated that he had been in custody for the last four (4) years and his family were ready to assist his reintegration if considered on a non-custodial sentence.

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.**

8. In this matter as stated in the Judgement, the deceased having been married to the convict at the age of nineteen (19) years and having given him seven (7) children was a rising star amongst the slum dwellers of Soweto. She was a money lender (Shylock), had a play school in addition to several rental houses. For her it seems the sky was the limit. The convict it seems left out in her mobile rise, leading to her moving out of Soweto into the nearby Highrise apparently into the hands of **PW5 DUNCAN ODOYO JABUYA** into whose house she found refuge and maybe new love and affection. This did not go down well with the convict who reported his loss to the Administration Police and the area Chief. His manhood was wounded by the said Jabuya openly walking with his wife within the streets of Highrise. According to his testimony, Jabuya would whenever he called his wife on phone answer and remind him to forget about her and on the other hand the local administrators to which he sought help seemed helpless.

9. Did the action of his wife leaving him to find comfort in the hands of Jabuya warrant her death? I have said before and will continue to say, that any woman has a right to fall in love and out of love and should not lose her life as a result of her decision however sinful one looks at it from the moral point of view. Whereas the convict's manhood was wounded, there was no justification in ending the life of the deceased. He should have upped his game plan to win her back. I have taken into account the emotional investment the convict might have put in the said relationship for the last seventeen (17) years but has weighed the same against the fact that he married the deceased at the age of nineteen (19) years and should have been prepared that she would grow up in the said marriage which it is apparent she did. It is not written anywhere save for the bible that the union was meant to be forever.

10. In passing sentence in line with the Supreme Court decision in Francis Muruatetu, the court ought to take into account the seriousness of the crime and the criminal history of the accused in line with the maxim "**The graver the offence, the longer the criminal record, the more severe is the sentence to be awarded**". In this matter the deceased was a victim of domestic or gender based violence which the court ought to take into account while passing sentence. In the case of **REPUBLIC v JOHANA MUNYAU MWENI [2018] eKLR**, I had this to say as regards similar circumstances:-

**"9. This offence was committed as a result of domestic violence, the deceased a workmate of the accused gave her life and love to the convict from which she expected love and protection in return. The fact that the deceased had not given birth to a child a factor which was beyond her control was no reason enough for her to lose her life. Whereas the convict had an unhealthy past which might have contributed to his character, there is no indication that the accused took any steps to seek help and therefore cannot use his past as a ground to escape punishment.**

**10. The court is alive to the rise in the number of deaths arising out of domestic violence or in family setting and therefore any Judgement/Sentence meted out by the court should send a warning that the home is a city of refuge and not a place where one has to be on his/her guard as was in the case herein."**

11. Whereas the convict's children needs his support and parental guidance, the manner in which the offence was committed and the reasons thereon calls for deterrence treatment so as to deter would be offenders. This court has stated before and would repeat that no woman/man should die for falling out of love and finding love elsewhere. The court has further taken judicial notice of the increase of death arising from domestic disputes and time has come for this court to state through its sentence that enough is enough and the only way this court can do so is through a sentence that will send an appropriate warning.

12. I have taken into account the fact that the convict has been in custody since 11/6/2015 when he first appeared in court and will therefore sentence the same to twenty (20) years to serve the twin objectives of deterrence and rehabilitation to be served as follows:-

- a) **Four (4) years from 11<sup>th</sup> June 2015 to date considered served.**

*b) Thirteen (13) years imprisonment with a warning to any would be offender and for the convict to benefit from the rehabilitation programs offered in the prisons.*

*c) The convict is entitled to remission if any on the first seventeen (17) years.*

*d) Three (3) years thereafter on probation for further rehabilitation and community placement on probation.*

13. The convict is entitled to right of appeal both on conviction and sentence while the State has right of appeal on sentence and it is hereby ordered.

**Dated, delivered and signed at Nairobi this 16<sup>th</sup> day of July, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Naulikha for the State*

*Mr. Koech for Mr. Masara*

*Accused present*

*Court Assistant - Karwitha*