



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO 48 OF 2014**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**JACKSON MUIMI TUMA .....ACCUSED**

**SENTENCE**

1. The convict **JACKSON MUIMI TUMA** was on the 13<sup>th</sup> day of March, 2019 found guilty and convicted of murder of **SONAL D’SOUZA** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The court is now called upon to pass an adequate, proportionate 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 Supreme Court decision above and in line with the Judiciary Sentencing Policy Guidelines and Regulations, the court called for and obtained Pre-sentencing report and allowed the convict to mitigate.

**MITIGATION**

4. The convict through his Advocate Ms. Chepkorir stated in mitigation that he was aged 43 years with school going children and was also

taking care of his brother's orphaned children. He had a bank loan which he was repaying and was therefore requesting for a second chance to go back to society. He was a first offender and very remorseful for what happened as he considered the deceased his employer. He stated that he was not sure whether Stephen Kyalo whom he went with to the house of the deceased was involved in the commission of the offence since he has not been seen thereafter. He sought non-custodial sentence.

5. Mr. Musa Juma Advocate for the victim submitted under **Section 229 of the Criminal Procedure Code** that the deceased was 43 years old and a mother of two children, a boy and a girl. The murder was a big blow to the widower who met her in high school as it had robbed the family of love of the mother, a role he could not play. He pleaded with the court to let the convict pay for his action.

6. Mr. Naulikha on behalf of the State stated that the convict having been known to the victim used that knowledge to become mischievous and exploited that with the result being the victim's death. It was submitted that the convict was in denial and not remorseful. It was stated that if the accused had his way there would have been three victims as he had ordered that the three people be shot to conceal evidence. It was submitted that based on how the crime was committed the court should pass a death sentence.

#### **PRE-SENTENCE REPORT**

7. It was stated that the accused met the deceased as a Chef while working at an hotel in Westlands and a friendship developed between them, leading to the deceased requesting the convict from time to time to make for her food at her house while hosting guests or on special occasions. The convict denied commission of the offence but sought leniency from the court. His family pleaded for his release so as to take care of his whole family since if incarcerated his family will suffer loss.

8. On the Victim Impact Statement the widower stated that the deceased was at her prime of her life with so much to offer both professionally and personally. It had been painful and harrowing for the children to lose their mother at the ages when they needed her most. He now had to scale down on his travels so as to be there for the children and that had affected his professional life. He sought for the convict to be given the maximum possible sentence as the crime was a senseless act that served no purpose.

9. It was concluded that the death had left the family of the victim distraught and were yet to recover from the pain, while the offender was in denial and did therefore not exhibit remorse nor seek forgiveness.

10. 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.**

11. In this matter, the convict in the company of others not before the court went into the house of the deceased where he was well known as a specialist cook and whatever their intention was, did not come out at the trial as the dead tells no tale. Whether anything was stolen from the deceased or whether they disagreed on an issue, we shall not know since the convict decided not to tell his story. The only thing we know is that the deceased stated "No no Jackson you cannot do this to me" and the convict stated "Shoot them all, I don't need any evidence."

12. I would therefore agree with the submission by the prosecution that the convict used his close proximity to the deceased to gain entry into her home for whatever purpose, thereby ending up causing her death. The death was uncalled for, cold blooded and calculated. Life has been lost and can never be restored. The convict is unremorseful while putting the interest of his family above that of the victim's family. From the Pre-sentencing report, it is clear that he is not ready to be rehabilitated and therefore ought to spend some time in custody so as to reflect upon his action.

13. The deceased was forty three (43) years old at the time of her death while the convict was forty two (42) years at the time of the sentence. Having stated that the death was uncalled for and senseless, the only sentencing objective that will be appropriate in this matter is a combination of rehabilitation, deterrence and denunciation, which can only be obtained if the convict is given stiffer jail terms so as to benefit from the prison rehabilitation services while at the same time a sending message to society that crime does not pay and he/she who takes human life must be ready to pay for it. I have therefore taken into account the mitigation, Pre-sentencing report and the evidence tendered before court and come to the conclusion that an imprisonment term of thirty five (35) years would be the most appropriate and proportionate sentence herein which I hereby award.

14. The convict is entitled to right of appeal both on conviction and sentence while the State retains the right of appeal on sentence. In the final analysis it is ordered as follows:-

**a) The convict to serve imprisonment term of thirty five (35) years.**

*b) The period he was in custody before being released on bond shall be taken into account and credit therein given to him.*

*c) He shall be entitled to remission on the said term if any after serving twenty (20) years.*

**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*

*Ms. Kinyori for the accused*

*Mr. Juma for the victim's family*

*Accused present*

*Court Assistant - Karwitha*