



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**HIGH COURT CRIMINAL CASE NO. 27 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BONIFACE KABUCHO KURIA.....ACCUSED**

**SENTENCE**

1. The convict was on 27<sup>th</sup> day of February, 2019 convicted of the murder of his friend **WILLY MWONGERI MBUGUA** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The court is now called upon to determine an adequate, proportionate and just sentence herein in line with the Supreme Court determination in **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR, Petition No. 15 & 16 of 2015 (consolidated)**, where the court stated:-

*“[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.”*

**PRE-SENTENCING REPORT**

2. In line with the said decision of the Supreme Court and the Judiciary Sentencing Policy Guidelines and Regulations the court called for a Pre-sentencing report in which the following was stated:- The convict was twenty nine (29) years old as at the time of the sentence. At the time of the commission of the offence he used to work as a DJ in weddings, birthdays, night clubs and was also a tutor. It was stated that he had fell out with his first partner who accused him of misappropriation of funds and was therefore depicted as a person not trustworthy where money was concerned. He was married with a young child.

3. It was indicated that he denied ever committing the crime and had nothing to do with the death of the deceased, who was his friend with whom they intended to start a Dee-Jaying Academy. His wife stated that the convict was set up since they were financially stable and he could therefore not have gone to such length to kill for money.

4. On the Victim Impact Statement it was stated that the deceased was very industrious and innovative. The mother indicated that she was forced to sell some family property so as to repay the money she had given the deceased which led to his death. The family stated that while on bond the convict had threatened the owner of the motor vehicle that had been used to track and arrest him and should therefore face the full force of the law.

5. On conclusion it was stated that the offender came up as a high risk of reoffending. He did not exhibit any remorsefulness or even sympathy that the deceased had lost his life.

6. The sentencing objectives as per the Judiciary Sentencing Policy Guidelines 4.1 are 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.**

7. In this case, the convict and the deceased were in the process of setting up a business venture for which the deceased obtained substantial sums of money from his mother towards the said project and that was the last night he was seen alive. The convict was in constant communication with him throughout that period, only to stop looking for him the night he died. Whereas the convict in exercising his constitutional right maintains his innocence and hopes to be vindicated on appeal, based upon the Pre-sentencing report, he comes out as one who might not benefit from rehabilitation based upon his attitude.

8. Having eliminated rehabilitation as an objective, this therefore leaves the court with retribution and deterrence as the best objectives to be obtained in punishing the convict herein. That is to say, punish him for his criminal conduct and to deter other would be offenders. Having looked at the age of the convict, the circumstances of the offence, the Pre-sentencing report and the mitigation by the convict, I am of the considered opinion and hold that a sentence of twenty five (25) years imprisonment would be the most appropriate sentence herein less the period he was in custody before being released on bond and it is so ordered.

9. The convict is entitled to right of appeal both on conviction and sentence while the State retains right of appeal on sentence.

**Dated, delivered and signed at Nairobi this 9<sup>th</sup> day of July, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Naulikha for the State*

*Mr. Maina for the accused*

*Accused present*

*Court Assistant - Karwitha*