



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO.78 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

TITUS NGAMAU MUSILA ALIAS KATITU.....ACCUSED

SENTENCE

1. The convict **TITUS NGAMAU MUSILA** *alias* **KATITU** was on 7th February, 2018 found guilty and convicted by this court on a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. What the court is now called upon is to decide what is an appropriate and or adequate sentence to be meted to the convict herein.

2. The starting point in this journey is **Section 204** of the **Penal Code** as read together with the Judgement of the Supreme Court of Kenya in **PETITION NO. 15 & 16 OF 2015, FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC & OTHERS [2017] eKLR**, wherein the Supreme Court had this to say:-

[41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage.

[42] Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process . . .

[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms . . .

[45] To our minds, what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless . . . Try as we might, we cannot decipher the possible rationale for this provision . . .

[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 . . .

[69] Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment . . .

[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines [Sentencing Policy Guidelines] are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(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.”

(Emphasis added)

3. My understanding of what the Supreme Court is saying is that under **Section 204** of the **Penal Code** the court now has discretion to impose any sentencing upto and including death sentence based on the circumstance of each and every case. This court had long before the decision of the Supreme Court herein above taken the following view in the case of **REPUBLIC v JOHN HENRY ALUBALE OMULIEBI [2016] eKLR, HIGH COURT OF KENYA AT NAIROBI HCRC NO. 49 OF 2013** as follows:-

“The accused has been convicted of the offence of murder and as per the provisions of Sections 204 of the Penal Code, the only available sentence is death. However, this court is alive to the Court of Appeal decision in *GODFREY NGOTHO MUTISO v REPUBLIC, CRIMINAL APPEAL NO. 17 OF 2008* and *JOSEPH NJUGUNA MWAURA & OTHERS v REPUBLIC, CRIMINAL APPEAL NO. 5 OF 2008* on the mandatory nature of the death sentence herein. However, and with due respect to the same decisions I am of the considered opinion that before Parliament enacts an amendment to the said provisions of the Law, the discretion of the court in passing appropriate sentence cannot be curtailed . . .”

See also my reasoning in **REPUBLIC v RODGERS KUTOSI alias PAUL KUTOSI RODGERS, CRIMINAL CASE NO. 50 OF 2014**.

4. Whereas the court has a wide discretion in view of the determination of the Supreme Court herein in the question of sentence, the said discretion cannot be used by the Court of law in a fanciful and whimsical manner. Very strong reasons on consideration of relevant facts have to form the fulcrum for lenient use of the said discretion as was stated by **BENJAMIN N. CARDOZO** in *The Nature of the Judicial Process* – Yale University Press 1921 Ed page 144.

”the judge even where he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life’ . . .”

5. Having set out the legal principles herein, the only issue for determination is what would constitute an adequate, appropriate and just sentence in the circumstances of this case? In the case of **STATE OF MADHYA PRADESH v MEHTAAB CR. APPEAL NO. 290 OF 2015**, the Supreme Court of India had this to say:-

“It is the duty of the court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstances may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and society. It is also the duty of the court to duly consider the aspect of rehabilitating the victim.”

6. In deciding an adequate sentence the court ought to take into account the nature of the offence, the circumstances of the commission, the age and character of the offender, the injury to the individual or to the society as stated by the Supreme (supra), the consequences of the crime on the victim and the members of his family so as to make the crime and the punishment equal or equivalent.

7. The objectives of sentencing are stated in paragraph 4.1 of the Sentencing Policy Guidelines but can be summarized as follows:-

- *To prevent the occurrence of crime.*
- *To punish the transgressor and the criminal.*
- *To rehabilitate the transgressor and the criminal.*
- *To compensate the victim.*
- *To deter the offender from committing any criminal acts in the future as well as other people from committing similar offences.*
- *To protect the community condemnation of the convict.*

8. The Supreme Court of India had this to say on the objectives which I find very relevant and useful in the case of **ANTONY PAREIRA v STATE OF MAHARASHTRA (2 AIR 2012 SC 3802)**:-

“70. Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles; twin objective of the sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence . . .”

9. Justice P.N. BHAGWATI in **SANTA SINGH v STATE OF PUNJAB [1978], 4 SCC 190** had this to say:-

“Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances--extenuating or aggravation of the offence. The prior criminal record', if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence.”

10. I now turn to the case before the court. The offender was a serving police officer. He was posted to Githurai Area on special duties and the fact that he was popular in the area has been captured in the Judgement herein. The fact of his larger than life status is further captured by the fact that upon his conviction by this court there has been a consistent effort both on main stream media and social media to influence the direction of this sentence in one way or the other which is confirmed by the fact that KTN Media dedicated two part series of their CASE FILE program to this case.

11. The Standard Newspaper on page 17 of their 22nd March 2018 Edition, from the Web reported the following people commenting as follows:-

“ M.O - Have you seen the clip where the policeman shot the suspect repeatedly in cold blood? If he boasts of many complaints and witnesses why shouldn't he have arrested the suspect and have him arraigned in court to face criminal charges? One day, he will pay for his sins. God's justice is the best.

- **A.O** How come both sons were shot. They must have been criminals.
- **P.O** Why should he be jailed for shooting a criminal? Please release the man to care for his children.
- **K.A.** The policeman should be released. We are once again facing the wrath of murderous thugs. How come they were killed by policemen and to make it worse from Githurai.”

12. In mitigation, the convict through his Advocate Mr. Ombeta stated that the same was remorseful and sought to be treated favourably and with mercy having been a police officer for twenty (20) years for which he had served diligently with this being the only negative incidence in his career. It was submitted that he has four (4) children all who depend on him and in case he is imprisoned the damage will be on them too. He submitted that putting the accused in custody will not benefit anybody since the accused has been adequately punished during the four (4) years.

13. Mr. Ombeta submitted further that he first met the convict in the year 2012 when his mobile phone was snatched from him at the same Githurai stage and the convict managed to recover the same for him. He submitted that in our country Kenya, we build heroes and then bring them down. He stated that the offender became a hero as a result of what he did for the people of Githurai from the time he was posted there. He submitted that we can only show gratitude to the convict for what he did for society which considers him a good man by giving him non-custodial sentence. It was further submitted that on the fateful day the convict responded to a call of duty and the deceased died as a result thereof.

14. The State through Miss Mwaniki confirmed that the convict was in the Quick Response Team and should be treated as a first offender there being no previous record on the same. She urged the court to weigh between the victim and the convict and come to a balance between the two cries.

15. Mr. Khangai on behalf of Miss Gikonyo for the family of the deceased relied on the affidavit sworn by the mother and stated that she does not believe in an eye for an eye and therefore urged the court not to sentence the convict to death but give the maximum sentence available.

16. In compliance with the Sentencing Policy Guidelines the court called for Presentencing Report which was filed and in compliance with the **Victim's Protection Act**, and **Section 329** of the **Criminal Procedure Code**, the mother of the deceased filed **Victim Impact Statement** on 15/3/2018 in which she stated that the deceased her 4th born son was born on 4/5/1986 and was not a criminal as he had never been convicted of any crime by any Court in Kenya. She was dependent on him for running most of her daily errands and that his brutal murder caused her untold pain and anguish that have remained permanent. She was further traumatized by the bravado expressed by the convict that he was justified to execute the deceased in cold blood, unarmed, in defenseless submission on account of unproved allegation and further that the family thereafter received veiled threats from the convict which forced them to flee to NORWAY where she lives with her daughter under great financial hardship. Finally she stated that true to the threats of the convict on 24/8/2014 the accused allegedly shot

dead her second born son **OSCAR MUCHOKI MWANGI**.

17. From the Pre-sentencing Report it was stated that the people interviewed in Githurai area stated that the offender had managed the crime rate well and brought sanity to an area that was full of ruthless thugs who robbed members of the public in broad day light. It was alleged that the deceased and his brother and accomplices were known to be notorious criminals who mugged unsuspecting people in broad day light and at night. The residents interviewed said they would want the offender released and posted back to Githurai to not only fight crime but also to ensure public safety and further that a trend of insecurity has picked up due to the incarceration of the convict.

18. The convict as stated herein was a police officer paid by Kenya Tax payers from which he was assigned a gun. His conduct was guided by the provisions of **NATIONAL POLICE SERVICE ACT NO. 11A OF 2011** where **Section 49 (4)** provides that **“a police officer who performs official duty or exercise police powers shall perform such duty or exercise such power in a manner that is lawful”**. **Section 49 (10)** **“A police officer shall respect the law, regulations and the service standing order and to the best of their capability prevent and oppose any violation of them.”**

19. Under **Section 58**, a police officer has powers to arrest a person without warrant:-

(c) when the police officer suspects on reasonable ground of having committed a recognizable offence.

(d) who commit a breach of the peace in the presence of the police officer.

(e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing.

(g) whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony.

20. **Section 61** provides for power to use fire arms:-

1. A police officer shall perform the functions and exercise the powers conferred by the Constitution and this Act by use of non-violent means.

2. Despite Sub-section (1) a police officer may use force and firearm in accordance with the rules on the use of force and firearms contained in the Sixth Schedule which provides as follows:-

A. 1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective.

2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence and the resistance of the person against whom it is used, and to the extent necessary while adhering to the provisions of the law and the Standing Orders . . .

5. Any use of force that leads to death, serious injury and other grave consequences shall be reported immediately by the officer in charge or another direct superior of the person who caused death or injury to the Independent Police Oversight Authority who shall investigate the case.

9. An officer shall not tamper or otherwise damage any evidence from the scene.

(B). CONDITIONS AS TO THE USE OF FIREARMS

1. Firearms may be only used when less extreme means are inadequate and for the following purposes:-

a. Saving or protecting the life of the officer or other person;

b. In self-defence or in defence of other person against imminent threat of life or serious injury.

c. Protection of life and property through justifiable use of force.

2. An officer intending to use firearms shall identify themselves and give clear warning of their intention to use firearms, with sufficient time for the warning to be observed except:-

a. Where doing so would place the officer or the other person at risk of death or serious harm; or

b. If it would be clearly inappropriate or pointless.

21. I have taken my time to state the law as to use of firearms because of the interest this matter has generated as stated herein so as to let the residents of Githurai understand the process their hero police officer was to observe as this is a matter where the “public” interest and justice are not walking together. For avoidance of doubt this case was not about whether the deceased was a criminal or not and not whether the accused thereafter killed his brother as that was not placed before the court. It is all about use or misuse of firearm by the convict in the

cause of his duties as a police officer. From the evidence tendered before me, the convict did not follow any of the procedures above.

22. In sentencing the convict this court is called upon to answer one big question: - What is the objective to be achieved? Whereas the convict can be reformed to be a better member of society and whereas the victim's life cannot be restored, this court is called upon to make a statement which I hereby do, that whereas the police in their fight against crime faces challenges, no police officer has the right to take away the life of any citizen of the Republic of Kenya and those residing there, whether criminal or not save for in compliance with the law as stated herein. Whereas there were allegations that the deceased was involved in criminal activities, the same did not deserve to die in the hands of the convict who did not make any attempt to apprehend him and subject him to judicial process.

23. The convict was in a position of power and authority over the victim. There is evidence on record that the victim was known in the area and to the convict too. Even if the victim was a criminal as alleged the convict was supposed to protect the society and the victim too by arresting him. I am not persuaded by the convict's contention that his acts was correct in the prevailing circumstances and whereas he seems to enjoy hero status in the area this is not the case where court ought to show leniency as submitted by Mr. Ombeta, the convict home situation notwithstanding.

24. It is well understood that this case has raised issues which have sensitive implications on the role of popularity on police officers on the fight against crime, the public attitude against alleged criminals and the police service and the Independent Police Oversight Authority which should be a joint systematic effort and not based on individual policeman's style or system of operation. It is equally well understood that the role of the court while taking all these into consideration is strictly confined to determining the appropriate sentence to be meted out and will not be assisted or swayed by rhetorical points made in the media – mainstream or social as stated herein above.

25. Having taken into account the circumstances of the offence, mitigating facts, Victim Impact Statement and Presentencing Report, I have come to the conclusion that any sentence passed ought to be a stern warning and act as deterrence to the convict and fellow officers against unlawful use or misuse of firearms on unarmed civilians and must reflect the society's condemnation of the same.

26. Having taken stock of the social and personal facts of the offence and keeping in view the rights of the victim of the crime, the society's attitude towards the crime and the rights and the interest of the convict and the fact that the victim who was unarmed was shot three (3) times, I have come to the conclusion and find that a sentence of fifteen (15) years to be served as herein under will be adequate, appropriate and just:-

- a. Twelve (12) years imprisonment to act as a warning to any police officer who takes the life of anybody and to appease the family of the victim.**
- b. Three (3) years thereafter on probation to rehabilitate and correct the offender and to satisfy his supporters that their cry has been taken into account.**
- c. Of the twelve (12) years, the convict shall be given credit for a period from 1/9/2014 to 29/1/2016 being the pre-conviction detention period as already served, and it is so ordered.**

27. The convict has right of appeal on both conviction and sentence while the State has right of appeal on sentence.

DATED, SIGNED and DELIVERED at Nairobi this 5th day of April, 2018

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Ms. Kali for Ombeta the accused

Miss Gikonyo for the Victim

Accused present

Court clerk – Paul