



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 93 OF 2015

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

RUTH WANJIKU KAMANDE.....ACCUSED

RULING ON SENTENCE

1. The accused **RUTH WANJIKU KAMANDE** was found guilty and convicted of murder contrary to **section 203** of the **Penal Code**.
2. The sentence for the offence is provided under **section 204** of the **Penal Code** which sentence is death.
3. I have considered that the State is treating the accused as a first offender having obtained a report to that effect from Identification Bureau, D.C.I. Headquarters dated 10th July 2018.
4. I have considered that the accused is a young person. The defence urged that she was 21 years of age when she committed this offence. I also took into account that she has been in custody for 2 years and 9 months now.
5. Mrs. Okonjo for the accused submitted that accused had become a devout Muslim praying five times a day since the incident. Counsel urged that accused had also undertaken several Theological Courses and proceeded to present 3 certificates from Presbyterian Church of East Africa all dated June 2018. Also presented was a certificate of participation in modeling at Langata Women Prison and another one by Kituo Cha Sheria for Paralegal Refresher Training. I have taken into account all these certificates.
6. Mrs. Okonjo has also presented a photocopy of an Admission letter to the University, JKUAT for a degree course in Bachelor of Business Information Technology. The secondary school certificates which enabled the admission to JKUAT was not supplied.
7. Mrs. Okonjo urged that the accused was very talented and was involved in modeling, dancing, poetry and script writing and was also nominated to present at a number of State functions. According to counsel, the accused was also highly disciplined.
8. Mrs. Okonjo submitted that the accused was a daughter of a single mother and was the sole breadwinner supporting her mother and was the only hope and source of assistance to her mother.
9. Counsel urged this court to be led by the Supreme Court Decision of Petition No. 14 and 15 of 2016 where the Supreme Court concluded that the mandatory death penalty was unconstitutional in nature and concluded that courts have power to give any other sentence. Counsel did not supply the judgment.
10. Ms. Onunga Learned Prosecution Counsel representing the State applied to make a statement on behalf of the victims' family. Counsel urged that the deceased was an orphan and a sole bread winner. That he was 24 years at the time he met his death. Counsel reminded the court that the deceased suffered multiple injuries and that as a consequence the family is yet to come to terms with his death.
11. Ms. Onunga urged that the accused has not been remorseful and that even in her statement in defence she did not show any remorse.
12. Regarding Supreme Court Petition No. 15 of 2016, Counsel urged that the decision was a Judge Made Law and does not purport to amend the Law. Ms. Onunga urged that the death penalty still exists and is still a valid sentence to impose and that there was nothing barring this court from passing the death penalty. Counsel urged that the Supreme Court incited case stated that the judgement should only apply in

the particular case before them.

13. I have taken into account all the factors given in the mitigation statement by Mrs. Okonjo on behalf of the accused. I also considered that the State has treated the accused as a first offender. I also took into account the statement attributed to the family of the deceased in which they state that they are yet to recover from their loss.

14. The accused is young person aged 21 years at the time of this offence. The deceased was equally young aged only 24 years of age at the time the accused cut short his life.

15. I have considered the circumstances of the offence and find that the accused was manipulative and controlling. The only reasonable explanation why the accused attacked the deceased on the material day was over two disappointments. The facts of the case show that the accused was snooping into deceased phone in order to find out who he had been communicating with. To the extent of swapping her sim card with his to access his mail or in box when she realized that the deceased had changed his phone pin and password. When she was unable to access the information, she locked the deceased at home preventing him from going to work for some time.

16. The second disappointment was the love letters the accused discovered the deceased was keeping many years after he broke up with the former girlfriends. The discovery led to upbraiding of the deceased by the accused and finally to this attack.

17. The accused alleged that the deceased had sex with her knowing he was HIV positive. I rejected that explanation, not only was it raised at the defence stage, but also for being an afterthought.

18. If we are to ask why the deceased in this case died, was it over frustration to access his phone, was it for keeping old love letters of persons who had long moved on, or because the deceased walked away from the accused to go to work without her? The reasons for taking the action that led to the deceased death cannot be justified by any standards or instrument of measure.

19. The court also considered how the murder was executed. The accused did not stab the deceased in quick succession. She stabbed the deceased one stab at a time. It was as if she was sampling with pleasure each and every stab she inflicted on him. And those who witnessed the accused actions told the court that they were traumatized over the act for some time.

20. I considered the fact that the accused ignored pleas to let go the deceased by desisting to stab him any further. That she did not stop. Even though the police said that they inadvertently lost the pictures of the scene, the evidence of those who went there created a vivid picture of how it looked after the incident. They said that there was blood all over the deceased house.

21. There is no doubt in my mind that the accused was not remorseful for this offence. The manner she has carried herself before this court is evident that the impact of what she did is yet to hit her with remorse.

22. Counsel for the accused has urged that the accused has while in custody over this case been religious, disciplined, talented and helpful in terms of leadership. She is said to have undergone many courses. These factors are relevant when considering sentence among other weighty factors. Loss of chance to further studies is not persuasive as Prison Service does aid inmates to undergo courses and studies, very much like the ones for which she submitted certificates.

23. Mrs. Okonjo quoted the Supreme Court Petition No. 15 of 2016. It was not supplied. However, it is of notoriety and I managed to get a copy of the judgment. The full citation is **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR** . Mrs. Okonjo urged that the Supreme Court declared unconstitutional the mandatory nature of the death sentence and urged that this court could pass any other sentence.

24. The Supreme Court in the **Muruatetu** case, supra sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows

“As a consequence of this decision, paragraph 6.4-6.7 of the 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.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it”.

26. I have taken into consideration all the factors necessary in accessing the appropriate sentence to mete the accused person in this case as set out in the above case. All these factors have been elaborated within this ruling. I must however mention that it has not escaped my mind that the offence in this case was a gender - based violence. It was a violence against the deceased person by virtue of being a boyfriend to the accused just because of perceived frustration the accused had in the relationship

27. The Supreme Court decision in Muruatetu & another supra, the justices of the Supreme Court, affirming the decision of the Court of Appeal in Godfrey Ngotho Mutiso v R C.A. No. 17 of 2008, and the High Court in Joseph Kaberia Kahinga and Others v The Attorney General [2006] eKLR of stated thus:

“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 offenders’ 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 penalty. If mitigation reveals an untold degree of brutality and callousness...”

‘If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused criminal culpability. Further imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of ‘over punishing’ the convict...’

‘The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution...’

27. The court has set out certain principles which should guide courts in sentencing, which I have applied in this case. The Supreme Court then dealt with the importance of pre-sentence hearing and entertainment of mitigation from the accused person, among others. The Court has made clear exactly how the mitigation of the accused person should be applied by the court before the accused is sentenced. The Court stated that **‘it is during mitigation, after conviction and before sentencing, that the offenders’ 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 penalty.’**

28. I have taken into account what has been presented by the accused in this case, as her version of the events. Is her version of the events of the material day heavy with pathos that would necessitate this court to consider an aspect that may have been unclear during the trial process? Pathos means **‘anguish, bleakness, despair, tragedy, sadness’**. The accused has not set before court anything that can lead to a finding that there was an aspect of the case which remained unclear at the trial which her mitigation has illuminated. The events of the day were clear. Conversely the accused has not alleged that she acted out of any despair or anguish or bleakness or sadness or tragedy of any kind.

29. I find that the accused deliberately stabbed the deceased with clear intention to cause him pain, suffering and death going by the manner in which she executed the injuries and by the number of stabs and the choice of the areas of the body stabbed. I have taken into account that the accused stabbed the deceased him 25 times.

30. In terms of sentence, the sentence for murder is the death penalty. It is true that pursuant to Muruatetu case, supra the courts now can exercise discretion when considering and passing sentence. It is important to say that in my view that discretion to pass a sentence other than death in capital offences should only be exercised in the deserving cases. I do not find this a deserving case. I think to pass any other sentence than the one prescribed would turn the accused to a hero. I want young people to know that it is not cool to kill your boy or girlfriend. Even where you feel disappointed or frustrated don’t do it. Instead it is cool to walk away and thereafter forgive.

31. Having considered all these factors I find that the only sentence to pass in this case is death.

32. The accused is sentenced to death as by law prescribed.

33. The accused has a right of appeal against conviction and sentence within 14 days from today.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY, 2018.

LESIT J

JUDGE