



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.39 OF 2008

ROBERT MWAI.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING: SENTENCING (IN ABSENTIA)

On 23rd January 2018 judgment was delivered in this case where the accused herein was found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was accordingly convicted for the murders of SW and AW. By time of the judgment the accused person had long absconded. The surety was subsequently discharged after he surrendered the security to the state.

This ruling follows the order for mitigation on his behalf by counsel, Ms. Mwai, and the filing of a victim impact statement pursuant to Section 329 B of the Criminal Procedure Code.

With regard to mitigation, counsel submitted that she had nothing to say on behalf of the accused.

With regard to the Victim Impact Statement the same was filed on 30th May 2018, and a further one on 13th June 2018 by the Sub-County Probation Officer Nyeri Central.

I have carefully considered the victim Impact Statement. The accused person was the brother to the father of the two children, their paternal uncle. They knew him as their uncle. It is clear from the two reports that the murders broke up the family of the deceased children. Their mother left the home with her remaining child to an unknown place and it is alleged that she developed some kind of mental illness out of the shock of losing her two youngest babies.

The father of the children, Benson Irungu's life was reduced into one of misery and sadness, losing his children at the hands of his brother and subsequently, being left by his wife who found the environment dangerous to her and to her surviving son's life. The report clearly describes that he is still tormented psychologically by the loss, and has never received any psycho- social support in terms of counseling.

The case dragged in court for 10 years and it has taken a toll on him both financially and psychologically. The worst part is that the perpetrator of this offence and its visible and lingering aftermath is at large.

What punishment does such a person deserve?

No punishment is sufficient to a person who has taken the innocent lives of two babies, whatever the grudge he may have had with their parents. The fact is, they are gone from this world.

Section 204 of the Penal Code provides that

“Any person convicted of murder shall be sentenced to death”.

I am aware to the controversy around the death sentence and the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the court stated:

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

I understand this to mean that the court's hands are not tied by the mandatory wordings of the provisions of s. 204. The window for not

treating every murder as the same, was opened, giving the leeway to weigh every aspect of the case and give the appropriate sentence, including the death sentence. Hence my understanding is that the sentence stays as is expressly provided for by section 204 of the Penal Code subject to Article 26 of the Constitution which clearly states that everyone has the right to life and (3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or any other written law”.

It is written, and the Constitution has spoken.

W and W were aged 2 years and 5 months respectively. Their uncle took them from their house, took them to river, and drowned them. Why? Because he had disagreed with their mother, his sister in law and chose to hurt her through the permanent removal of her children with his brother from the face of this earth.

Let the word reach him, wherever he is that for what he did, he is just deserts is set out by the law, and supported by the people of Kenya in article 26 (3) of the Constitution. Justice will be served for W and W when the long arm of the law catches up with Robert Mwangi Njui. Justice will be served for their brother who will always wonder what happened to his little sisters and live with the fear of having escaped death from his own uncle. Justice will be served for their mother and father, whose love and lives were disrupted forever, by the heinous act of the deceased. And for what?

It is for people like him, who would not hesitate to take the life of a helpless, vulnerable person, that the death sentence was put in the Penal Code and the Constitution of Kenya. And when the long arm of the law catches up with him, he is to suffer death as provided for under section 204 of the Penal Code to which he is hereby sentenced.

Unlike the two innocent lives he took without mercy, he has a right of appeal.

Dated, delivered, and signed in open court at Nyeri this 20th September 2018

Mumbua T. Matheka

Judge

In the presence of: