



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 32 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WESLEY KIPYEGON MUTAI.....ACCUSED**

**RULING ON SENTENCE**

1. In the judgment delivered in this matter on 27<sup>th</sup> June 2018, I found the accused, Wesley Kipyegon Mutai, guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was my finding that on the 28<sup>th</sup> day of July 2013 at Kimugul Village in Londiani District within Kericho County, he murdered Alphonce Nejeeyeye Fundi. He had on that day, with malice aforethought, caused the death of his step-father.

2. In mitigation on his behalf, Learned Counsel, Mr. Chelule, submitted that the accused is a first offender, a father of four children. He was the first born in a family of eight, most of whom do menial jobs and depend on him. He was remorseful and his action was out of character. He was a relatively old man, aged 50, and he pleaded with the court to sympathise with him and give him a lenient sentence.

3. In the social inquiry report which is undated but was filed in court on 9<sup>th</sup> October 2018, the Probation Officer paints the family of the convict as a very troubled family. The deceased was the step-father of the convict in this case. He had started cohabiting with the mother of the convict after his biological father deserted the family. There was bad blood between the deceased, the convict and his siblings over family assets. The convict and his siblings apparently blamed their mother for siding with the deceased, whom they alleged was squandering family assets. At the heart of this murder, therefore, was family property, and resentment of the deceased for having such a hold on the convict's mother that she always sided with him, even when, as they allege, he was squandering family property.

4. The question is whether the family circumstances can excuse or justify murder, and evoke the sympathies of the court so that it gives the convict a lenient, non-custodial sentence.

5. The convict did not kill the deceased in a fit of anger, or in the heat of passion. He cold bloodedly planned his execution. He waited for him on a rainy night, in a cow shed, and stabbed him to death. The convict is not a young man: he is aged 50. Rather than killing his step-father because of property that belongs to his mother, he should have made his own way in the world. I see no basis for leniency in this matter, and a non-custodial sentence is not within the contemplation of section 204 of the Penal Code, which prescribes death as the penalty.

6. In its decision in **Francis Karioko Muruatetu vs Republic Supreme Court Petition Nos. 15 and 16 of 2015**, the Supreme Court of Kenya held that the mandatory nature of the death penalty contained in section 204 of the Penal Code was unconstitutional. While the sentence of death is not *per se* unconstitutional, imposing the death sentence without considering mitigating factors or extenuating circumstances violates the right to a fair trial guaranteed under Article 50 (2) of the Constitution.

7. I believe that the effect of this decision is that the court, where the sentence to be imposed for an offence is death, has a discretion to consider mitigating factors in determining what sentence to pass, and is not bound to impose the death penalty. The Supreme Court suggested certain criteria which the court can consider in determining what penalty to impose on a murder conviction. In this case, the criteria that is applicable is that the convict is a first offender and is of a relatively advanced age, being past 50. Aside from his commission of this offence, the convict appears to have been of good character, and has expressed remorse for his actions.

8. In the circumstances, I hereby sentence him to a term of imprisonment for 25 years.

9. He has a right of appeal to the Court of Appeal within 14 days.

**Dated Delivered and Signed at Kericho this 11<sup>th</sup> day of October 2018**

**MUMBI NGUGI**

**JUDGE**