



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL DIVISION

CRIMINAL CASE NO. 78 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SARAH MUTETE MATHEKA.....ACCUSED

SENTENCE

1. The convict was initially charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** to which she pleaded not guilty.
2. By a Plea Agreement dated 7/3/2018 and accepted in court on 16/5/2018 the said charges were reduced to manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** the facts of which were that on the night of 27th and 28th October 2016 the accused and the deceased one **FESTUS WAMBUA MUTUNGA alias KATALINA** were at a chang'aa drinking den within Mukuru Kwa Njenga slums seated on different tables. At around 11.00 p.m. the accused left the den alone and proceeded to her house which was ten (10) meters away and as she was opening the door the deceased appeared from behind, held her by the waist and forcefully gained access into her house.
3. The deceased took the accused mobile phone and demanded for money. A struggle ensued and in the process the convict managed to pick a knife that was on the table and stabbed the deceased, she then alerted the neighbours who rushed the deceased to the hospital from where he was pronounced dead on arrival with the cause of death being exsanguination due to penetrating sharp force trauma.
4. The convict pleaded guilty to the said facts and was convicted on her own plea of guilty. The court is now called upon to decide an appropriate, just and adequate sentence as per **Section 205** which provides that any person who commits the felony of manslaughter is liable to imprisonment of life.
5. The Penal Code does not define what the term 'liable to imprisonment for life' means. The Court of Appeal in the Case of **M.K. v REPUBLIC (NAIROBI), CRIMINAL APPEAL NO. 248 OF 2014** reported in [2015] eKLR in an attempt to define what 'liable' means had this to say:-

*“19. What does “shall be liable” mean in law? The Court of Appeal for East Africa in the case of **OPOYA -v- UGANDA (1967) EA 752** had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in **JAMES -v- YOUNG 27 Ch. D.** at p.655 where North J. said:*

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are “shall be sentenced to death”.

6. In defining what construction of the term 'shall be liable' is, Mativo J. in **D.M.W. v REPUBLIC (HIGH COURT OF KENYA AT NYERI), CRIMINAL APPEAL NO. 140 OF 2012** reported in [2015] eKLR had this to say:-

“In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a

written law for an offence, unless a contrary intention appears, is the maximum penalty. This principle is contained in Section 66 (1) of the Interpretation and General Provisions Act which provides:-

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed”

. . . my observation is that the principle of law in Section 66 aforesaid is entrenched in Section 26 of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment.”

7. In Kenya ‘imprisonment for life’ means the full life of the convict. This is also the position in India as stated in the case of **MUTHURAMALINGAM & OTHERS v STATE REPRESENTED BY INSPECTOR OF POLICE [2016] 8SCC 31**, where it was stated that life imprisonment would be treated as imprisonment for full life. That is to say, a convict undergoing life imprisonment is expected to remain in custody till the end of his life unless remission is granted. It means that imprisonment for life lasts until the last breathe of the convict.

8. The objectives of sentencing as per the Judiciary of Kenya Sentencing Policy Guidelines number 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.**

9. In compliance with the provisions of the said Policy Guidelines the court called for Pre-sentencing Report dated 14/9/2018 in which the following observations were made:-

- a) **The offender admits commission of the offence in self defence when she was accosted by the deceased who threatened to rape her. She is remorseful and acknowledges that life was lost due to the drunk state she was in.**
- b) **On the victim impact assessment report it was stated that the family of the deceased were not opposed to the convict being granted a non-custodial sentence.**
- c) **Under recommendations: - it stated that the convict was suitable for non-custodial sentence to enable her undergo intensive guidance and counselling on several aspects - alcohol and substance abuse programmes (SAPTA), training on life skills.**

10. In mitigation the convict through her Advocate on record stated that she had been rehabilitated while in remand custody and that she was remorseful and sympathetic to the family of the deceased who she did not intend to kill as she only acted in self defence. The prosecution confirmed that she was a first offender.

11. I have taken note of the fact that it is the deceased who attacked the accused in her house and that the convict only acted in self defence having been attacked by the deceased in her house at 11.00 p.m. who threatened to rape her and therefore her action was reasonably expected. I have further taken into account the fact that the convict has been in custody since 14/11/2016 to date and having weighted the needs of the community and balancing the same with the best interests of the convict who needs to be rehabilitated further so as to be a useful member of society, there is no evidence that the convict had any anti social being behavior before the material day and in exercising the discretionary powers of the court I have come to the conclusion and hold that a probation period of three (3) years would be an adequate, appropriate and just sentence herein.

12. The convict shall serve a probation sentence of three (3) years and it is so ordered.

DATED, DELIVERED and SIGNED at Nairobi this 9th day of October, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Ms. Wegulu for the State

Mr. Olando for the accused

Accused present

Court Assistant – Karwitha