



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE**

**NO. 5 OF 2015**

**BETWEEN:**

**THE REPUBLIC**

**AND**

**1. MWANYIKA MBELE...1<sup>ST</sup> DEFENDANT**

**2. SAIDI MWAKE .....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T O N S E N T E N C E**

1. The Defendants now before the Court were convicted by the Judgment of Hon J. Kamau J ('the Trial Court'). That Judge was transferred and therefore it falls to this Court to deliver the Judgment on the sentence.
2. Both Accused/Defendants were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code Cap 63**, Laws of Kenya.
3. The particulars of the Offence are that on 22<sup>nd</sup> April 2015 at Buguta village within Voi Sub County, Taita Taveta County, they did cause the death of Julius Mwalimu Mbele who was a member of their family.
4. The two Defendants were convicted on 30<sup>th</sup> May 2018. In arriving at the appropriate Sentence this Court has a wide discretion. The Court held a Sentencing Hearing on 18<sup>th</sup> September 2018. The Probationary Reports were only availed on that morning.
5. In relation to the First Defendant Mwanyika Mbele alias Hamisi, his Advocate told the Court he was remorseful on the loss of a relative. It is said he is a reformed character because he has now become a Christian. It is said he is relatively young and is a family man with 4 children in primary school. He is a First Offender. Although he was charged for "an offence" for which he was tried in Mombasa, he was not convicted. He is said to have reformed from his past life. The First Defendant asks the Court to pass a non-custodial sentence.
6. The Probation Report was finally filed on the third time the case was listed for Hearing. The Court was told the Voi Probation office was waiting for details from their counterparts in Malindi.
7. The Probation Report for the First Defendant is dated 17<sup>th</sup> September 2018 and is authored by Antony M. Piri. It starts off by recording that the Defendant Mwanyika Mbele is a resident of Buguta, Kasighau. In fact all the other evidence before the Court is that he may hail from Buguta but has lived in Malindi for many years. In the circumstances, it is unclear who are the neighbours consulted. The Probation Report described the First Defendant as an old man because he has attained the age of 52. He is married and had either 3 or 4 children ( the report contradicts itself). The Report records that the Accused was anti-social in his youth. He was charged and acquitted but the Report neglects to mention the nature of the charge. According to the Report he spent 18 years at Primary School.
8. The Probation Report recommends a custodial sentence for the protection of the First Defendant. It is said the family of the Deceased are bitter and unwilling to reconcile and/or forgive and therefore there is a risk of retaliation. The First Accused continues to deny his involvement.
9. The Second Accused SADI MWAKE is 38 years old and a nephew of the Deceased. He was convicted on his own confession and provided to the police the incriminating evidence upon which the First Defendant and his siblings were charged. The Prosecution then decided not to proceed against the other two.

10. The Second Accused is married with 3 children. He is said to be of good conduct previously. He now denies his involvement and claims he was incriminated by the police. The Probation Report recommends a custodial sentence for the protection of the Second Defendant. Neither report has included any report from the Criminal Records Bureau in relation to either Defendant.

11. In mitigation Counsel for the Second Defendant relies on the Probation Report to say he was previously of good conduct save for a strained relationship with the Deceased. He is seeking a non - custodial sentence.

12. The Prosecution is arguing for the Death Penalty. Although that is no longer a mandatory sentence, it is available to the Court in circumstances such as this. Defence Counsel argues that “there is a practice to abandon the death penalty”. Recent case law contradicts that submission.

13. The Prosecution seeks justice for the family of the Deceased. It seeks an eye for an eye. The Court takes guidance from the **Sentencing Policy Guidelines, 2016** (“the Guidelines”) published by the Kenya Judiciary, at paragraph 4.1 state that the objectives for sentencing are as follows:-

- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
- ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- v. Community protection: to protect the community by incapacitating the offender.
- vi. Denunciation: to communicate the community’s condemnation of the criminal conduct.

All of above are applicable here. The Supreme Court in the **Francis Karioko Muruatetu case (supra)** therefore nullified paragraphs 6.4 – 6.7 of the guidelines in their place to avoid a lacuna, provided the following guidelines with regard to mitigating factors in sentencing 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.

The Supreme Court stated:

“[70] 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.”

**The Sentencing Guidelines 2016 at paragraph 7.19** states that in determining whether to grant a non –custodial sentence the following should be taken into account:

- a. Gravity of the offence
- b. Criminal History of the offender
- c. Children in conflict with the law. Applicable where the offender is a minor
- d. Character of the offender

e. Protection of the community

f. The Offender's responsibilities to third parties

The gravity of the offence in this case is the prime factor to be considered.

14. Looking first at the nature and gravity of the offence. The Deceased was murdered late at night. The intruder was described by PW1 as a man. He wore a black hood and carried a torch which he shone into the eyes of his victims. That approach has 2 consequences firstly it is intended to and does terrorise the victims, secondly to mask the identity of the offender. In this case it is recorded that the widow of the Deceased is still bewildered by the attack. The assailant then proceeded to use a panga to slash indiscriminately at his victims. He slashed the wife of the Deceased but she survived. The Postmortem states '*the Deceased was attacked by a man armed with a panga who slashed him several times on the body and fatally stabbing him on the abdomen*'. The Deceased was 58 at the time of his demise. The injuries included injuries to the head and neck. There was a deep cut to the neck which severed the backbone and spinal cord and lacerated major blood vessels. The anterior abdomen had a deep cut which resulted in the gut hanging out which was itself stabbed several times. The ferocity of the attack is readily apparent. As a consequence the Deceased suffered heart failure.

15. The murder was not a single unprovoked act committed in the spur of the moment. It was the culmination of a vendetta perpetrated by all 4 of the ..... accused.

16. The Deceased, the First Defendant, Amina Riwa and Stephen Wanjala were the children of Mzee Mbele Mwake. The second accused is the son of his nephew. Mzee Mbele Mwake owned several pieces of land which he divided between his children and his brother's children who he fostered. One such Beneficiary was the Father of the Second accused. During his life he was displeased with the way the property was divided and it seems the boundaries between the plots. That is where the vendetta began. Aided by the First Accused, Amina Riwa and Stephen Wanjala he accused the Deceased of witchcraft. It is unclear how the witchcraft is supposed to have manifested itself. The Court takes judicial notice of the fact that allegations of witchcraft are used to explain a variety of events which may have leave other causes eg death, illness and poverty. Those changes were followed by a direct threat by the First Accused. After the killing both Accused and Amina Riwa shared news of the success of their venture by a SMS text message. There was no remorse shown at that time. That is the gravity of the offence.

17. The criminal history of the offenders, if the Probation Reports are correct, is that neither has antecedents. Nevertheless the fact of an ongoing intergenerational vendetta does not suggest that they were likely to take their disputes to the usual authorities for resolution.

18. The Court must also take into account the protection of society and the needs of any dependants of the offenders. In this case there are other family members who live on the land the two offenders would like to own. In the circumstances if the offenders were given non-custodial sentences, the lives of those persons would also be at risk. They have shown themselves capable of fratricide.

19. In the circumstances only a custodial sentence is appropriate. Given the seriousness and heinous nature of the offence. It is appropriate that both the Accused spend the remainder of their lives in custody, both to signify the revulsion of society and for the protection of the family of the Deceased. This Court does not believe that the nature of this offence is such that justifies the death penalty.

Order accordingly,

**FARAH AMIN J**

JUDGE

**SIGNED DATED AND DELIVERED ON THIS the 22<sup>nd</sup> day of November 2018.**

In The Presence of :

Court Assistant: Josephat Mavu

Accused: Mr. Mwinzi

State: Ms Anyumba