



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA at VOI

CRIMINAL CASE NO 13 OF 2014

B E T W E E N:

THE REPUBLIC.....STATE

VERSUS

DAVID MATATA KITEME.....ACCUSED

SENTENCE

1. The Defendant before the Court was convicted of the Charge of Murder by a Judgment of this Court (differently constituted) by a Judgment delivered on 30th May 2018. The Defendant was charged with the Offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63, Laws of Kenya.
2. The Particulars of the Offence were that the Defendant David Matata Kiteme did on the night of 21st/22nd day of May 2014 at Mtakuja Village in Taveta Sub-County, Taita Taveta County, cause the death of Bahati John.
3. The Deceased victim of the Defendant was his niece. She was the daughter of his sister, Mbithe Kiteme. Mbithe Kiteme was a single parent and when she passed away her daughter, in effect an orphan was cared for by her maternal grandmother, the Mother of the Defendant. The Deceased victim was suffering from a mental illness which appears to be epilepsy from the descriptions in the evidence. The Mental Health Report on the Defendant also records a family history of epilepsy.
4. The Judgment describes the crime in the following terms: ".. it was the finding of this court that the deceased suffered fatal injuries as a direct result of being assaulted by the Accused person who had the intention of killing him. Further, the nature of the injuries was ghastly and shocking, demonstrating the Accused person's intention to kill the deceased. The nature of the assault is apparent from the post mortem, and the evidence of Dr Chai, The Deceased was 17 years old and had deformity to both hands and legs meaning she was crippled. There were bruises on the back and neck and frictional injuries indicating that she may have attempted to drag herself away from her assailant. The post mortem report reads as follows: "*With small areas of skin bruises in various parts of the body especially upper and lower limbs, there is a significant superficial skin peel/bruises on the back extending from the left shoulder to the lower most subcostal space, a similar extensive bruise is noted on the left side of the neck extending from base of It jaw to the thoracic inlet..... The head reveals area of depression and a few blood stains especially the occipital region and the parietal regions bilaterally...*" . The cause of death is recorded as intracranial haemorrhage possibly due to blunt object head injury. The Judgment records that; "*PW 4 was emphatic that the intracranial bleeding was due to blunt injury and the frictional injuries pointed to the deceased having been dragged on a surface. There was also an extensive bruises from the left shoulder to the last rib.*"
5. The evidence of the eye witnesses is that the Defendant beat the Deceased with a stick. The stick was variously described as a big stick and a small stick. Such descriptions are subjective. The injuries sustained speak for themselves. It is also telling that the Accused's mother tried to stop him from beating her granddaughter and then she ran and hid in the field. That indicates that she was unable to reason with him and found it necessary to save herself.
6. It is now a well established principle that the Court has a discretion as to what sentence to pass following a conviction of premeditated killing by the Accused. (**Francis Karioko Muruatetu vs Republic Petition No. 15 of 2015(Consolidated with Petition No. 16 of 2015)**). In the circumstances, a sentence can range from a custodial sentence to imprisonment to the death penalty if the Court considers that the circumstances justify that.
7. On 30th May 2018 this Court directed that the Probation Services produce **two** reports. Firstly, a probation report and secondly a victim impact assessment. By the next hearing date on 26th June 2018 neither report was ready. The sentencing hearing was therefore adjourned. The Probation Officer eventually managed to file the report on the morning of the Hearing. Counsel assured the Court that if they were given time to read the report they would be able to address the Court the same day. The Court also has the benefit of a pre-bail report filed by Probation Services in Mombasa.

8. The Court has heard Submissions from Counsel for the Defendant and for the Prosecution. In mitigation Counsel for the Defendant informed the Court that he is aged 36 years and has 30 years to live to make it to 65. Counsel described that as "active life". It is said that the Accused regrets the act and that it was accidental even though the Court found otherwise. It is submitted that the weapon used was not a stick and not even a piece of wood. It is said the Accused used to take care of the Deceased. The Accused blames his lack of education and poverty for the murder. It is said that he is remorseful and he has learnt from his mistake. It is argued he should be given a lenient sentence because he has three children.

9. On behalf of the Prosecution it is argued that the Accused is a first offender. The Deceased was an orphan and a niece of the Accused. The Court is reminded that the murder victim was a female and she was sickly. It is further argued that it matters not what weapon was used, the fact is that Joan Bahati is dead. The State is seeking a retributive penalty which fits the crime which can only mean a custodial sentence.

10. The Court brought the inconsistencies in the probation report and the evidence to the Notice of the author of the Probation Report. He confirmed that he did not interview the wife of the Defendant. He only interviewed 3 (out of supposedly 14) of the Defendant's siblings. Also that ALL the persons interviewed were men. It seems the Mother of the Accused who was an eye witness was not interviewed. There was no victim impact assessment filed.

11. The Probation Officer considers that the family has a positive record because they "aren't known to have entrenched criminal tendencies". The Defendant is described as rough and a trouble shooter while under the influence of alcohol. In the context of the commission of a murder, the only way that phrase can be interpreted is that he will act as he wishes regardless of the consequences. The Author of the Probation Report also thinks that the victim was the "uncle" of the perpetrator. The Probation report also records that there is no bad blood between siblings after the incident yet it makes no mention of the fact that the Victim's grandmother spent the night in the shamba after the incident and the wife of the perpetrator left and did not return. The probation officer believes "It's unfortunate that the offender couldn't control his anger, culminating in the tragedy".

12. By contrast, the Bail Assessment Report reports facts that are significantly different. First it is said that the parents of the accused hailed from Mutomo Division in Kitui County. They separated in the 1970s. Both parents came to Taveta Sub-county independently and settled as squatters at the then embattled Basil Criticos ranch. It is said "Due to the volatile nature of the ranch and the various squatters' infighting the family has been shifting from one area to another. In relation to the family's economic status it is said "The family's main economic mainstay is only subsistence farming.... The family is living in squalor habitation with mud thatched structures. The Accused person does not have a house and was sheltering outside his mother's structure. They are rated as a subsistence family. The accused and his siblings have been eking out a living as casual labourers in the locality. At the time of his arrest, it is recorded that the Accused was not yet married. It is therefore unclear where the absent wife and three children reported by Mr Piri came from.

13. In coming to an appropriate sentence, the Court must take into consideration the gravity of the offence. In ***Omuse v. R (2009) KLR 214*** the Court of Appeal held; "***The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.***"

14. Paragraph 4 of the 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:-

- 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.

15. In this case the Defendant is now said to be remorseful and therefore deserving of leniency from the court, the evidence before Court tells a different story. The Trial Court found the Defendant to have been evasive and untruthful. He denied that the deceased was physically challenged despite testimony from PW 1, PW 2 and PW 3 who knew both the Defendant and the Deceased. PW 4, the medical practitioner confirmed that the deceased was physically challenged.

16. Testimony by PW 1, the Convicted person's mother was that on the fateful night, when she tried to intervene, the Convicted person "beat her up and she took off screaming, hiding in her shamba where she slept until morning. Whereas it is not unusual for family members to have disagreements, a mother who she sleeps in her shamba until morning because of fear of her own son was not indicative of peaceful co-existence" (Par 36 of judgment). The Probation Officer describes that as "trouble shooting". No doubt, within a family setting that would be considered an unacceptable level of violence. That was the Defendant's normality.

17. In relation to the victims of the Defendant, they seem to invariably be female members of his family. That is undeniably gender based violence which the Court must consider. As to the nature of the offence, the Trial Court stated paragraph 40 of the Judgment that "*Further the nature of the injuries was ghastly and shocking, demonstrating the Accused person's intention to kill the deceased.*"

18. Since the Supreme Court rendered its decision in the *Francis Karioko Muruatetu case* the Courts have had occasion to exercise their discretion in determining appropriate sentences to mete out for murder cases depending on the conduct of the convict upon the commission of the offence herein, the nature of the injuries inflicted on the deceased and general circumstances of the case. The Courts have taken a variety of approaches as follows;

a. In **Republic v Daniel Kitsao [2018] eKLR**

The Offender took a room in lodging to spend the evening with the woman. He murdered the woman. She was not a member of his family, He was sentenced to **30 years imprisonment** from the date of arrest.

b. In **Republic v Johana Munyau Mweni [2018]eKLR**

The victim was subjected to domestic violence by the offender as a result of their union lacking a child which he blamed upon her. On the material day he had a drink with the deceased before they had a disagreement over whether to employ a house help or to stay with the daughter of the accused from his previous marriage which led to a physical fight resulting into him inflicting the fatal injuries on the deceased. Sentenced to serve **35 years imprisonment** from the date of detention.

c. In the case of **Republic v Kevin Omwanza Oua alias Junior [2018] eKLR**

The Offender, a young man, killed the Victim, another young man, in a bar in what the court termed as an unprovoked manner. Sentenced to serve **25 years imprisonment**.

d. Mumbi Ngugi J. in the case of **Republic v Ronald Kipkoech Bii [2018] eKLR**

The offender murdered his wife with whom he had cohabited with for only three months. He had beaten her from 2.00. p.m. on the material day, but no-one could rescue her as he threatened them with a panga. He assaulted his wife mercilessly, broke two sticks which he was using to beat her, then took her to the house and strangled her. Sentenced to **death**.

e. The Court of Appeal in the appeal of **William Okungu Kittiny v Republic [2018] eKLR**

The offender murdered the deceased by hitting on the head several times. The deceased had stepped in to assist another man who the offender had hit over the head with a rungu in a disagreement on where the offender's cattle could graze.

The Court of Appeal upheld the sentence of **25 years imprisonment**

19. 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:-

- 7) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 8) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 9) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- 10) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- 11) Community protection: to protect the community by incapacitating the offender.
- 12) Denunciation: to communicate the community's condemnation of the criminal conduct.

20. This is a case where the Accused picked a victim who was completely unable to defend herself. She was a member of his family and dependant on her maternal grandmother. The Defendant returned home drunk and feeling slighted because their impoverished circumstances could not provide him with the meal to which he felt entitled, he beat one female member of that household to death and caused the other to flee for her safety. The existence of the alleged wife and three Children has not been established. The Court notes the two Probation Reports vary significantly. The Probation Officer in Voi has been unable to locate the wife he states exists. The Court also takes judicial notice of the fact that the same Probation Officer found it appropriate to address a training on gender based violence and informed those present that he believed that if the authorities punished gender-based violence, men would become an endangered species.

21. The Defendant has shown no remorse. Throughout the trial he denied the incident and continued to do so in mitigation. He blames the Deceased's epilepsy.

22. In the circumstances of this case it is clear that the Defendant needs time to reflect and understand his offending behaviour before he can even start to reform. In addition, there must be retribution for the life he took in such a brutal manner. This Court also considers that there is a real and urgent need to protect the female members of his family from his offending. Therefore, in line with the guidance, and in the circumstances of this case, the Defendant is sentenced spend the rest of his life in prison. Sentence: Life Imprisonment.

It is so Ordered,

FARAH S. M. AMIN

JUDGE

Signed Dated and Delivered in Voi on this the 5th day of December 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Prosecution: Ms Anyumba

Accused/Defendant: Mr Muthami