



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL CASE NUMBER 29 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON ALUBE NGOTA.....1ST ACCUSED

ROBINSON NGIYA KAMANU.....2ND ACCUSED

SENTENCE

The two accused persons were tried and convicted for the murder Sammy James Oyongo which occurred on 24th March 2011 at Dandora Phase Two Estate. Judgement in that regard was delivered on 30th January 2017. This court invited each of the accused person to mitigate before sentence in line with Section 216 of the Criminal Procedure Code. Ms Celine Odembo, counsel for both accused persons, told the court that her clients did not wish to mitigate for reasons that there is only one penalty under the law for a conviction for murder; that of death, and therefore the mitigation would not serve any purpose.

This court was not able to pronounce sentence straight away because it had not received previous records in respect of the accused persons. The prosecution sought more time to retrieve such records. On 13th February 2017 the prosecution counsel told the court the Directorate of Criminal Investigations Identification Bureau did not have any previous records for the two accused persons. Counsel however alerted the court that Samson Alube Ngota, the 1st accused person, has been convicted for murder in High Court Criminal Case No. 28 of 2011. No records were however presented in court. I am therefore not able to confirm this information. Be that as it may, this court will proceed to pronounce sentence in respect of this matter.

The penalty for murder is provided for under Section 204 of the Penal Code. This section is worded as follows:

Any person convicted of murder shall be sentenced to death.

There are certain things that a court is required by the law to do before pronouncing sentence in line with Section 215 of the Criminal Procedure Code. Under Section 216 of the Criminal Procedure Code:

The court may, before passing sentence or making an order against an accused person under Section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.

Section 329 of the Criminal Procedure Code is also relevant on the issue of mitigation. It provides as follows:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

The court in **Joseph Kaberia Kahinga & 11 others v. Attorney General [2016] eKLR** had this to say in respect of mitigation:

“But what is mitigation in our context?” Simply understood, the word mitigation means the act of lessening or making less severe the intensity of something unpleasant such as pain, grief or extreme circumstances. It is an act of making a condition or consequence less severe and in our case it is the act of making a punishment or sentence in a criminal case less severe. In Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed. mitigation is defined as: “Alleviation; abatement or diminution of a penalty or punishment imposed by law. ‘Mitigating circumstances’ are such as do not constitute a justification or excuse of the offence in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.”

The same court while discussing the role of mitigation before sentence in criminal trials had this to say in the same **Joseph Kaberia Kahinga & 11 others**:

“.....we are of the view that although it may appear that Kenyan courts have no discretion to consider mitigation in the case where an accused person is convicted of a capital offence, however, we hold that it is a constitutional requirement for such an accused person to be granted an opportunity to present his mitigating circumstances before sentencing.

This is because Article 50(2) of the Constitution sets out some of the principles that are considered to constitute fair trial. One of these principles is the right to lodge an appeal or apply for review in a higher court, if convicted (see Article 50 (2) (q)). Such mitigation will enable a court hearing the appeal to have a holistic view of the case, and in the event that the appellate court decides to alter the conviction from a capital offence to any other offence, it will have all the facts and circumstances of the accused on record to enable it assess the appropriate sentence for the reduced offence. Further, some mitigating circumstances may disclose certain facts that materially affect the finding made by the court to such an extent that it may result in the court arriving at a different decision.”

We wish to put mitigation in its proper place in the trial process. The law under Sections 216 and 329 of the Criminal Procedure Code requires the court to receive such evidence as it thinks fit to guide it as to the proper sentence to impose on an accused person after conviction. Mitigation is an important part of the trial where the court obtains information, which may be in the form of evidence or reports, whether expert or otherwise (for instance a medical or Probation Officer’s or Children Officer’s reports) giving the circumstances either of the offender, or the victim or their respective families or members of the community to which either of the parties belong. Some of this information have statutory underpinning, for instance under Section 323 of the Criminal Procedure Code the court is required to ask the accused person whether he has anything to say after his conviction and before sentence. Under Section 333 (2) of the Criminal Procedure Code the court is required to take into account the period the accused person spent in custody before conviction. It may be argued that this provision is not relevant where an accused has been sentenced to death but this does not preclude the court from performing its statutory duty imposed on it to consider such information.”

I need not say anything more on this matter.

I have considered the circumstances under which this offence was committed. I have also taken into account that both accused persons have been in custody from March 2011 to date. Had this been a lesser

offence punishable by a term of imprisonment, the period spent in custody awaiting the determination of this case would have been deducted from the term of imprisonment imposed. However, this is not the case since the law provides death as the only penalty for murder. The time spent in custody is relevant in the event the appellate court decides to review the decision of this court and give a term of imprisonment.

Given that the law provides for death penalty as the only sentence for murder, I hereby obey the law and sentence Samson Alube Ngota, 1st accused person, and Robinson Nginya Kamanu, 2nd accused person, to death for the offence of murder. Each of them shall suffer death in the manner prescribed by the laws of Kenya. Orders shall issue accordingly.

Dated, signed and delivered in open court this 14th day of February 2017.

S. N. Mutuku

Judge