REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 10 OF 2013

REPUBLIC…………………………………......PROSECUTOR

VERSUS

MARY NDINDA MUTISYA…………………..........…ACCUSED

SENTENCE

Mary Ndinda Mutisya has been tried and convicted for the murder of J. M. N, a minor contrary to section 203 as read with section 204 of the Penal Code. Judgement was delivered on 2nd March 2017. The State through prosecution counsel Ms Ikol informed the court that the accused is a first offender. In her mitigation through her defence counsel Mr. Wamwayi, the accused told the court that she was a first offender and that she was deeply sorry and remorseful of the incident leading to the death of the deceased. She told the court that she is a mother of three children, the oldest child being 16 years of age and that her children live with their father who is not able to cater for all their needs. She said she has reformed while in custody and has been born again. She asked the court to consider the circumstances of the offence and treat her with leniency. She urged the court to give her another chance to lead a useful life. Mr. Wamwayi told the court that he did not believe that the court's hands are tied in respect to the sentence to meet out against the accused

I understand Mr. Wamwayi's statement to mean that this court has discretion in passing sentence in capital offences.

The penalty for murder is found in section 204 of the Penal Code which is worded thus:

> ***"Any person convicted of murder shall be sentenced to death."***

Courts in Kenya have discussed the issue as to whether courts have discretion in sentencing where an accused is charged with capital offences. The case in ***Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008)*** *seems to have stated so. The Court of Appeal had this to say in* **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR (Criminal Appeal 5 of 2008)** in reference to the Godfrey Ngotho Mutiso decision:

> ***"The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. The Court will also not follow a case that it considers per incuriam."***

In other words, while mitigation is a requirement before a court can determine the appropriate sentence to pass, courts have no discretion in sentencing in capital offences.

In **Joseph Kaberia Kahinga & 11 others v Attorney General Petition Number 618 of 2010 [2016] eKLR)** the court was considering whether courts had jurisdiction to vary the mandatory death sentence and if so whether the sentence thereby meted is constitutional. The court stated that:

> ***"The Petitioners are asking us to resolve this issue in finding in the affirmative. The position in***

> ***Kenya is that all the provisions of the law that impose the death sentence are couched in mandatory terms."***

My considered view is that after considering the circumstances in this case and after taking the mitigation of the accused person into account, I have no jurisdiction to vary the death sentence. The penalty of death for murder is in our statute books starting with the Constitution 2010. Courts have also affirmed it in decided cases.

Although Sections 216 and 329 of the Criminal Procedure Code require me to take mitigation into account, I do not have jurisdiction to vary death sentence in a murder trial like this one. For this reason, I hereby sentence Mary Ndinda Mutisya to death as by law provided. She shall suffer death in the manner provided by the law. She has 14 days from today's date to lodge her appeal against conviction and sentence if she so wishes. Orders shall issue accordingly.

Dated, signed and delivered today, 6th day of March 2017.

S. N. Mutuku

Judge