



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 50 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

RODGERS KUTOSI alias PAUL KUTOSI RODGERS.....ACCUSED

SENTENCE

1. The accused has been convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya.
2. In mitigation the accused through his advocate on record has submitted that the same is a first offender as confirmed by the State and that the same has a single parent – his mother who is unable to take care of herself. He is remorseful and has had health challenges during the period he has been in custody. He therefore sought a lenient sentence.
3. Section 204 of the Penal Code, provides that any person convicted of murder shall be sentenced to death. There has been a debate and the jury is still out, whether this then makes it mandatory for the court to pass the death sentence upon conviction for the offence of murder and whether that sentence goes against the Constitutional provision at Article 26(1) – Right to life.
4. Since the Supreme Court has not made a pronouncement on this issue the following judgments stand as a guide in this dispute:-
 - a. **MUTISO v REPUBLIC Court of Appeal Criminal Appeal No. 17 of 2008 at Mombasa** wherein the Court of Appeal held that the Shall under **Section 204** of the **Penal Code** is interpreted permissively and the gravity of a murder is a factor to be considered in determining whether to sentence an individual to death, so that the death penalty might only be restricted to aggravated murder.
 - b. **JOSEPH NJUGUNA MWAURA & 2 OTHERS v REPUBLIC Criminal Appeal No. 5 of 2008 Court of Appeal at Nairobi** upheld the mandatory nature of the death penalty for robbery with violence and stated that the issue in dispute of its mandatory nature should be decided by the legislature.
 - c. **JACKSON MAINA WANGUI & ANOTHER v REPUBLIC High Court of Kenya at Nairobi [2014] eKLR** where the three Judge Bench held that the law is clear on the penalty for murder, which is death sentence by hanging and further stated that the law does not permit the exercise of judicial discretion in the passing of the sentence.

d. HIGH COURT OF KENYA AT NAIROBI PETITION NO. 618 OF 2010 JACKSON KABORIA KAHINGA & 11 OTHERS v HON. A.G.

Attempted to provide a solution to the debate on the mandatory nature of death sentence and directed the Hon. Attorney General in consultation with other relevant authorities to consider the shortcomings identified in respect of the mandatory nature of death sentence under Section 296 (1), 296(2) and 297(2) of the Penal Code.

5. Taking into account the provisions of Article 2(5) and (6) of the Constitution of Kenya 2010 and Article 21(4) which provides that the State shall enact and implement legislations to fulfill its international obligation in respect of human rights and fundamental freedoms and while awaiting the outcome of **THE SUPREME COURT OF KENYA AT NAIROBI PETITION NO. 15** consolidated with **No. 16 of 2015 FRANCIS KARIUKI MURUATETU & ANOTHER v REPUBLIC** and taking into account the provisions of Article 165(3)(a) of the Constitution, I am of the view that Mutiso's case (supra) set the right trend. See my decision in **REPUBLIC v JOHN HENRY ALUBALE OMULIEBI HIGH COURT OF KENYA AT NAIROBI CR. CASE NO. 49/2013**.

6. In respect of this matter, the facts are that both the accused and the deceased were Ugandan citizen working for gain in Kenya as at the time of the commission of the offence. The accused and the deceased were married and lived together as man and wife before the deceased moved out due to what was described by the mother of the deceased as domestic violence only to fall into the hands of another man also a Ugandan citizen who took her as a wife.

7. The accused in an attempt to win her back followed her into her new home and since the dead tells no tale the court was not told what took place between the deceased and the accused on the material day at the deceased new home but from the nature of injuries inflicted on the deceased it is clear to my mind that the accused attitude was that of **"either me or nobody else."**

8. Sentencing policy guidelines No. 7.19 provides that the court must take into account the gravity of the offence or any other circumstances. The fact that the accused had lived with the deceased as husband and wife did not give him the right to hunt for the same and kill her once she had left his home. If this trend is allowed, one can only imagine what would happen to spouses if every time they find a new love and moved on they are hunted and killed.

9. The conduct of the accused herein only calls for a deterrence and denunciation sentence and taking into account the evidence presented before court and having found the accused guilty of murder I find and hold that this is a clear case where the same ought to suffer death sentence and I hereby sentence the accused to suffer death as by law allowed for the death of **LYDIA MUKIMBA**.

DATED, SIGNED and DELIVERED at Nairobi this 5th day of April, 2017.

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J. WAKIAGA

JUDGE

In the presence of:-

..... *for the State*

..... *for the Accused*

Accused –

..... *- court clerk*