



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NUMBER 114 OF 2013**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**JANE NAMBUYE MANYONGE.....ACCUSED**  
**SENTENCE**

Jane Nambuye Manyonge was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence was committed on 30<sup>th</sup> November 2013 at Riruta Dagoretti in Nairobi County. The victim of the crime was Francis Manyonge Mulumeti, husband to the accused. She was tried, found guilty and convicted for that offence in a judgment delivered in open court on 30<sup>th</sup> day of May 2017. The State through the Prosecution Counsel told the court that she did not have any previous criminal records of the accused. She asked the court to treat the accused as a first offender.

This court then invited the accused to mitigate before the sentencing as required by law. Ms Majune who represented the accused at the time of delivering judgment on behalf of Mr. Kraido asked the court for more time to allow Mr. Kraido to attend court to offer mitigation on behalf of the accused. The application was allowed and the date for mitigation was fixed for 8<sup>th</sup> June 2017. On that date Mr. Kraido did not attend court. Ms Majune attended court on his behalf for the second time. She informed the court that the accused had nothing to say in mitigation and that she has been advised and understood the consequences of not mitigating. Sentencing was deferred until 12<sup>th</sup> June 2017.

The requirement for an accused persons convicted of any crime to mitigate is statutory. It is provided for under sections 215 and 329 of the Criminal Procedure Code. **Section 216 of the Criminal Procedure Code** provides that:

***“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** which is worded that:

***“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.”***

**Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed.** defines mitigation 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.”***

Mitigation is part of the trial process. It is an important part of the trial where the court obtains information about the accused that may not be in the knowledge of the court and that may aid the court in making a decision as to what sentence to pass. The spirit of the importance of mitigation was captured by a bench of three High Court Judges in **Joseph Kaberia Kahinga & 11 others v Attorney General, Petition No. 618 of 2010 reported in [2016] eKLR**. The court in that Petition was addressing the issue whether the court is required in law to take into consideration the mitigation of an accused person who has been convicted under Sections 203 as read with 204, 296(2) and 297(2) of the Penal Code and whether the court has jurisdiction to vary the death sentence. The court had this to say:

***“.....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.”***

I have noticed a tendency by accused persons facing murder charges or any other capital offence to refuse to mitigate. This decision is more often than not based on the erroneous thinking that because one is charged with a capital offence which does not allow the court discretion to vary the mandatory death sentence then there is no need of mitigating. It is true that the position in Kenya currently is that Section 204 of the Penal Code, just like all other provisions of the law that impose the death sentence, is couched in mandatory terms (see Sections 204, 296(2), 40(3), 60 and 297(2) of the Penal Code). The Court of Appeal in **Joseph Njuguna Mwaura and others vs Republic [2013] eKLR** stated as follows in regard to jurisdiction:

***“A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word “shall”. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purports to impose another sentence than has been provided in law.”***

While I agree with that Court and acknowledge that its decisions are binding to this court, it is my view that despite the mandatory nature of penalty for murder a trial court has no excuse or exemption from receiving and considering the mitigation and other reports that are legally required after the conviction of the accused and before sentencing. The reasons for this are explained above in the citation from Petition No. 618 of 2010. As the judges in that petition stated, mitigation by a convict facing any criminal charge before sentencing is a constitutional imperative of fair trial. A convict has no other chance to address the court on any mitigating circumstances. That chance is only given after conviction but before sentencing by the trial court. Most of the convicts who refuse to mitigate are normally unhappy about the way the case has been concluded but in that state of emotion they fail to realize that they are denying themselves a chance to tell the court any mitigating circumstances that may aid their case on appeal or review.

I think I have said enough to demonstrate that mitigation is part and parcel of a fair trial and a constitutional requirement whether one is charged with murder, any other capital offence or other criminal charge. The circumstances of this case are within my knowledge. The accused has been convicted for murder. The penalty for murder is provided under Section 204 of the Penal Code and it is death. As stated above this court has no discretion to vary the death penalty. Consequently, this court

must act in compliance with the dictates of the law and sentence Jane Nambuye Manyonge, which I hereby do, to death in the manner provided by the law. This court further informs Jane Nambuye Manyonge of her right of appeal within 14 days of today's date. Orders shall issue accordingly.

**Dated, signed and delivered this 12<sup>th</sup> day of June 2017.**

**S. N. MUTUKU**

**JUDGE**