



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO.55 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

JARED NYAKUNDI RATEMO..... 1ST ACCUSED

NICHOLAS MAAGATI OIGO.....2ND ACCUSED

JOASH SOTA RATEMO.....3RD ACCUSED

JULIAS NYAKUNDI MASENYA.....4TH ACCUSED

SENTENCE

1. The four accused persons herein were on 29th September 2015 (*differently constituted*) by this court for the offence of **Murder contrary to Section 203** as read with **Section 204 of the Penal Code**.

Section 203 of the Penal Code states:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

While Section 204 states as follows:

“Any person convicted of murder shall be sentenced to death.”

2. This court heard the mitigation by Mr. Ondari, advocate for the accused persons who alluded to the fact that death was not the only sentence available to the court in this instant case where the accused persons had already been convicted for murder. Mr. Ondari was of the view that the court has a discretion to mete out a prison term sentence that the accused persons could serve and eventually be set free to join their families.

3. Having listened to Mr. Ondari’s submissions, the question that arises to my mind is whether or not **Section 204** of the **Penal Code** that provides for the sentence upon conviction or murder leaves room for the court to have discretion on which sentence to mete out in such an eventuality.

4. A person may be charged with a felony or a misdemeanor in the case where a person is convicted for misdemeanor, the court has a wide latitude to impose a sentence of its discretion.

There are however instances where the statute specifies the maximum or minimum sentences that a court may impose upon conviction.

On the other hand, there are instances where the court's hands are tied by sections of the law when it comes to sentencing and only a specific sentence can be imposed such as in the **Sexual Offences Act No.3 of 2006**.

5. To my mind and understanding of the law on sentencing, the law uses words '*shall*' or '*is liable*'. Where the word "shall" is used, the discretion of the court is expressly limited by parliament as opposed to the instance where the word '*is liable*' is employed as it denotes that the court has a discretion.

6. Where parliament has restricted the discretion of the court in sentencing, the court's hands are tied as it were and cannot go against the statute and give the words 'shall' a different that was not intended by the law makers.

7. The sentence for murder has clearly been spelt out under **Section 204 of the Penal Code**. It has however been argued in a number of cases that a death sentence contravenes the Constitutional provision under **Article on 26(1)** which states that: '*Every person has a right to life*' – see **Godfrey Ngotho Mutiso –vs- Republic [2010] eKLR**.

However, under **Article 26(3)** of the **Constitution**, the right to life is not absolute as it has been qualified and can be deprived through written law.

8. **Article 26(3)** states as follows:

"A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."

Article 24(1) of the Constitution states:

"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

9. It therefore follows that the enjoyment of a right or a fundamental freedom can be limited through written law in so far as that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In considering the intention of the limitation imposed, it is worthy to understand the purpose or basis of a particular sentence assigned to a specific offence.

10. In the case of murder, our law still holds the mantra that '*an eye for an eye*' and '*a tooth for a tooth*' is the best option in order to have a safe and secure society since murder is still considered to be the worst form of transgression against a fellow human being for which an offender must equally pay with his own life.

11. Human rights activists and pro-life advocates have severally argued that the death penalty ought to be abolished all together as it is not only barbaric but also has not served the deterrence purpose for which it was intended as murders continue to be committed every single day despite the existence of the death penalty in our laws.

12. The abolitionist argument and theory focuses on promoting human rights based on the rights of the living while our law, as it currently stands, focuses on justice to the dead and the victims of the crimes.

Our constitution, which is the grundnorm and the legal, legitimate expression of our collective will grants every citizen equal protection in the eyes of the law. If Kenyans intended to do away with the death penalty, then nothing could have stopped them from doing so at the making of the Constitution (2010) or through an amendment of the Penal Code.

13. The will of the people is generally expressed through legislations which must be in conformity with the Constitution.

14. Despite the many arguments that have been advanced to counter death penalty, our laws as currently drafted, still provide for the imposition of a death penalty. The court is therefore mandated to interpret, implement and enforce the law as it is currently and not as it is proposed to be by the pro-life advocates who envision the abolition of the death penalty.

15. In a nutshell, I am of the considered view, that currently, the only available sentence for a person convicted for murder is death. **Section 204** of the **Penal Code** is couched in mandatory words '*shall*' which gives me no option or discretion to mete out any other sentence other than to impose death penalty. Consequently, I hereby sentence the four accused persons **JARED NYAKUNDI RATEMO, NICHOLASS MAGATI OIGO, JOASH SOTA RATEMO** and **JULIUS NYAKUNDI MASENYA** to suffer death as prescribed by law.

16. Orders accordingly.

Dated, signed and delivered in open court this 7th day of March 2016

HON. W. OKWANY

JUDGE

In the presence of:

-for the State
-for the Accuseds
-court clerk