



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 103 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

NANCY WAITHERA MACHARIA.....ACCUSED

RULING ON SENTENCE

Nancy Waithera Macharia was found guilty and was convicted for murder on 9th July 2015. She was accused of murdering her husband Peter Njoroge Mwangi on 8th December 2012. The scene of murder was at their residence at Mathare Kosovo Slums in Nairobi. This ruling is in respect of the sentence.

In mitigation before sentence, defence counsel, Mr. Clarence Jumba stated that the accused was remorseful for the offence; that she is a mother of one child who solely depends on her; that the accused has used the time in custody to meditate and reflect on the incident and concluded that this offence ought not to have happened; that she did not defend herself because she was overwhelmed by the offence and that she has made efforts to reach out to the family of the deceased to seek forgiveness and reconciliation. Counsel further told the court that the accused has registered for pastoral training at Langata Women's Prison and urged the court to recommend the accused for Presidential pardon.

The penalty for murder is provided for under section 204 of the Penal Code which states that “**any person convicted of murder shall be sentenced to death.**” The section is couched in mandatory terms. It does not leave room for exercise of the court's discretion. The court of Appeal in **Joseph Njuguna Mwaura & 2 others v. Republic Criminal Appeal No. 5 of 2008 [2013] eKLR** considered its earlier decision in **Criminal Appeal No.17 of 2008 Godfrey Ngotho Mutiso v. Republic [2010] eKLR** and stated as follows:

“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 is considered *per incuriam*.”

A look at all the provisions of the law that impose the death sentence show 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 purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so.....”

I need not say more on that issue.

Counsel for the accused asked this court to recommend the accused for Presidential pardon. Article 133 (1) of the Constitution on the Presidential Power of Mercy states as follows:

On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by:

- a. **granting a free or conditional pardon to a person convicted of an offence;**
- b. **postponing the carrying out of a punishment, either for a specified or indefinite period;**
- c. **substituting a less severe form of punishment; or**
- d. **remitting all or part of a punishment.**

The Article provides the procedure to be followed by anyone seeking Presidential pardon. In my view the court has no role to play in recommending an accused for Presidential pardon. The accused is at liberty to petition for this pardon in accordance with the above Article and section 5 of the Powers of Mercy Act (No. 20 of 2011). I need not belabor the point that after conviction this court has no discretion in the matter and must sentence the accused as provided under the law. After this, the court becomes *functus officio*.

I have said enough to demonstrate the role of this court after entering a conviction for murder. Having taken into account the mitigation by the accused through her legal representative, this court therefore must pronounce itself in sentencing her as provided for under section 204 of the Penal Code. The accused Nancy Waithera Macharia shall suffer death in the manner provided for by the law. It is so ordered.

Dated, signed and delivered this 16th day of July 2015.

S. N. MUTUKU

JUDGE

In the presence of:

Miss Macharia, Counsel for the prosecution

Mr. Clarence Jumba, Counsel for the accused

Nancy Waithera Macharia, the accused

Daniel Ngumbi, Court Clerk