



REPUBLIC OF KENYA



KENYA LAW
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**Mukoto v Republic (Criminal Appeal 186 of 2016)
[2022] KECA 706 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 706 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 186 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022**

BETWEEN

JACKLINE LIYEMA MUKOTO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Kakamega (R. N. Sitati, J) delivered on 19th January, 2016 in Kakamega HCCCR No. 34 of 2013)

JUDGMENT

1. The circumstances of the case giving rise to this appeal are sad and tragic. On July 1, 2013, at about 10.00 am, Jackline Liyema Mukoto (the appellant) killed her daughter, DNM, aged 3 years.
2. This was after the appellant kept an overnight vigil ('kesha') at a church. In her defence, the appellant gave this bizarre account:

“DNM was my child, the child was 2 years old. I do not know whether the child is alive or dead. I cannot also tell whether I killed the child.....

I cannot remember whether I ever got hold of my child. All I remember is that I saw myself in heaven.”

3. At trial, the court held that the prosecution had established that the appellant had the requisite mens rea and malice aforethought for the offence of murder and convicted her accordingly. As to the sentence, the trial court imposed a sentence of 50 years imprisonment.
4. Counsel for the appellant told us that the appellant was pursuing the appeal on sentence only. She asked us to review that sentence and in so doing, to consider the relationship between the appellant



and the deceased; the facts leading to the commission of the crime; the appellant's remorse and; the period the appellant has spent in custody, since July 1, 2013.

5. In a short rejoinder, Prosecution Counsel, Ligami Shitsama, reiterated the guidelines on re-sentencing set out in *Francis Karioko Muruatetu & Another-vs- Republic* [2021] eKLR and submitted that the trial court correctly imposed a sentence of 50 years imprisonment after considering the appellant's mitigation.
6. This is a first appeal and our duty as regards an appeal on sentence only was spelt out in *Wanjema - v- Republic* (1971) EA 493:

“ [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

7. In arriving at the sentence, the learned trial judge stated: -

“The court has carefully considered the filed statement of mitigation and has also placed this mitigation against the back drop of the circumstance leading to the death of the deceased. Although the court notes that the accused is remorseful. There is ready (sic) no option open to the court in this matter as the only prescribed sentence for the offence of murder is death by hanging. I have however, taken judicial notice of the fact that convicts sentenced to death had not been hanged for years. On this ground, I sentence the accused to serve fifty (50) years in prison. Right of appeal to the Court of Appeal within 14 days from today.”

8. The learned trial Judge undoubtedly proceeded on the premise that the only sentence for the offence of murder was the death sentence, a correct view before the Supreme Court decision in *Francis Karioko Muruatetu*. We think that had this matter come for sentencing after *Muruatetu* and considering the sad circumstances of the killing of the child, the trial Judge may have imposed a less severe sentence.
9. The appellant was remorseful. She committed the killing after overnight prayers at a church. It is not clear why she would want to kill her own child. Her defence suggests that she committed the offence when under some spell and was oblivious of her action or its gravity. Considering all these circumstances and that she has been incarcerated since July 1, 2013, we hereby allow her appeal on sentence and reduce the same to the period already served.
10. The appellant shall be released forthwith unless held for some other lawful reason.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

