



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE, J. MOHAMMED & KANTAI, J.J.A]

CRIMINAL APPEAL NO. 86 OF 2017

BETWEEN

ISAAC MWANGI MUCHOKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal against the Judgment of the High Court of Kenya at Nairobi (Korir J.) dated 30<sup>th</sup> January, 2017*

*in*

H.C.C.R.A. No. 2 of 2012)

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JUDGMENT OF THE COURT

This is a first appeal against the judgment of the High Court, **Korir J.**, delivered on **30<sup>th</sup> January 2017**, wherein the appellant was convicted and sentenced on a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He was sentenced to suffer death.

Briefly, the facts of the case as presented by the prosecution before the trial court are that the appellant, **Isaac Mwangi Muchoki** and his deceased wife, **Loise Adoyo Ouma** were married for two years. The appellant sold cabbages in Muthurwa Market in Nairobi while the deceased owned a food stall in the same market. The two had a tumultuous relationship and in the morning of **18<sup>th</sup> November, 2011** at around 6.00 a.m, **Judith Omusungu (P.W.1)** found the appellant and the deceased quarreling in the food stall. The appellant accused the deceased of failing to spend the previous night at home and demanded a cup of tea but the deceased refused to provide the cup of tea. The deceased then called the market security who forcibly removed the appellant from the stall. According to **P.W.1**, the appellant circled back and forth and told the deceased that he was going to get his army and that she would '**see him today**'.

The appellant was later seen at about 12 noon by P.W. 6, **John Muchoki Kabugi** sitting on the soda crates next to the deceased's food stall. P.W.6 owned a neighbouring stall. A short while later, P.W.6 heard a scream. He turned and saw the deceased falling down and the accused running away. **P.W.3, Evans Njunguna Macharia** who owned an adjacent stall, also heard the scream, got out of his stall and saw the deceased screaming while holding her stomach. P.W.3 tried to get hold of the appellant but the appellant ran away. P.W.3 suspected that the appellant had done something wrong because he had declared the previous day that he would kill the deceased. He turned back and found the deceased bleeding from her stomach. He saw a blood stained knife on the ground. The deceased was rushed to Kenyatta National Hospital by **P.W.4, Sarah Wambui Muhia** in her vehicle **KBL 412C** accompanied by three other women. The deceased who was still screaming told **P.W.4** that her husband had stabbed her. On arrival at the hospital, the deceased was wheeled in for treatment. Unfortunately, she succumbed to the injuries and died. **Dr. Joseph Ndungu (P.W.9)** who conducted an autopsy on the deceased's body produced a post-mortem report indicating that the deceased had a stab wound extending from the upper part of the abdomen to the right side of the chest through the right lung which had partially collapsed. In his opinion the deceased died from a penetrating stab wound inflicted by significant force. **No. 58194, Cpl. Peter Mwangi (P.W. 8)** visited the scene and took custody of the deceased's dust coat and the kitchen knife which was the murder weapon. The appellant was arrested at Mlolongo area in Machakos County on **30<sup>th</sup> December, 2011** and taken to Mlolongo Police Station. He was subsequently charged with the murder of the deceased.

When the appellant was placed on his defence, he gave an unsworn statement and called no witness. He admitted that the marriage between himself and the deceased was strained and was marred with disagreements. He alleged that on the material day, he went to his wife's stall and she refused to give him tea. Instead, she called security and had him removed from her stall. He went back to his stall and later received a call from a gentleman called **Karis** who insulted him saying that the deceased was not his wife. He went to his wife's stall to enquire about

the said **Karis** and sat on a crate of soda while confronting her. The deceased insulted him while holding a knife stating that he was not the only man and that he should go look for his parents even though she knew they were deceased. He then grabbed the knife and ‘**scratched her with it**’.

He heard a woman scream, saw the security personnel approaching and he ran away.

He maintained that he did not know that the deceased had died.

In a judgment delivered on **30<sup>th</sup> January, 2017**, the court found the appellant guilty of murder and sentenced him to suffer death as per the law then prescribed.

Aggrieved by this decision, the appellant preferred this appeal against his conviction and sentence vide a Supplementary Memorandum of Appeal dated **2<sup>nd</sup> March, 2020** wherein, the learned Judge was faulted for failing to find that the appellant acted in a state of provocation and that the sentence meted out was too excessive.

When the appeal came up for virtual hearing before us on **15<sup>th</sup> June, 2020**, the appellant was represented by learned Counsel **Mr. Koigi** whilst **Mr. Mwaniki**, Senior Principal Prosecution Counsel represented the respondent. **Mr. Koigi** informed the court that they were withdrawing the appeal against conviction and would only challenge the sentence.

Submitting on the mandatory nature of the sentence, the appellant’s counsel contended that the High Court had failed to consider the mitigating circumstances presented by the appellant and that in view of the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015**, the sentence of death was unconstitutional.

He further urged us to interfere with the trial court’s sentence on the basis that the penalty imposed was excessive and inappropriate. Citing the case of **Ali Abdalla Mwanza v Republic [2018] eKLR** counsel further submitted that it would be in the interest of justice, fairness and proportionality for the sentence to be lessened and that a sentence of 20 years as was given in the decision of **Ali Abdalla Mwanza vs. Republic**, (supra) would suffice.

Opposing the appeal against sentence, **Mr. Mwaniki** submitted that the appellant was sentenced on **30<sup>th</sup> January, 2017** prior to the **Muruatetu** (supra) decision which was rendered on **14<sup>th</sup> March, 2017** and at the time of the conviction sentence of death was the only available sentence. Nonetheless, counsel submitted that the evidence presented clearly showed the aggravating circumstances in the matter; that the deceased was about 31 years old when she was killed thus, the future of a young woman was extinguished; that the deceased was a mother of two children who are now orphans; that the murder was contemplated as a kitchen knife was used to inflict the injuries; that the deceased had a constitutional right to life and that the appellant’s right to life is not superior to that of the deceased. Consequently, counsel urged us to dismiss the appeal against sentence.

We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law.

The only issue before us is whether the appellant’s sentence was justified in the circumstances, and in view of the Supreme Court’s decision in the case of in **Francis Karioko Muruatetu & Another vs. Republic (supra)** where it was held that the mandatory nature of the death sentence as provided for under **Section 204** of the **Penal Code** is unconstitutional. In the Supreme Court decision, the court stated:

**“We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”**

Contrary to the assertions by the appellant’s counsel, we wish to state for the record that the decision of **Francis Karioko Muruatetu** (supra) did not outlaw the death sentence. The death sentence is indeed still a lawful sentence under the Constitution.

The distinction made by the Supreme Court in the said decision (**Francis Karioko Muruatetu** (supra)) is that the mandatory nature of the death sentence is unlawful.

Accordingly, one may lawfully be sentenced to death, depending on the circumstances of each case. However, the **Muruatetu** decision restored the discretion of a trial court whose hands are not now tied by lack of discretion at the time of sentencing.

The record clearly shows that the learned trial Judge did not exercise his discretion in sentencing the appellant as he considered himself bound by the death penalty provided under **Section 204** of the **Penal Code**. He stated:

**“On her part, Ms. Ikol submitted that the State had no criminal records of the accused and prayed that he may be treated as a 1<sup>st</sup> offender. The court gave the accused an opportunity to further mitigate. He said that he had nothing further to add. I have considered the mitigation and the circumstances of the offence. Whereas the accused has sought the leniency of the court, the sentence provided for a conviction for murder is death. I therefore sentence the accused to suffer death as provided by law and I hereby pronounce the sentence”.**

In considering the appropriate sentence to mete out, we must therefore consider the appellant's mitigation and the aggravating circumstances in the matter.

We note that the appellant was a first offender. It was submitted that he was remorseful and regretted the death of his wife. The appellant also admitted to inflicting injuries on the deceased with a knife during an argument. Nevertheless, the gravity of the offence cannot be understated. According to the post-mortem report produced by **Dr. Joseph Ndung'u** (P.W.9), the deceased died of a penetrating stab wound to the right side of the chest through her right lung. The injury was extensive showing that significant force was used to inflict the injury. Furthermore, the evidence tendered before the court clearly shows that the appellant's crime against his wife was premeditated and that the appellant fled the scene after committing the heinous crime and was in hiding for one and a half months before his arrest. The deceased was a young woman of 31 years. The effect to the victim's family and specifically to the deceased's two children are no doubt traumatic and far reaching.

The upshot of the above is that we allow the appeal against sentence, set aside the death penalty and substitute thereof with a sentence of thirty (30) years imprisonment with effect from **30<sup>th</sup> January, 2017**, the date of the appellant's conviction.

It is so ordered.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of October, 2020.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**