



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL CASE NO 94 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MARANGU ALIAS

KIHARA ALIAS JAMES MWANGI NDIRANGU.....ACCUSED

SENTENCE

1. The convict was on 20th May, 2021 found guilty and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in respect of the murder of OMIT SHAH on the 13th day of September, 2012.

2. The court is now called upon to pass an appropriate, adequate and justifiable sentence thereon taking into account the provisions of section 204 as read with the supreme Court decision in the FRANCIS KARIOKO MURUATETU & ANOTHER wherein the Court declared the mandatory nature of the death sentence provided therein unconstitutional and stated thus:

“45. To our minds what Section 204 of the Penal Code is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the Constitution are not exhaustive.”

3. The court therefore proceeded to pronounce itself thus:

“58. We now lay to rest the quagmire that has plagued the court 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 article 25(c), 28, 48 and 50(1) and (2) (g) of the Constitution.

4. In compliance with the said decision of the Supreme Court, the Court called for pre-sentencing report and allowed the convict to offer his mitigation

PRE-SENTENCING REPORT

5. It was stated on the report dated 8th June, 2021 that the convict was at the time of the offence residing at Mlango Kubwa though originally from Githunguri village within Meru County. After his class seven examination in 1978, he proceeded to Nkubu Polytechnic for vocational tailoring. At the time of his arrest, he was engaged in taxi business.

6. He was married with seven grown up children. He was brought up in the catholic faith and at the time of the offence, he was a member of criminal gang and had converted to the Islamic faith between 1997 and 1998, before reverting back to Christianity

7. On the circumstances of the offence, he admitted having been part of a gang that attacked and killed the deceased and that he was very remorseful for the offence, which according to him was a simple robbery that went bad.

8. On his health, it was stated that he was diagnosed with prostate cancer in the year 2020, for which he was under medication, in addition to suffering from stomach ulcers and high blood pressure. His family stated that he left home in 1975 but frequently visited home. It was stated that since childhood he never had any delinquent behaviour and wished that he be given non-custodial sentence on account of his age and health.

9. On the victim impact statement, the family of the deceased stated that he was aged 48 years and a successful business man, with a hardware shop in downtown Nairobi. He was engaged in several philanthropic activities and his twin sons then aged 12 years are now both in second year at Universities in UK. It was stated that their education was affected by the death of their father and had to endure a traumatic first five years of the murder, characterised by intense fear and nightmares.

10. The deceased wife at the time of the offence, was a house wife and helping bring up the two sons. She suffered immense psychological distress that ranged from insomnia to sever depression and had to undergo two surgical operations. She stated that their family empire collapsed as she lacked the skills to run the same. She therefore sought for death sentence against the convict. They expressed that they remained at risk since the accused knew of their residence

11. On the community attitude: it was stated that the offence shocked the residents of the Parkland area, with most of them becoming paranoid about their security, they therefore called for a deterrence sentence. The community where the accused hails from, on the other hand stated that the same was not known for criminal behaviour, which must have been confined to Nairobi, they urged the court to give the same non-custodial sentence

12. The Investigating Officer on the other hand stated that the accused seem to had delinked himself from crime and the area Chief was of the opinion that the accused could benefit from non- custodial sentence.

13. On the assessment for non-custodial sentence: it was stated that the accused was a member of a dangerous gang that usually engaged in incidences of robbery. His main risk area at the time was active association with the members of criminal gang, harbouring criminal activities and commission of violent acts as an adult, which was a strong indicator for recidivism. It was however observed that the accused had a supportive family of origin and nuclear family, which had no reservation about him being granted non-custodial sentence.

14. It was recommended that the accused need to be held accountable for the offence and the immense pain that he caused to the victim's family and that taking into consideration his professed character change of his involvement in past crime, his ill health, advance age and support from family, he should be granted mixed sentence with term in prison and thereafter non-custodial supervisory order.

MITIGATION

15. In mitigation, the accuse through his Advocate on record Mr. Wakaba, stated that he was the leader and sole bread winner of his

family of seven children, wife and elderly parents. It was submitted that one of the mitigating factors was his health, having been diagnosed with high blood pressure and ulcer while in custody, which enabled him to be granted bond in the year 2015 to enable him seek treatment.

16. It was submitted further that he was thereafter diagnosed with prostate cancer for which he was attending treatment, having undergone surgery on 24th September, 2020. It was contended that he was entitled to non- custodial sentence on account that he had been in custody for a period of three years between 2012 and 2015 before he was granted bond, which should be taken into account as time served under Section 333(2) CPC.

17. His conduct while out on bond showed evidence of having been rehabilitated, having not engaged in any bad conduct and was therefore not a danger to society. His health status and age which requires him to still attend clinics for check-up and medication, which he may not get while in prison coupled with the conditions caused by Covid 19, which makes him a vulnerable person, were submitted to be factors which favoured non-custodial sentence. It was further stated that he had the right under Article 57 of the Constitution as an old member of society to live in dignity.

18. It was contended that whereas he was convicted of a serious offence, the court should take into account the fact that he was a first offender and that he had cooperated with the police throughout the investigations.

19. Mr. Mitula on behalf of the victim's family, in response, submitted that this was a case that required retribution as the accused was part of a gang which was accompanied with the use of dangerous weapon which left great suffering to the victim's family and that the accused had not sought any reconciliation with them and had not been remorseful. It was finally submitted that the community was shocked, had not recovered and needed protection.

20. On behalf of the state Mr. Okeyo relied upon the presentencing report.

21. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -

- 1) ***Retribution***: to punish the offender for his/her criminal conduct in a just manner.
- 2) ***Deterrence***: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 3) ***Rehabilitation***: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- 4) ***Restorative justice***: to address the needs arising from the criminal conduct such as loss and damages.
- 5) ***Community protection***: to protect the community by incapacitating the offender.
- 6) ***Denunciation***: to communicate the community's condemnation of the criminal conduct.

22. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -

- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
- b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
- c) Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.

d) Protection of the community:- where the offender is likely to pose a threat to the community.

e) Offenders responsibility to third parties:- where there are people depending on the offender.

f) Children in conflict with the law:- non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.

23. The Supreme court in the **Francis Muruatetu case** at paragraph 71 amended the guidelines in respect of re-hearing sentence for the conviction of murder charge to include:-

a) *Age of the offender.*

b) *Being a first offender.*

c) *Whether the offender pleaded guilty.*

d) *Character and record of the offender.*

e) *Commission of the offence in response to gender-based violence.*

f) *Remorsefulness of the offender.*

g) *The possibility of reform and social re-adaptation of the offender.*

h) *Any other factor that the court considers relevant.*

24. In this matter it is clear that the offence herein was committed in the process of the commission of a felony being robbery with violence. The convict was a member of a known criminal gang operating around the parklands area of Nairobi. Their network was well elaborate as seen from the number of people the police arrested before arresting him.

25. To facilitate their operation, they even bought a motor vehicle which according to the evidence of PW7 was “gari ya kiwanja”. It was akin to what our brothers from Nyanza call “Jo-pap”. In the process of the commission of the offence herein the convicts accomplish one PETER KANYWERA also lost his life and his co-accused was shot by the police while in the process of committing another robbery with violence even after being charged with the present offence.

26. There was also evidence placed before me to the effect that the accused had multiple identification documents several alias together with sales agreement in respect of the motor vehicle which was facilitating their mission and was therefore not a small time criminal.

27. I have taken into account the cry by the family of the deceased on the need for severe punishment so as to act as a retribution and their fear that they have been exposed as a result of the death of the deceased and weighed the same against the fact that this case has been within the corridors of justice for a period of almost ten (10) years during which period there has been no report of another attack on them. I am alive to the fact that there is no sentence which can adequately compensate them by the life once lost can never be restored in the present life.

28. I have further taken into account the mitigation by the accused person, his advanced age and the medical condition as supported by the medical records and documents produced in court and the fact that the Bible in the Book of Psalms 90:10 had this to say on age: -

“the years of our life are seventy or even by reason of strength eighty, yet their span is but toil and trouble, they are soon gone and we fly away” ESV.

29. It is clear to my mind that with the Biblical principle stated herein above, the best the convict may live will be up to seventy (70) years with a bonus of up to Eighty (80) years but with trouble. Having taken his present age any sentence given must effect this reality noting that the death sentence proposed by the family is now only left in respect of the nearest kind of cases as the Muruatetu judgment.

30. As stated herein, no sentence however severe, will restore the life of the deceased and may not adequately compensate his family. Further having noted that the offence herein was committed in the course of commission of robbery with violence, which shows that the accused did not set out on a mission of killing the deceased but to take away from him his earthly possession whatever they were as at that time.

31. Directing my judicial mind on the most appropriate sentence herein, I have come to the logical conclusion that a sentence of fifteen (15) years will be the most appropriate sentence herein at the same is almost equal to life sentence having taken into account the accused advanced age.

32. The accused is therefore sentenced to a term of fifteen years of which the first twelve (12) thereof shall be imprisonment of which two (2) years shall be taken into account as duly served in respect of the period the same was in custody before being granted bond under the provision of Section 333 (2) of the Criminal Procedure Code, to act as deterrence and retribution and the last three (3) thereof shall be on probation for purposes of further rehabilitation and resettlement of the convict into society.

ORDER

33. In the final analysis I make the following orders:

- a) Sentence of fifteen years to be served as follows: -
- b) Two (2) for the period when the convict was in custody considered served.
- c) Ten (10) years imprisonment from the date herein.
- d) Three (3) years thereafter on probation.
- e) The convict is entitled to remissions if any on the imprisonment term.

34. The convict is entitled to right of appeal on both conviction and sentence while the State is entitled to right of appeal on sentence

35. And it is ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 15th DAY OF JULY 2021.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Gichohi for the State

Mr. Wakaba for the accused

Mr. Mitula for the family

Court Assistant – Gitonga



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