



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERUGOYA

(CORAM: R. MWONGO, J.)

CRIMINAL CASE NO 2 OF 2012

SIMON MUCHIRI GORDON.....ACCUSED

VERSUS

REPUBLICRESPONDENT

JUDGMENT ON SENTENCING

1. The accused was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 8/5/2012 at Kamugunda Village in Thumaita Sub-location of Kirinyaga County he unlawfully murdered Ephantus Munene Ndegwa.

2. Initially, the accused pleaded not guilty, and the hearing proceeded with eight prosecution being called, before the prosecution closed its case on 22nd January 2019. The court found that the accused had a case to answer on 5th November, 2019, and the defence hearing was set for 3/2/2020.

3. On 14/8/2020 the accused through his lawyer, Mr Nganga, prayed to change his plea. Thus plea was taken afresh in Kikuyu, the language he requested, and the accused pleaded guilty, which was recorded. On 23/9/2020, the court asked the accused to confirm his change of plea, and the Accused confirmed it.

4. There is no doubt that the accused conscientiously chose to plead guilty. Nevertheless the court directed that the information be once again stated and read to the accused; he confirmed his plea. The court recorded it again.

5. The facts of the case as presented by the prosecutor were that on the material day of the incident leading to the death of the deceased, the victim had visited his home. He met with the accused and there was bitter exchange of words. The accused used a panga and cut him. The victim succumbed to his injuries while undergoing treatment at Kerugoya District Hospital on 9/5/2012 at 11.00pm. The exhibits relied upon were PEx1 mental assessment report, PEx2 Post Mortem Report and PEx3 Panga with Rubber material.

6. On request of his counsel, a probation report was ordered, and mitigation hearing fixed for 8/11/2021. Mr. Otukey acted for the accused during mitigation. He said the accused was remorseful for his actions, was a first time offender, and had a family. He prayed that the probation report be considered. Further, the court was requested to consider the fact that the accused had been in custody since 2012.

7. The Probation Report filed by the Probation Officer on 5/10/2020, indicates that the accused is aged 54 years old; that he is married to one wife with whom they had 3 children together; that he is said to be a hardworking, supportive and protective person to

his family; but had a persistent grudge against his brother, the deceased. The community and the local administration were aware of the siblings' rivalry that had been affecting the family. However, the accused was not a security risk to the community.

8. The report adds that the other siblings have no ill feelings about the accused and are receptive about his release. Further, the accused has his dwelling house, tea bushes and coffee stems that are being cultivated by his son and sister hence he would have ease in settling and restarting his life. The probation officer recommended a probation sentence subject to the discretion of the court.

9. I have carefully considered the facts of the case as presented by the Prosecution counsel, the exhibits, and the fact that the accused person pleaded guilty unequivocally to those facts which disclose the offence. I further note the mitigation presented by counsel, and note that he is a first offender.

10. I have also taken into account the Judiciary Sentencing Guidelines and the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2021]eKLR** where it was clarified that on sentencing the court should consider mitigating factors such as the following;

- 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. The manner in which the offence was committed on the victim;*
- g. The physical and psychological effect of the offence on the victim's family;*
- h. Remorsefulness of the offender;*
- i. The possibility of reform and social re-adaptation of the offender;*
- j. Any other factor that the Court considers relevant.*

11. The accused has been convicted for murder on his own plea of guilt. **Section 204 of the Penal Code** provides that a person so convicted of murder shall be sentenced to death.

12. In many courts the principles of sentencing have been highlighted in cases such as: **Dahir Hussein v Republic Criminal Appeal No. 1 of 2015; [2015] eKLR**, where the High Court held that the objectives include:

“deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

13. This position is buttressed in the case of **Republic v Karema Mlewa Mdzomba [2020] eKLR** where the court noted that if in mitigation, the offender has no previous criminal record and has confessed to having committed the offence, these go to show that he is not only remorseful, but it also saves the court’s time and resources. In such cases where the offender voluntarily admits to the commission of the offence for the sole purpose of seeking a lesser sentence, the court should not lose sight of the same.

14. Notwithstanding the conviction, the mandatory nature of the death penalty has been outlawed by the Supreme Court in the now famous case of **Francis Karioko Muruatetu and Another -v- Republic and Others 2015 eKLR**. Consequently, this court is not bound by the penal requirement of section 203 & 204 Penal Code

15. Further, the accused pleaded guilty with the hope of getting a lesser sentence. Though he should not have killed his brother, he acted out of anger and is remorseful for his offence. He has been incarcerated since 23rd May 2012, a fact that I take into account.

Sentence

16. Considering all these matters, and in particular the fact that the offender was found through a trial to have a case to answer, and that he then did in fact admit the offence, I sentence the accused to eleven (11) years imprisonment. The term shall take into account the period he has already spent in prison.

17. For the remainder of the sentence term, the offender shall serve a probation period of two (2) years in a programme designed, facilitated and overseen by the Probation Officer, which shall include a substantial rehabilitation element; and:

- a. The programme shall begin with effect from thirty (30) days from today; and
- b. The offender may attend the programme from his home; and
- c. The Probation Officer shall maintain a record of the offender's attendance to the programme, and
- d. The Court may require the Probation Officer to avail a record and report of the offender's attendance to the said programme.

18. Orders accordingly.

Dated at Kerugoya this 31st day of January, 2022

R Mwongo

JUDGE

Delivered in the presence of:

- 1. Simon Muchiri Gordon, the Appellant
- 2. Mamba for the State
- 3. Winnie Wanjiru Court Assistant



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