



**Republic v Opija & another (Criminal Case 49 of 2021)
[2024] KEHC 7857 (KLR) (25 June 2024) (Sentence)**

Neutral citation: [2024] KEHC 7857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 49 OF 2021**

**JN KAMAU, J
JUNE 25, 2024**

BETWEEN

REPUBLIC ACCUSED

AND

JOEL ONDEKO OPIJA 1ST ACCUSED

ISSACK OPIJA 2ND ACCUSED

SENTENCE

1. The 1st and 2nd Accused persons were initially charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 (Laws of Kenya). They entered into a Plea Agreement on 24th April 2024 whereupon this court convicted them of the offence of manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#).
2. The facts of the case were that on 1st February 2018, at Ebusakala Market within Luanda Township, the 2nd Accused person attacked one Florence Mukhaye with a stone and a slasher over a family dispute. She informed her husband John Mukhaye (hereinafter referred to as the “deceased”) and he asked her to report the matter to the Chief. She did so and the said Chief referred her to Emuhaya District Hospital for treatment.
3. The deceased, his son, one Reuben Mukhaye and his friend Alfred Mukuna deliberated on how to deal with his wife’s case. They resolved to inform the 2nd Accused’s father. On their way there, they met the 1st and 2nd Accused persons. The 2nd Accused person grabbed the deceased by the stomach and started fighting with him. The 1st Accused was armed with a jembe. He chased Alfred Mukuna who ran away. He then hit the deceased on the head three (3) times with the jembe while the 2nd Accused was holding him. The deceased fell down bleeding heavily from the head.



4. The 1st and 2nd Accused persons ran away with the stick and jembe that they had used to assault the deceased. A crowd gathered trying to administer first aid on the deceased but he had stopped breathing. The Assistant Chief was informed and he called the police at Luanda Police Station who took the deceased's body to hospital.
5. The cause of the deceased's death was determined to have been severe head injury caused by blunt force trauma following assault. The Postmortem Report dated 5th February 2018 was produced as evidence in this court and marked as Exhibit 1. The jembe and the stick were also produced and marked as Exhibit 2 and 3 respectively.
6. Having entered into a Plea Agreement, the State urged this court to sentence the Accused person to fifteen (15) years imprisonment while the 1st and 2nd Accused persons sought for ten (10) years imprisonment.
7. In their mitigation, both the 1st and 2nd Accused persons asked this court to consider that they were first offenders, that they were remorseful for having caused the death of their cousin, the deceased herein. They asserted that they had known the ways of the Lord, reformed and developed more conscience during the time they had spent in custody.
8. They also urged this court to appreciate that the dispute between the deceased's wife and their mother emanated from a land dispute and hence the offence was not pre-meditated. They further persuaded this court to take into consideration that they sustained injuries following the incident.
9. They pointed out that although they would have been ready to serve a non-custodial sentence, their parents had relocated from their home and a non-custodial sentence would not therefore have been possible. They urged this court to mete a lenient sentence to them noting to take into account the period they had been spent in custody while awaiting trial.
10. The 1st Accused person stated that although the date of arrest in the Charge Sheet was shown to have been on 2nd February 2018, the Covering Report showed the date of the incident as having been on 1st February 2018. He averred that he had therefore been in custody for six (6) years, four (4) months and twenty six (26) days.
11. On his part, the 2nd Accused person contended that he was arrested on 5th February 2018 and had therefore spent six (6) years, four (4) months and twenty two (22) days in custody.
12. On its part, the State prayed for a custodial sentence on the ground that the deceased's family was still bitter following the incident and it was not ready for reconciliation. The State averred that the deceased's wife was bitter having been left with eight (8) children to fend for alone. It pointed out that some of the children had dropped out of school. It asked this court to consider that the deceased sustained injuries to his head.
13. It added that the community was not receptive to the Accused persons being given a non-custodial sentence as had been demonstrated in the Pre-Sentence Report. It recommended that while noting that sentencing was a sole discretion of the court, the Accused persons ought to be given a custodial sentence for their own safety.
14. According to the Pre-Sentence Report of Benard O. Musitia, Probation Officer, Vihiga County that was dated 24th May 2024 and filed on 3rd June 2024, the 1st Accused person was thirty-two (32) years old. He attended Ebusiralo Primary School where he completed class eight (8) but did not proceed with secondary education due to economic hardship in the family. He pursued masonry trade through



- apprenticeship. Prior to his arrest, he was living in Busia. He was married and was blessed with two (2) children. He professed the Christian faith.
15. On the other hand, the 2nd Accused person was thirty four (34) years old. He also attended Ebusiralo Primary School where he studied until standard eight (8). He did not proceed to secondary education due to lack of school fees. He later engaged in apprentice welding in Luanda town and worked in various welding yards before moving to Kisumu.
 16. Prior to his arrest, he had been working as a supervisor in a welding shop in Kisumu. He was married but later separated. He was blessed with two (2) children. He professed the Christian faith and engaged in alcohol consumption.
 17. The 1st and 2nd Accused persons were brothers. They both prayed for leniency of court stating that they had been in remand for over six (6) years. They pointed out that they would seek forgiveness and reconciliation from the victim's family. They regretted their actions that led to the demise of the deceased and their family being rendered outcasts after being forcefully evicted from the ancestral home.
 18. Their family was not available for the social inquiry despite efforts to reach them on mobile phone. Their parents' whereabouts were not established as the family had been excommunicated from the community after the incident. Their father was said to be putting up in Kitale while their mother had returned to her maiden home in Vihiga County.
 19. The deceased's family was not ready to reconcile with the offenders' family. They pointed out that the deceased left behind eight (8) children one being mentally challenged and that those that were still in school dropped out after their father's demise. Her wife reported that she was overwhelmed in meeting her family needs after the demise of her husband. They pointed out that they were still insecure in the event of the return of the Accused persons as the land issue remained unsolved. They urged the court to mete out sentence that was commensurate to the offence committed following conviction of the offenders.
 20. The Local Administration feared for the safety of the Accused persons because the offence they committed attracted excommunication of their entire family.
 21. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. *The Sentencing Policy Guidelines* in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
 22. It was also important that the sentence communicate to the community, condemnation of their criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.
 23. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of their offence at the time of sentencing them, chances of the 1st and 2nd Accused persons being reintegrated in the society would be next to impossible as there were possibilities of being harmed.
 24. Killing someone is an abomination in the society and that explains why the deceased's family and community did not want them released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.



25. Although the 1st and 2nd Accused persons had never been charged with any offence prior to the incident, they had sought leniency and had reformed, it was clear that they intended to kill the deceased. The nature of the injuries that the deceased sustained showed the malice that they had at the material time. The deceased must have died a harrowing death as the 1st Accused person hit him thrice on the head with a jembe as the 2nd Accused person held him.
26. From the facts that were given in the Pre-Sentence Report, the 1st and 2nd Accused persons killed the deceased following a family dispute. Whereas the offence was not pre-mediated as they contended, the offence was so abhorred by the community that their parents were ex-communicated from the society.
27. Having considered the facts of this case, the 1st and 2nd Accused persons' mitigation, the State's response thereto, the Pre-Sentence Report and bearing in mind that sentencing was the sole discretion of the court, this court came to the firm conclusion that a sentence of fifteen (15) years imprisonment was suitable and adequate herein purely because the Accused persons entered into a Plea Bargain Agreement. If the matter had proceeded as a murder case, this court would have meted out on them a stiffer sentence.
28. Going further, this court was mandated to consider the period the 1st and 2nd Accused persons spent in remand while trial was on going in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
29. The said Section 333(2) of the *Criminal Procedure Code* provides that:-
- “Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
30. Further, Clauses 7.10 and 7.11 of the *Judiciary Sentencing Policy Guidelines* provide that:-
- “The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
31. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
32. According to the Charge Sheet, the 1st and 2nd Accused persons were arrested on 2nd February 2018. The 1st Accused person clarified that he was arrested on 1st February 2018 which was the day of the incident. The 2nd Accused person pointed out that he was arrested on 5th February 2018. This court adopted the two (2) dates that they gave as they were indicated in the facts that were read out to them at the time they pleaded guilty to the offence of manslaughter.
33. Notably, their applications for bond were denied and never reviewed. This court agreed with them that the period they spent in prison ought to be taken into consideration while computing their sentence.



Disposition

34. Accordingly, it is hereby directed that the 1st and 2nd Accused persons be and are hereby each sentenced to fifteen (15) years imprisonment to run from the date of this Sentence.
35. For the avoidance of doubt, the period between 1st February 2018 and 24th June 2024 in respect of the 1st Accused person and the period between 5th February 2018 and 24th June 2024 in respect of the 2nd Accused person be and are hereby taken into account while computing their sentences in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
36. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JUNE 2024

J. KAMAU

JUDGE

