



**Republic v Mwanzia (Criminal Case 64 of 2014)
[2024] KEHC 9374 (KLR) (30 July 2024) (Sentence)**

Neutral citation: [2024] KEHC 9374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 64 OF 2014**

**FR OLEL, J
JULY 30, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

BENSON MUTUA MWANZIA ACCUSED

SENTENCE

Introduction

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [penal code](#) and after trial was found guilty and convicted of a lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the [penal code](#) on 24th September 2020. The court thereafter called for a pre-sentence report and it was revealed that the victim's family and the accused family had entered into Alternative Dispute resolution talks aimed at compensating the victim family. The matter was subsequently mention severally where the court was briefed on the status of the reconciliation talks and eventually on 4th June 2024, due to the delay and the unending nature of the reconciliation engagement, the court remanded the accused person herein and directed that a fresh pre-sentence report be filed, the accused be allowed to mitigate and sentence be passed.
2. The accused advocate, Counsel Muema did mitigate and stated that the accused person was a family man and was sincerely remorseful for the incident that had occurred, which lead to the death of Bernard Kioko Kisoi. He was a first offender, who did not have any prior criminal record and had lived peacefully with members of his community. The accused family and clan elders had engaged the victim family and had mutually agreed on compensation to be made to the victim's family, which was payment of fifteen (15) cows. Out of this number of cows, the said victim family had already been compensated with ten (10) cows so far. This fact, too was also confirmed by the probation officer in her current probation report filed to court.



3. The accused had already served a long period in remand before being released and prayed that that period be deemed sufficient punishment for the offence committed. The accused urged court to deem it fit to find that for the rest of his sentence, he be placed under Community service order as recommended by the probation office. That would also enable him to source for funds and pay for the addition five (5) cows yet to be delivered as mutually agreed. The said five (5) remaining cows were to be delivered on or before July 2025.
4. The probation department did file their pre-sentence report dated 16th July 2024, wherein it was noted that the accused person herein was 60 years old but had previous conviction. In 1998 he had been convicted having been found guilty of the offence of stealing in Mombasa, and sentenced to serve four years. He appealed and after one and half years in custody was freed on Appeal. Further in the year 2017 before Kangundo court the accused was again convicted for the offence of attempted murder of the deceased father and was imprisoned to serve seven years imprisonment, which term he did serve to its completion. The accused was a family man blessed with six children from two wives, one of whom was deceased. But currently the accused and his wife were estranged and he was staying alone.
5. The genesis of the dispute herein was a dispute over land boundary. On the fateful day the families had meet and resolved the same, but later in the day, as the accused was tilling part of their family land he was attacked by the deceased and his father. The accused retreated to his house and locked himself in. The deceased kicked open the door and in self defence the accused shot him with an arrow on the neck and the deceased later succumbed to his injuries. The accused then went and reported the incident to the police and was arrested and charged in court.
6. The two families belonged to the “Atangwa clan” who had initiated reconciliation and compensation talks under their auspices. On 18th June 2024, the said parties had held a meeting in the presence of the clan elders and the Area chief. After discussions, compensation was agreed upon and the accused family had delivered four cows (one live cow and three in monetary form) and one goat. Further on 4th July 2024 the accused family had further delivered additional five cows to the victim’s wife and the same was done in the presence of the Area chief. (The same was in monetary form of Kenya shillings ten thousand per cow). In addition, both families did sign minutes dated 4th July 2024 committing to clear the remaining five cows on or before 25th July 2025.
7. It was also noted that members of the community were not hostile to the accused person and maintained a positive prescription about him. Ever since he was released on bond he had resided amicably with the community and was willing to serve non-custodial sentence. The victim’s family too was interviewed by the probation officer and they appreciated the resumption of the reconciliation and compensation process and were hopeful the same would be completed as scheduled. In conclusion the probation report recommended that the accused be placed on non-custodial sentence and recommended that he be placed on three (3) years’ probation.

B.Sentencing

8. I have considered the mitigation made, as well as the comprehensive pre-sentence report filed by the probation department dated 17th July 2024.
9. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas*



Mwamba Wanyi Vs Republic (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira Vs The state of Maharastra* at paragraph 70 – 71 where the court held;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

10. The provisions of *Judiciary sentencing policy Guidelines* provides that; to determine the most suitable sentence, the court shall take into account the aggravating and mitigating circumstances. The probation department has recommended that the accused be placed to serve his sentence under community service order, taking into account, the period already served while in remand, his successful reintegration and acceptance by the community and most importantly based on the Alternative dispute resolution mechanism undertaken by both families under the leadership of the “Atangwa clan” elders and the Area chief which had culminated in payment of nine cows to the family of the victim and the remaining five cows would be paid by July 2025.
11. The judiciary sentencing policy at guideline 10.1 to 10.7 further expressly allows for compensation order to be made in addition or in substitution for punishment. Such compensation order are particularly desirable as they fuse restorative and retributive justice and gives the offender an opportunity to take responsibility of his/her conduct and remedy harm caused. If supervised properly, it achieves the objectives of sentencing and courts should impose it where in the circumstances, it is the most suitable sentence.
12. The accused was arraigned before this court on 27th October 2014 and spent two years before being released on bond on 6th May 2016, but since he had a different criminal matter pending before Kangundo law court, where he had been charged with the offence of attempted murder of the deceased father, he remained in custody as he had been denied bond in the said matter. Eventually the accused was convicted and sentenced to serve a period of seven (7) years, in the Kangundo criminal case, which sentence was later reduced by 2 years, 11 months and 10 days spent in remand based on his application to have the remand period be considered under provisions of Section 333(2) of the *Criminal Procedure Code*.
13. The accused was eventually released on bond in April 2020, and effectively spent about six years in remand. Considering this period, the aggravating factors leading to the death of Bernard Kioko Kisoi and mitigating circumstances including period spent in custody, and most importantly the successful alternative dispute resolution agreement the accused, the victim family and the clan have arrived at, I do concur with the probation officer that this is a proper case where the court can exercise its discretion and place the accused on community service order.



14. The accused person, Benson Mutua Mwanzia Alias Katua is therefore sentenced/placed on probation for 3 years. During this period the accused will submit/report and be supervised by the Machakos probation office every three (3) months to ensure he keeps to good order.
15. The accused will also honour the compensation agreement entered into with the victim family and shall pay the remainder of the five (5) cows on or before July 2025 as agreed between the two families and incorporating the elders of “Atangwa clan”
16. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30TH day of July, 2024.

In the presence of;

Ms Otulo for ODPP

Mr Muema for accused

Susan/SamCourt Assistant

