



**Republic v Tuisang & 3 others (Criminal Case 22 of 2019)
[2024] KEHC 9299 (KLR) (29 July 2024) (Sentence)**

Neutral citation: [2024] KEHC 9299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 22 OF 2019
RB NGETICH, J
JULY 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SIMON KIPRUTO TUISANG ALIAS DAVY 1ST ACCUSED

ELIJAH LESOPIAN KAMALAL 2ND ACCUSED

NICKSON LELEBO 3RD ACCUSED

ALEX CHUNCHUNG KAMALAL 4TH ACCUSED

SENTENCE

1. The four accused persons Simon Kipruto Tuisang Alias Davy, Elijah Lesopian Kamalal, Nickson Lelebo And Alex Chunchung Kamalal were charged with the offence of murder contrary to section 23 as read with section 204 of the penal code. The particulars of the charge were that on the 22nd day of September,2019 at Ng’oswe village in Baringo South Sub- County the accused parsons jointly murdered Khamis Salim Abdallah.
2. The 4 accused persons herein denied the charge and the case proceeded for trial and upon close of trial, by judgement delivered on the 2nd day of May,2024, this court found the 4 accused persons guilty of the charge of manslaughter contrary to section 202 as read with section 205 of the penal code and were jointly convicted them under section 215 of the Criminal Procedure Code accordingly.
3. This court called for pre-sentence report to be filed before mitigation and reports were filed in respect to each accused person.



Pre-sentencing Report

1st Accused Pre-sentence Report

4. From the report, accused 1 is 32 years old and his other family members have no history of criminality and the father indicate that the 1st accused is a first offender. He said they have not had any reconciliation with the victim's family and he prays that the offender be given non-custodial sentence so that he can continue with the work he was doing at Marigat area. From the social inquiry, the offender has less family support and he rarely communicate with the parents or the siblings. After dropping out of school he spent most his time at Marigat and his criminality is attributed to bad company and alcohol use.
5. The 1st accused dropped out of school at standard six due to his own will and family poverty. After dropping out of school, he relocated to Eldama Ravine where he worked as a herder. In the year 2009-2011 he worked in Eldoret as a herder. He went to Marigat in the year 2012 and was doing casual jobs within Marigat. He says he was married but separated with the wife in the year 2016 due to alcoholism. They were blessed with two children who currently live with the mother at Marigat inn. From the social inquiry the offender has no communication with the wife and the children.
6. The victim was aged 38 years and was a father of two children aged 10 years and 5 years. He worked as a driver. The wife of the deceased is still bitter. she says since the year 2019, no member of the offenders' family has approached them for reconciliation purpose. She opposed the offender being granted non-custodial sentence. She is of the view that custodial sentence is the best sentence for him.
7. The deceased brother is also still bitter over loss of his brother. He added that as a family, they have not been approached for reconciliation from the offender's family and is opposed to the offender being granted community-based rehabilitation sentence.
8. Three uncles of the deceased/victim indicated that the victim experienced a painful death and the victim's wife together with the children have suffered a lot following the demise of the deceased and they prayed for custodial sentence for the reason that his family have not initiated reconciliation process.
9. The offender states that he does not understand the offence; that he was not with the deceased and he was framed by the second offender since they were not in good terms with him because he had planted maize on the family land of the second offender. He is not remorseful.
10. The local administration together with the village elder stated that the 1st accused had a challenge of excessive alcohol consumption which might have attributed to his criminality. He opposed community-based rehabilitation sentence on ground that reconciliation has not taken place with the victim's family.

2nd Accused Pre-sentence Report

11. From the report, the 2nd accused is 39 years old, he dropped out of school in class 7 and is a first-time offender having committed the offence under the influence of alcohol; the brother did not show any interest on facilitating his supervision and reintegration within the community. His wife relocated to his parent's home after his arrest.
12. Form the report, the deceased had conversation with the lady and since the first offender had interest with the lady, he got annoyed and started quarrelling with the deceased (victim). The first offender out of anger hit the victim using timber from part of the bed that had a nail which pricked the deceased



on his head. The victim was left alone and started asking for help but offender two, three and four started beating him.

13. The local administration added that the victim was a Muslim and the Ilchamus people have no issue with the offender but the Muslim communities have a negative perception towards him. He added that the manner in which the victim was killed was so inhuman and the offender together with his family have not initiated any reconciliation process. He indicated that the offender's character was not good at all. He opposed the offender being given community rehabilitation indicating that their life will be at danger.
14. Sentiment given by the victim's family and local administration are similar to the sentiments given in respect to the 1st accused.

3rd Accused Pre-sentence Report

15. From the report, the 3rd accused is 29 years old. The offender's mother indicated that this is the second offence his son has committed the first offence being offence of creating disturbance where he completed the sentence well. She added that his son's criminality arises from his habit of excessive alcohol consumption and negative peer influence. She added that reconciliation has not taken place due to low financial status of the family. She prayed for his son be given community rehabilitation sentence so that he can restart his life afresh since he has been in custody since the year 2021. Efforts to reach out to the father were futile as his parents are currently separated. The offender's criminality is contributed by negative peers and excessive alcohol consumption.
16. The offender denies committing the offence stating that he had disagreed with the first offender, he left and went straight home. He is aware that reconciliation has not taken place and he pray for non-custodial sentence so that he can restart his life.
17. The sentiments of victims' family and local administration is as captured above under 3rd accused.

4th Accused's Pre-sentence Report

18. From the report the 4th accused is aged 21 years old, the offender dropped out of school in form two out of his free will. He started practicing farming within the community. His uncle (brother to his father) indicated that the offender's criminality is as a result of bad peer company and excessive alcohol consumption. He stated that reconciliation with the victim's family has been difficult due to low economic power at family level. He prayed for the offender to be admitted into non-custodial sentence so that he can continue assisting his grandmother. From the social inquiry, the offender has very little communication with his siblings.
19. The sentiments of local administration and village elder are as captured above.

Mitigation

20. On 9th July 2024 the accused persons mitigated through their Advocates. Mr. Kipkulei counsel for the 1st accused submitted that the 1st convict is aged 30 years old, is married with 2 children aged 11 and 8 years and that he is a young man with a promising future. That having been found guilty for the offence of manslaughter, he is remorseful and regrets the incident. He prayed for a non-custodial sentence having served more than a year and since he was released on bond, he has been of good behavior and the offence was not intended but arose out of drunkenness and he could not reason as a right-thinking member of the society; he is remorseful.



21. Counsel submitted that from the pre-sentence report, the accused is not remorseful but he submitted that there was no reconciliation between the accused and the victim's family for the reason that the accused's family is disintegrated where it is everybody for himself which was captured well in the pre-sentence report. He submitted that the 1st accused has not come to terms with the conviction but he is remorseful. Counsel prayed for the period the accused served in remand to be factored in at the time of sentence and that he be given a chance to relook at his future and fend for his family.
22. Mr. Chepngoswo counsel for the second, third and fourth accused persons submitted that the 2nd accused is remorseful and a first offender aged 39 years and has more prospects in life; that he was the family bread winner and his wife ran away after his arrest and he had children. That he committed the offence under the influence of alcohol and prays for a non-custodial sentence stating that he would have wished to have reconciliation with the victim's family but he was in custody and his family did not conduct the reconciliation since the victim's family were so rigid and they did not want to reconcile.
23. Counsel submitted that they pray for a non-custodial sentence so that he can re-unite with his family. That he has attended bible classes while in prison and has obtained several certificates and recommendations from the in-charge. That they wish to avail them to the court to show that he has changed and he is ready to go back to the society and will not commit offences again. That although the pre-sentence report is negative, the njemps community have no problem with him and it is only his Muslim community who have problem with him.
24. In respect to Accused 3, counsel submitted that he is a young man aged 29 years, he is remorseful. That although he is not a first offender, he was charged with misdemeanor and jailed for 6 months which he completed. That he committed the offence under the influence of alcohol and that there has been no reconciliation since the parents of the convict separated and the father was not available for comment since he could not be reached. That the mother prays that A3 be released for rehabilitation in the community.
25. Counsel submitted that the njemps community where he comes from have no problem and it is only the Muslim community who have problems with him. That he does not own the responsibility for the offence saying that it is Accused 1 who disagreed with the deceased and he was not involved. He stated that he was a bread winner of his family and he urges the court to take note of the fact that he has been in custody from 2021 and while in prison, he has been attending bible teachings and has certificates which they wish to produce to show that he has changed and he is ready to integrate back to the society. That he is remorseful and they pray for a non-custodial sentence and in the alternative, the court to exercise its discretion on sentence.
26. In respect to accused 4, counsel submitted that he is aged 21 years old and he is a first offender. That he is a young man with great prospects in life. He regrets the offence and he is an orphan raised by his grandmother. Counsel submitted that the commission of the offence was not intentional but as a result of excessive consumption of alcohol. That there was no reconciliation because he was in custody and he comes from a poor background.
27. Counsel further submitted that his community, the njemps community have no problem with him and they pray for a non-custodial sentence or for the court to exercise its discretion; and prayed that the period the three convicts served in custody be considered during sentencing.
28. The prosecution counsel Ms. Ratemo submitted that no efforts have been made by the accused persons to reconcile with the family of the victims. That it is not true that the victims are rigid but since the occurrence of the offence in the year 2019 to date, the accused have not made attempts to reconcile with the victim's family. That A3 and A2 formed part of the Muslim community before being charged



and it is unclear if they denounced Muslim faith and joined Christianity. That be that as it may, the family of the victim lost a young man and the wife has been left with 2 children without a provider.

29. She submitted that the deceased died in a violent manner and that as much as there was alcohol involved, the untimely date has left the family/community grieving over the loss of the deceased. That from the report, Accused 2 has been troublesome in the community likewise to Accused 3 who has also been troublesome in the community. She stated that Accused 3 had served 6 months imprisonment and although records were not available, he has admitted in the report and the community still view him as a danger and the home environment is still very hostile. She prayed for custodial sentence for all the accused persons and she proposed a sentence of not below 20 years.

Determination

30. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 as set out below:-
- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
31. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
- i. Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - ii. Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - iii. Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - iv. Protection of the community:- where the offender is likely to pose a threat to the community.
 - v. Offender's responsibility to third parties:- where there are people depending on the offender.
 - vi. 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.
32. 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.
33. From evidence adduced herein, the 1st convict had a disagreement with the deceased which led to him attacking the deceased with pieces of a bed on the head hence injuring him. The other co-accused came in and joined in assaulting the victim resulting in his death.
34. The available maximum punishment for the offence of manslaughter is life imprisonment. The Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die. In view of the above, the accused persons deserve determinate sentence.
35. Having taken into account the circumstances leading to the commission of the offence herein, the mitigation by the accused persons, the recommendation by the Probation Officer, I am of the considered opinion that while the accused persons should be given the opportunity for reconciliation, they also merit a deterrent sentence, the offence committed is serious, taking the life of another owing to minor differences is barbaric and unacceptable and custodial sentence of 15 years imprisonment is appropriate in my view.
36. Final Orders: -
- 1. Each accused person to serve 15 years imprisonment.
 - 2. The period served in remand to be computed in the sentence.
 - 3. Right of appeal 14 days.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 29TH DAY OF JULY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis

Ms. Ratemo for state

Mr. Kipkulei for Accused 1

Mr. Chepngoswo for 2nd, 3rd and 4th Accused

