Republic v Musumba (Criminal Case E007 of 2022)
[2024] KEHC 9526 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9526 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL CASE E007 OF 2022

WM MUSYOKA, J

JULY 26, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JEREMIAH OCHUADA MUSUMBA ..... ACCUSED

RULING

1. I convicted the accused person herein, Jeremiah Ochuada Musumba, on 26th April 2024, of the murder of Christine Anyango Ochwada. In my judgment, I directed the Busia County Director of Probation and Aftercare Services to compile and file a pre-sentence report. That was done, and a pre-sentence report was filed, dated 9th May 2024. I conducted a sentencing hearing on the same date, 9th May 2024.

2. At that hearing, Ms. Chepkonga, for the Republic, stated that the accused was a first offender, and the pre-sentence report was favourable to him. She, however, submitted that the death had had a negative impact, as 2 of the children of the deceased had dropped out of university. She submitted that there were aggravating circumstances that militated against a non-custodial sentence. She pointed to the fact that the deceased died of 1 stab wound, near the heart, which suggested an intent to kill, and that the accused did not take the deceased to hospital immediately for medical attention, and that there was no suggestion that the deceased was a threat to the accused. She cited *Omuse v Republic* [2009] KLR 214 (O'Kubasu, Waki & Onyango Otieno, JJA), to argue that the sentence to be imposed ought to be commensurate to the moral blameworthiness of the offender. She argued that a non-custodial sentence would not be in the interests of justice. It was emphasised that a life was lost, and the deceased did not deserve to die in the manner she did.

3. In mitigation, it was said, by the Advocate for the accused, Mr. Onsongo, that the accused was an elderly man, aged 74, and a retired army officer, who had served the country with dedication, and who suffered multiple medical complications, which were detailed in that submission. It was argued that his medical status could not allow him to survive custodial sentence. It was submitted that the

accused regretted the incident, which was said to have had happened unexpectedly and accidentally. It was further submitted that the incident had affected the family, for children had dropped out of university, as they were dependent on him, for education and upkeep. While agreeing with the position stated in *Omuse v Republic* [2009] KLR 214 (O'Kubasu, Waki & Onyango Otieno, JJA), Mr. Onsongo detailed the circumstances that the court ought to take into account in sentencing the accused, the fact that the accused and the deceased were married since 1978, had 6 children together, and that on the material day, the couple had gone out together. He stated that the family, in the pre-sentence report, rooted for a non-custodial sentence, to enable the accused assist the children complete their education. He submitted that there was reconciliation of the family, following a process undertaken through the Catholic Church.

4. The accused made a personal statement on 6th June 2024. He alluded to the reconciliation exercise that had been undertaken by the church, at the request of his son. He also cited the decision in *JNN v Republic* [2015] eKLR (Kimaru, J), where a 20-year sentence was reduced upon reconciliation. He submitted that at age 73, and on humanitarian grounds, capital punishment ought not be imposed on an elderly man or a pregnant woman. He also alluded to his health and medical challenges, saying that he was suffering from a condition that was not treatable. He pleaded for consideration of a non-custodial sentence.

5. Subsequent to that, a second pre-sentence report was filed, following a complaint made by 1 of the children, on grounds that her views on the matter had not been sought, when the initial report was prepared. The second pre-sentence report is dated 3rd July 2024. It expresses that there were mixed views from the family on the sentence that should be considered for the accused. While some rooted for leniency, and pointed towards a non-custodial sentence, a section of the family was of the view that the accused should pay for the offence he committed, while other family members were non-committal, and left the fate of the accused to the court. The community and the church were inclined to non-custodial measures.

6. I have considered the mitigation, the pre-sentence reports, the recorded evidence, the medical records and other filings. I bear in mind a number of things, as I mull over the sentence to impose. Firstly, a life was lost, in a manner that was fairly senseless. Secondly, the conduct of the accused, immediately after inflicting the injury on the deceased, did not reflect a person who had empathy for the deceased. Thirdly, although there was reconciliation between the accused and the family, including the maternal family of the deceased in Uganda, the said efforts did not negate the fact of the death, and the reconciliation was not with the dead. The killing has to be atoned for, the reconciliation notwithstanding. Choices have consequences. Fourthly, the accused has pleaded ill-health. However, the fact of his ill-health did not restrain or prevent him from committing the offence, the same is not enough ground to excuse an offender from punishment.

7. I have perused several authorities, among them *Republic v Kirui* [2021] eKLR (Lagat-Korir, J), *Republic v Korir* [2023] KEHC 25568 (KLR)(Ng'etich, J) and *Republic v John & another* [2024] KEHC 3775 (KLR)(Muriithi, J), where reconciliation was considered in sentencing, with respect to convictions for manslaughter and murder. I have noted that, in all these cases, the accused persons had spent quite sometime in remand custody, and that influenced the decisions by the court to consider non-custodial measures. In the instant case, the accused was on bond throughout his trial. Plea was taken on 5th July 2022, when he was admitted to bond, and the bond was approved on 14th July 2022. The accused, therefore, spent roughly 9 days in remand custody. The conviction herein is for the offence of murder, not manslaughter. I believe sentencing the accused herein to non-custodial measures would sent the wrong message. The decision, cited by the accused, *JNN v Republic* [2015] eKLR (Kimaru, J), would be of little application here. It related to a conviction for a sexual offence, and

not an offence involving a death, as would be the case in manslaughter and murder. The considerations, when it comes to sentencing, with respect to the 2 sets of offences, would be totally different.

8. Taking everything into account, I hereby sentence the accused person herein, Jeremiah Ochuada Musumba, to serve imprisonment, for a period of 10 years, for the murder of Christine Anyango Ochwada. I would have considered a stiffer sentence, but I am alive to the health and medical challenges of the accused, his great age, as well as the efforts to reconcile him with his family and that of the deceased over that death. There is a right of appeal, to the Court of Appeal, and the appeal ought to be filed within 14 days of the date of this order.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA ON THIS 26TH DAY OF JULY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Ms. Madillah and Mr. Adewa, Probation Officers.

Advocates

Mr. Onsongo and Mr. Ipapu, instructed by Obwoge Onsongo & Company and Ipapu P Jackah & Company, Advocates for the Accused person.

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the Republic.