



**Republic v Kerema (Criminal Case 11 of 2018)
[2024] KEHC 13823 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 13823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 11 OF 2018
SN MUTUKU, J
SEPTEMBER 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

WILBERFORCE KUNINA KEREMA ACCUSED

RULING

Background

1. The accused before the Court was initially charged with murder contrary to section 203 read with section 204 of the *Penal Code*. The particulars of the offence are that on the night of 27th/28th July 2018 at Ngong Township in Kajiado North Sub-County within Kajiado County, he murdered Elshaddai Migowe.
2. The accused was presented in court on 15th August 2018 to plead to the charge of murder. He pleaded not guilty. He was released on bond on 17th August 2018. Thereafter, the defence offered to enter into a plea bargain agreement. This took some time for reasons that the defence kept on requesting for more time to finalize negotiations. On 24th January 2019, the trial court (Nyakundi, J) noted that the defence was over exploiting the alternative dispute resolution process; that it was over 5 months from the time the plea was taken and that the matter was not proceeding any further. The court directed that it would not allow further adjournments sought under the guise of plea bargaining agreement.
3. Upon transfer of Justice Nyakundi, the matter was taken over by Justice Mwita. It seems that the defence took advantage of the change and continued to seek more time to finalize the agreement. The court allowed adjournments. The matter did not proceed any further.
4. On 23rd November 2021, I took over the conduct of this matter. I was informed that there was a plea-bargaining agreement pending. I fixed the matter for hearing on 3rd May 2022 but the matter did not proceed to hearing on that day. On 25th July 2022, the accused was absent. This court was informed



that the accused had been deployed to duties outside the country. The matter was adjourned to 13th October 2022 for mention on which date a pre-trial date was fixed for 25th January 2023.

5. The accused absented himself and did not attend court on 25th January 2023. A warrant of arrest was issued. He attended court on that date and gave a story that he had a breakdown on the date he failed to attend court which this court found unsatisfactory but pardoned the accused with caution that he was required to obey court orders and attend court.
6. On 14th May 2024, the plea-bargaining proceedings were conducted leading to this ruling.
7. I have decided to give that background to explain the delay in this matter in light of submissions by Mr. Moseti, learned counsel for the accused, who during mitigation alluded to the delay in finalizing this matter. He told the court that he had been instructed that the accused pleaded guilty on the first attendance in court which is not true. The accused seemed to attribute the delay in finalizing this matter to the court or the prosecution when in actual fact the delay is attributed to him and the defence lawyers who represented him. The record is clear that he has changed advocates on several occasions. He has also absconded from attending court, sometimes without permission to travel out of this court's jurisdiction. He has not been truthful to his current legal counsel, which is unfortunate.

Plea-bargaining Agreement

8. On 24th June 2024, the Plea-bargaining proceedings were conducted. The accused pleaded guilty to the offence of manslaughter contrary to section 202 read with section 205 of the Penal Code. The particulars are similar to those for murder save for lack of the element of malice aforethought in the offence of manslaughter and substitution with the words "unlawfully killed Elshaddai Migowe."

Facts of the case

9. The Prosecution Counsel presented facts of the case as follows:

The deceased Elshaddai Migowe was having a good time with his girlfriend Michele Wakoyo Njoroge and Wellington Arunga on 27th July 2018. They had supper at Milele Shopping Mall and later proceeded to Moran Club for some drinks till the wee hours of the night. The accused person was having drinks at the same Moran Club with his wife Rose Parsaine Nkanaiyai and Samuel Orpejos Moseka. They equally drank till midnight when the deceased and his friends and the accused and the people accompanying him left the Club to go home.

At the parking area of the Club where boda boda riders and other vendors ply their businesses, Samuel Moseka was waylaid and pushed to the ground by Wellington Arunga who was ahead of the accused and his wife. An altercation ensued. The accused was confronted by four people. He stepped back a few metres, drew his gun from his waist and shot the deceased. The other people around scampered for safety.

The deceased was taken to Zam Zam hospital where he was pronounced dead on arrival. The matter was reported to the police who commenced investigations. The body of the deceased was taken to the City Mortuary where it was examined on 1st August 2018. The cause of death was confirmed to be due to exsanguination secondary to chest injury secondary to a single gun shot at close range.

The accused was later arrested, disarmed of his firearm CZ075 Duty S/No. 045049. It was subjected to ballistic examination where it was confirmed that the spent cartridge was discharged from the firearm.



The postmortem report, the mental assessment report, ballistic forensic report, the firearm and spent cartridge were produced in evidence as exhibits.

10. The accused admitted the facts presented as correct. Upon that admission, this court found him guilty of manslaughter and convicted him. The matter was placed for mitigation hearing which was conducted on 25th September 2024. The court also called for a pre-sentence report which was filed on 18th September 2024.

Mitigation

11. In mitigation, Mr. Moseti narrated the circumstances of the case which more or less are similar to the facts presented in court safe that he stated that it was in the process of the accused trying to rescue his friend from the young men who had confronted him that the young men saw the gun and attempted to take it. He stated that the accused stepped aside and used the gun to defend himself and protect the gun by preventing the young men from taking it from him, which would have endangered everyone at the scene.
12. Counsel mitigated that the accused is aged 54 years, is a military officer with Kenya Defence Forces who did not know the deceased prior to this day; that the attack happened very fast and sudden that the accused did not have time to think of alternatives to safe the situation; that he is a first time offender with a distinguished military career defending this country and that he surrendered to the police at Ngong Police Station and saved police the time to go searching for him and saved court time by pleading guilty.
13. It was submitted that the accused mobilized his family and friends to visit the family of the deceased and that the latter agreed on compensation of Kshs 2,000,000 of which he has paid Kshs 1,600,000 and that he is making arrangements to pay the balance. It was submitted that had the accused's friend not been attacked, the circumstances of this case would have been different.
14. Court was told that the accused is the sole bread winner for his family with school going children whom he pays school fees for and that a custodial sentence would devastate the family and that a custodial sentence would cause the accused to lose his job. Counsel alluded to the delay in having this case concluded and asked the court to take that into account.
15. Ms Akunja, the prosecution counsel, submitted that the deceased was shot at close range by the accused, a member of Defence Forces, whose duty is to preserve life and that the mere inconvenience of attending court is not a mitigating factor. It was also submitted that the compensation alluded to by counsel for the accused has not been paid fully and that a life was lost. Counsel urged the court to consider handing the accused a custodial sentence.

Determination of sentence

16. I have read the pre-sentence report filed on 18th September 2024. The report confirms that the family of the deceased and that of the accused have engaged in reconciliation negotiations and an amount of Kshs 2,000,000 agreed, out of which Kshs 1,353,830 has been paid. In addition the report shows that the two families also agreed on a piece of land, Plot B232 Olchoro-Onyori Trading Centre in Kajiado County which the family of the deceased opted to have is sold and proceeds given to them.
17. The report shows that the accused had accepted responsibility for causing the death of the deceased and regrets causing that death. He has asked the family of the deceased and the court to forgive him.
18. I have considered that in criminal matters the complainant is the State representing the people of Kenya. But it is the family of the deceased that bears the pain and anguish of losing a member. The life lost



cannot be brought back. In a gesture in coming to terms with that death and for closure, the family has opted for compensation. In most cases, the court knows and the family of the victim know, that the life lost cannot be brought back. Justice for them means either incarceration of the perpetrator or receiving compensation.

19. Article 159(2)(c) of the Constitution commands this court to promote alternative dispute resolution methods. It provides that:
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
20. The families of the deceased and that of the accused decided to employ reconciliation and compensation according to Maasai customs. The family of the deceased does not subscribe to the Maasai culture and customs but they are agreeable to accept compensation by payment of cattle and a piece of land according to the report. They have opted to have the cattle and the land sold so that they can receive the monetary value.
21. This court is agreeable to the method the parties have chosen in obedience to the command of the Constitution. I do not find this alternative form of resolving this dispute by payment of a form of compensation falling under any of the exceptions expressed under Clause 3 of Article 159 which provides that:
 - (3) Traditional dispute resolution mechanisms shall not be used in a way that—
 - (a) contravenes the Bill of Rights;
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - (c) is inconsistent with this Constitution or any written law.
22. I will and do hereby urge the accused and his family to finalize the payment of compensation to avoid a situation whereby a dispute arises of the same.
23. Although this court was told that the accused pleaded guilty to the offence he is facing and saved court's time, this is not true as the narration in the ruling shows. The day he wants to attribute to the court or the prosecution is purely attributable to him. He is the author of the delay in finalizing this matter and to blame any one else is imprudent on his part.
24. I will and do hereby consider a non-custodial sentence for the accused pegged on the idea that he finalizes the payment of compensation to the family of the deceased. I do hereby place the accused on probation for three (3) years under the supervision of the Probation Office which shall facilitate the payment of the remaining part of the agreed compensation between the two families.
25. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

