



**Republic v Burugu (Criminal Case 30 of 2018)
[2024] KEHC 13185 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 30 OF 2018
EM MURIITHI, J
OCTOBER 31, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

BONIFACE KAIMENYI BURUGU ACCUSED

RULING

1. The accused was convicted of his own plea of guilty to a charge of manslaughter contrary to sections 202 as read with 205 of the Penal Code following plea bargain agreement dated 19/12/2023 by which the initial charge of murder contrary to sections 203 and 204 was reduced to manslaughter.
2. The facts of the case, which the accused admitted and were the basis of the conviction were as follows:

“Factual Basis Of Offence Charged

7. The accused person knowingly, voluntarily, and truthfully admits the facts contained herein.
8. Had this gone to full trial, the State would have presented evidence sufficient to prove the guilt of the accused beyond reasonable doubt.
9. On the material day of 30th March, 2018 Douglas Gitonga (hereinafter the deceased) was on his daily work of riding a motorcycle registration number KMEK 102 make Captain, blue in colour and around 2000 hours while at Ntugi market stage with other boda boda rider he was called through a mobile call by the accused. The accused who was at Kamene requested the deceased to come and pick him. Erick Kaimenyi Mwongera (Dr) and John Muriuki (D2) confirmed that the deceased was called by the accused.
10. The deceased left and proceeded to pick the accused.



11. The following day in the morning the deceased body was discovered having been dumped at Mboroga village along the cutline dividing Kiirua police station and Subuiga police station area.
 12. Investigation commenced and the accused was not able to disclose where in particular he was taken at Kiirua trading centre and also who he met on that particular day.
 13. During the incident, the deceased also lost his motorcycle as well as his mobile phone.
 14. On the 24th March 2018 at around 0100 hours, the area chief namely Mwirigi with the help of Administration police officers arrested the accused person at Karanene and escorted him to Kiirua police station where investigation commenced and it was established that the deceased was last seen with the accused.
 15. On 26th March 2018 at Meru level 5 hospital a post-mortem was conducted on the body of the deceased and the doctor opined that the cause of death was severe head injury.
 16. That it is light of the aforementioned that the accused pleads to the lesser charge of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.”
3. The facts do not show how the act of killing occurred and the Court is left with the Probation Officer’s report, the version which supports provocation upon Accused from an alleged stabbing by the victim, which must be credited to the accused, as follows:

“Circumstance of the offence

The offender and the victim were known to each other since they were from the same village, according to those interviewed they used to patronage together at the local drinking dens. On the material day the victim and the offender were from the local market where they were drinking and as they were going home, the victim hit the accused on the back side of his head asking him for money. The accused fell down and as they wrestled the victim stabbed him on his right leg with a dagger. In self-defense the offender took a stone which he used to hit the victim with. The accused left him there and in the morning he was told he passed on. The subject was later arrested and charged with the offence before this court.”

4. In mitigation, counsel for the Accused urged a non-custodial sentence as follows:

“Ms. Kinyanjui for the Accused

We pray for a lenient sentence. The Accused is a 32 years and he his whole life ahead of him. He has been in custody since 26/3/2018. Six years and six months. He pleaded guilty to the offence of manslaughter and saved the court judicial time. The evidence is circumstantial. The accused is remorseful. He has learned skills during his time in prison. We pray for non-custodial sentence so that he can utilize his skills outside. He is the only son in his home. He was assisting his parents with the farming at home. He also used to own a general shop from which he assisted his family with proceeds therefrom. We pray for non-custodial sentence.”



5. The Prosecution Counsel, Mr. Masila, for the DPP urged a custodial sentence contending that rehabilitation began after conviction and it was, therefore, necessary to detain the convictee for his rehabilitation and reformation as follows:

“We rely on the Presentence Report from the probation Officer. It is recommended that the convict is not suitable for non-custodial sentence. He has been in custody from 26/3/2018. Bond was not denied . He was granted bond on 16/7/2019. He entered into plea bargain agreement in December 2023.

The Court has to consider period in custody awaiting trial in factoring in the sentence. The Court should note that at the time, he was still innocent. He was treated differently from the one who is convicted. When does rehabilitation begin? Rehabilitation begins when someone is innocent pending trial? This is what the court needs to consider as one of the principles of sentencing is rehabilitation.

The court needs to send a clear signal that the sanctity of life needs to be protected at all costs. The right to life needs to be protected. The right to life was violated by the action of the convictee.

The court has original exclusive jurisdiction in protection of rights and fundamental freedoms in *the Constitution*. The court needs to send a clear message that killing of innocent people shall not be tolerated no matter the circumstances. There are other ways of redress if feels offended by a party and killing is not one of the ways to resolve any misunderstanding or dispute.

From the post mortem report the injury was a head injury and from that more often than not results in death if not treated immediately. This was the circumstances in this case.

The court has a duty to change the society and the only way to change society is by meting out appropriate sentences so as to deter other likeminded people from committing such offences.

An innocent life was lost.

The victim’s family has objected to a non-custodial sentence. No reconciliation efforts have been done between convictee and his family with the victim’s family.

Defence has not tendered any certificates as to the skills the convictee has undergone while in custody.

Maximum sentence is life imprisonment. It is discretionary and this court has to look at all the circumstances of the matter. The aggravating circumstances outweigh the mitigating factors. For these reasons, I pray for a custodial sentence.”

6. The Probation Officer’s report dated 23/7/2024 found the accused unsuitable for non-custodial sentence recommending as follows:

“Summary

Your Lordship, after conducting the social inquiry in respect of the offender; I came up with the following findings:-

Offender is approximately 32 year old and hails from the same area with the deceased person and was well known to each other. The Offender insists that he never committed the offence out of his own will but out of provocation. It was not pre planned and that the victim was



the one who assaulted him first and he acted on self-defense. He however pleads that the honorable court be lenient on him since he has been found guilty of the offence. The subject at one time was given a bond when someone stood surety using a title deed; The subject jumped bond and owner of the title revoked the same.

Family members interviewed stated that they long for that time the offender will be free and acknowledged the fact that the victim's family lost one of their own. They previously tried to engage the victim's family for reconciliation at the initial stage of this matter but the process later failed.

The victim's family is very much objected to his release on a non-custodial sentence, they say that for a long time the offender and the other accused persons were people who knew their kin very well and should not have done what they did to him. To them their kin was a trusted person at home and supported his family in all ways but since his demise many things have changed and affected the family in a big way.

The area chief said that there were efforts of reconciliation which later failed but to him he is optimistic that the two families can be brought back together for reconciliation if the court grants the accused a non-custodial sentence.

Recommendation

Your Lordship, from the above findings and with due respect towards this honorable court, I find the offender can jump the sentence. This is because the bond when he was accorded the same. Therefore I find him unsuitable for non-custodial sentence. This is subject to the discretion of this Court.

Report prepared

Jackson Kinyua

Probation Officer

Meru.”

7. The Postmortem report dated 26/3/2018 gave the cause of death as Dislocation of C3/4 with severe intra cerebral damage/injury secondary to comminuted skull and noted the injuries on the head - “multiple comminuted skull fractures to parietal and occipital areas. Dislocation of Mandible with loss of anterior 8 teeth canines and incisors. Diffuse disorganization of brain structures and Dislocation of vertebrae at C3/4.”

Appropriate sentence

8. The Court has considered the objectives of sentencing as set out in the Kenya Judiciary Sentencing Guidelines, 2023 as follows:

“

“1. 3 Objectives Of Sentencing

1. 3.1 Sentences are imposed to meet the following objectives.

There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.

- (i) Retribution: To punish the offender for their criminal conduct in a just manner.



- (ii) Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
- (iii) Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
- (iv) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.
- (v) Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
- (vi) Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
- (vii) Reconciliation: To mend the relationship between the offender, the victim and the community.
- (viii) Reintegration: To facilitate the re-entry of the offender into the society."

9. I respectfully disagree with the suggestion by the Prosecution that rehabilitation only starts upon sentence and that, therefore, the period of time spent in custody is immaterial. I am not able to accept that there is nil contribution to the rehabilitation of an offender by the long period of pre-trial detention.
10. Deterrence must be taken to have inbuilt elements of rehabilitation as the offender must be taken to be rehabilitated and reformed by the deterrent punishment that he receives in Prison! Or at least, that is the justification of retributive deterrence; that the offender will be changed.
11. Rehabilitation, that is to enable the offender to reform from his/her criminal disposition and become a law-abiding person, as defined in the Kenya Judiciary Sentencing Guidelines, is not only possible when one has been found guilty and sentenced to imprisonment. The offender may be reformed from his criminal disposition into a law-abiding citizen through the path of retribution and deterrence. It need not begin after sentence; it may begin immediately upon being remanded in custody when the prison life experience imparts on the offender lessons on the consequence of criminal conduct as to dispose him to avoiding criminal conduct. That is rehabilitation or reformation.
12. The proviso to section 333(2) of the Criminal Procedure Code provides for taking into account of pre-trial detention where the court considers an imprisonment sentence as follows:

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“ 333. Warrant in case of sentence of imprisonment

1. A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for



carrying into effect the sentence described in the warrant, not being a sentence of death.

2. 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.

[Act No. 7 of 2007, Sch.]”

13. The principle of the proviso must be the acceptance that the pretrial detention contributes to the overall objectives of custodial sentence. If we accept that custodial sentence serves retribution, deterrence and rehabilitation, the requirement for taking into account the period of pre-trial detention is an acknowledgement that while detained an accused through prison life and discipline and programmes, he is exposed to retributive, deterrent and rehabilitative scheme in sufficient measures proportionately to account for the formal imprisonment sentence.
14. A prison life for over six years although on remand awaiting trial is reformatory in that it is a sufficient deterrent to crime. The loss of liberty, freedom of movement, and the very confinement is a retributive deterrence that would no doubt reform the person affected.
15. This court will take into account the period of six years and five months since 26/3/2018 the accused was arraigned in court and remanded to await his trial, discounting the period of two months between 15/8/2019 and 22/10/2019, when the accused had been on bail which was cancelled when he absconded. It is not for his fault that the case has taken long to conclude. Had the case finished earlier, his full term of sentence could have commenced on the date that the sentence is pronounced, or on a date of arrest just shortly prior thereto.
16. The Court considers that a sentence of imprisonment for nine (9) years meets the circumstances of this case. I should respectfully agree with the prosecution and the probation officer as to the appropriate sentence herein being a sentence of imprisonment. However, having been in custody for over six years, the accused will have served, with remission, his full sentence of imprisonment.

Orders

17. Accordingly, for the reasons set out above, the court having convicted for manslaughter contrary to section 202 as read with 205 of the Penal Code, the Court now sentences the accused to imprisonment for nine (9) years.
18. The sentence of imprisonment for nine (9) years shall commence on 26/3/2018 when the accused was arraigned in court and remanded to await his trial and except the period of two (2) months when he was released on bail.
19. As the Accused has with his over six years of pre-trial detention served in full the sentence of imprisonment for nine (9) years, with remission, there shall be an order for his immediate release from custody, unless the Commissioner of Prisons has for misconduct withheld the accused's remission under section 46 of the *Prisons Act*, or unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.



EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Kinyanjui for the Accused.

Mr. Masila for the DPP.

