Republic v Akivaga (Criminal Case E011 of 2023)
[2024] KEHC 13545 (KLR) (30 October 2024) (Sentence)

Neutral citation: [2024] KEHC 13545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL CASE E011 OF 2023

JN KAMAU, J

OCTOBER 30, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

FREDRICK LITU AKIVAGA ..... ACCUSED

SENTENCE

1. The Accused person was initially charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 (Laws of Kenya). He entered into a Plea Agreement on 4th July 2024 whereupon this court convicted him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

2. The facts of the case were that on 26th July 2023 at around 1700 hours, Maurice Kalisa Akivaga (hereinafter referred to as the "deceased") was at home with his mother, Ronika Akivaga, and the Accused person herein who was his brother, when he picked a quarrel with the Accused person after realising that his phone was missing from where he had kept it before taking a nap. The Accused person became violent and attacked him with a sword that was hanging in the ceiling of their mother's house. He inflicted injuries on the deceased's forehead and eye by cutting him.

3. Their mother and the Accused person's son, Enza, rescued the deceased. Both the Accused person and the deceased went to their respective houses.

4. At around 9.00 pm, their mother was in her house when she heard a scream from the deceased's house. She recognised his voice. She also heard the Accused person saying, "Wacha akufe". She screamed for help from the neighbours, woke up her grandchildren and rushed to the deceased's house.

5. She found him lying on the ground outside his house with blood oozing from his chest. The neighbours arrived and rushed him to Vihiga County Referral Hospital (JOOTRH). He was referred

to Jaramogi Odinga Teaching and Referral Hospital where he succumbed to his injuries while undergoing treatment.

6. The Accused person surrendered himself to the Police at Mbale Police Station on the same night of 26th July 2023. He handed over a blood-stained sword which was kept as an exhibit. Investigations commenced and police officers visited the scene on 27th July 2023. They visited the deceased in hospital on 28th July 2023. However, on arrival, they were informed that he had already succumbed to his injuries.

7. The postmortem was conducted on 28th July 2023. The doctor formed the opinion that the cause of the deceased's death was pneumo-haemothorax with left lung collapse secondary to penetrating chest injury due to assault with sharp object.

8. After investigations were completed, the Accused person was charged with the offence of murder. The Postmortem Report dated 28th July 2023 was produced as evidence and marked as Exhibit 1.

9. Having entered into a Plea Agreement, the Accused person urged this court to sentence him to seven (7) years while the State urged the court to sentence him to fifteen (15) years imprisonment.

10. In his mitigation, the Accused person said that he was remorseful. He pointed out that the Pre-Sentence Report was positive with regard to his sentencing hence sought for leniency. He stated that his conduct was commendable as he saved the court time by entering a Plea Bargain Agreement. He further said that although the views of the victim's family and the community towards his sentencing were negative, he urged the court to look at the objectives of sentencing especially rehabilitation and deterrence. He pleaded with the court to grant him a lenient sentence stating that he would not repeat the offence again.

11. On its part, the Prosecution noted that although the Accused person was remorseful, the Pre-Sentence Report was negative. It pointed out that the community was still hostile to him and his security was not guaranteed as he could be lynched in the event he was released on a non-custodial sentence. It said that the victim's family were his relatives as he was a brother to the deceased. It submitted that the Accused person would have handled the phone dispute amicably to resolve their difference instead of assaulting the deceased. It was categorical that his family members had indicated that he was troublesome and were not willing to welcome back home. It urged the court to look at the circumstances of the case, the injuries that the deceased sustained and mete upon him a non-custodial sentence.

12. According to the Pre-Sentence Report of Fanny Masinde, Probation Officer, Vihiga County that was dated 19th September 2024 and filed on 30th September 2024, the Accused person was said to have been thirty-five (35) years of age. He attended Mukingi Primary School and later joined Itando Secondary School where he studied until Form four (4). Upon finishing school, he engaged in casual jobs. He later started abusing alcohol and stealing petty things in the village.

13. He had once been placed on probation by Hamisi Law Courts for the offences of house breaking and stealing malicious property belonging to his mother. He served the probation sentence for a period of one (1) year. He was suspected to have absconded.

14. He had previously been arrested several times for creating disturbance in the home. He also used to threaten his mother demanding to be given a title deed to his portion of land so that he could sell it. He and his wife were blessed with four (4) children. She fled from him due to his violent behaviour, abuse of alcohol and use of bhang and kuber.

15. He stated that on the material day, he took the deceased's phone and went with it to a drinking den as security since he did not have money. He explained that when the deceased enquired about his phone,

an argument ensued. He said that he took a somali knife, hid in a nearby banana plantation and when the deceased was passing by, he pierced him in the stomach. He expressed remorse for his actions and prayed for leniency.

16. His family which doubled up as the victim's family were bitter about the events that led to the offence and were strongly opposed to him being released on a non-custodial sentence. They pointed out that their mother consequently died of shock after the incident. They added that the Accused person abused drugs and that he was indisciplined and a danger to himself and the society.

17. The Local Administration viewed him as a social misfit who could not get along with other people. The Area Chief pointed out that he did not have a good track record in the community as he had previous criminal history. He added that area residents did not want him as he was regarded as a troublesome and a danger to them. He was of the view that the Accused person ought to be given a custodial sentence. He averred that the environment was hostile and the Accused person's security could not be guaranteed and he could be lynched if was released

18. The Probation Officer did not therefore find him to be suitable to be released on a non-custodial sentence.

19. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

20. It was also important that the sentence communicate to the community, condemnation of his criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.

21. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the Accused person being reintegrated in the society would be next to impossible as there were possibilities of being harmed.

22. Killing someone is an abomination in the society and that explains why the Accused person's family and community did not want him released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.

23. Although the Accused person had sought leniency, it was clear that he intended to kill the deceased. The nature of the injuries that the deceased sustained showed the malice that he had at the material time. The deceased must have died a harrowing death as the Accused person pierced his stomach with a somali knife.

24. From the facts that were given in the Pre-Sentence Report, the Accused person killed the deceased after an argument ensued when he took the deceased's phone to the drinking den as security without his knowledge.

25. The deceased's death was unwarranted as the phone did not belong to the Accused person. His behaviour smacked of a spoilt child who felt entitled to acquire free things in life. The incident was so traumatising to their mother that she died from the shock of the Accused person having killed his brother.

26. Having considered the facts of this case, the Accused person's mitigation, the Prosecution's response thereto, the Pre-Sentence Report and bearing in mind that sentencing was the sole discretion of the court, this court came to the firm conclusion that a sentence of ten (10) years imprisonment was suitable and adequate herein purely because he entered into a Plea Bargain Agreement. If the matter had proceeded as a murder case, this court would have meted out on him a stiffer sentence.

27. Going further, this court was mandated to consider the period he spent in remand while his trial was on going in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

28. The said Section 333(2) of the *Criminal Procedure Code* provides that:-

> " 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" (emphasis court).

29. Further, the Judiciary *Sentencing Policy Guidelines* provide that:-

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

30. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR.

31. The Accused person was arrested on 27th July 2023. He was convicted on 4th July 2024 and remained in custody while awaiting to be sentenced. Although he was granted bond terms, he did not posted bail and remained in custody during his entire trial. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

32. Accordingly, it is hereby directed that the Accused person be and is hereby sentenced to ten (10) years imprisonment to run from the date of this Sentence.

33. For the avoidance of doubt, the period from when he was first arraigned in court on 27th July 2014 until 29th October 2024 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

34. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE