Republic v Muiwa (Criminal Case E009 of 2021)
[2023] KEHC 17821 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEHC 17821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL CASE E009 OF 2021

GL NZIOKA, J

FEBRUARY 20, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

DENNIS MUIWA ..... ACCUSED

JUDGMENT

1. The accused (herein "the subject"), was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63) law of Kenya. The particulars of the offence are that; on May 20, 2021 at Sanctuary, Karagita area in Naivasha Sub-County within Nakuru County, he murdered Kioko Wambua.

2. He pleaded not guilty to the information and the matter set down for hearing. However, subsequently on the May 18, 2022, the court was informed that the parties had commenced engagement in plea bargain negotiation.

3. On 13th July, the plea bargain agreement was registered in court whereupon the charge was reduced from the charge of murder to a charge of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

4. The new charge of manslaughter contrary to section 202 as read with section 205 of the *Penal Code* was read to the subject and he pleaded guilty thereto. The facts were read and he confirmed the same to be correct. He was then convicted on his own plea of guilty.

5. The court ordered for a pre-sentence report and the same was availed. In addition, the accused counsel filed submissions on mitigation. The prosecution left the matter to the court for decision on sentence.

6. I have considered the circumstances under which the offence was committed and I note that, the incident occurred in the presence of the accused and the deceased alone. There was no any other person. Therefore, the explanation as to how the offence occurred cannot be authenticated.

7. Furthermore, the accused does not explain the reason why the deceased allegedly attacked him. It is not normal that someone known to you would just invite you to his house and attack you without saying anything. A perusal of the post mortem report indicates that, the deceased died as a result of massive blood loss due to sharp trauma across the anterior of the neck, due to a stab wound on the anterior neck measuring 90mm. The trachea was severed and lungs collapsed. These injuries speak to a vicious attack.

8. I have also considered the pre-sentence report, it reveals under the circumstances of the offence as detailed out by the suspect that, the offence was allegedly committed when the deceased requested the subject to go to the deceased's ex-wife's house and get the deceased's child, and that when the subject declined; the deceased allegedly attacked him with a knife and an altercation ensued. That the subject took the same knife the deceased attacked him with and fatally stabbed the deceased.

9. The report further reveals that the community where the offence was committed is not ready to accept him if he is released on a non-custodial sentence, unless he should re-locate. Further, the victim's family is opposed to his release on a non-custodial sentence, considering the magnitude of the offence. That, the accused ended the life of their kin and therefore belongs in custody.

10. However, the subject's mother is said to be ready to receive him back and re-integrate him in the family. The probation officer, Ms Njeri E Kahumba recommends a non-custodial sentence as he is said to be genuinely remorseful, of good conduct in prison remand and has been appointed as a prefect.

11. However, the report also concludes that there are areas of risk that have been identified that require intervention in the offender's rehabilitative process. That, he can be supported in vocational training should the court consider him for a non-custodial sentence.

12. Finally, I note from the mitigation submissions filed by the subject's learned counsel that he pleaded guilty willingly, voluntarily and freely; contributing highly to enhancing efficiency of the court process through quick delivery of justice. That, the offence was committed in self-defence and he has been of good conduct in Prison facility and given leadership responsibility. Further he has been in remand for seventeen (17) months and is very remorseful.

13. Having considered the aforesaid, I note that, the law that governs sentencing is provided for inter alia under Article 50(2)(p) of the *Constitution of Kenya 2010*, which provides that a convicted person has a right to the benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

14. In the same vein the objective of sentence must be considered. In that regard, Clause 4.1 of the *Sentencing Policy Guidelines of Judiciary*, in Kenya states that, the objectives of sentencing are:

    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 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. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

e) Community protection: To protect the community by incapacitating the offender.

f) Denunciation: To communicate the community's condemnation of the criminal conduct.

15. Similarly, the Supreme Court of Kenya in the case of; *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), sets out guidelines to assist the court in considering the sentence to be meted out in murder cases.

16. The guidelines states:

> " In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;
>
> (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) The manner in which the offence was committed on the victim;
>
> (g) The physical and psychological effect of the offence on the victim's family;
>
> (h) Remorsefulness of the offender;
>
> (i) The possibility of reform and social re-adaptation of the offender;
>
> (j) Any other factor that the court considers relevant."

17. In addition, the provisions of: section 333 (2) of the *Criminal Procedure Code* which is couched in mandatory terms requires that during sentencing the court should take into account the period spent in custody, and 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"

18. The import of this section was well canvassed by the Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR where in it stated that:

> " By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody."

19. Further, in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR the Court of Appeal pronounced itself thus:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced...."Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."

20. Taking all the aforesaid in consideration, in particular the pre-sentence report and mitigation and the fact that the subject committed the offence while he was a minor although he has attained the age of maturity, I find that he deserves a sentence that will still accord him an opportunity to reform.

21. However, the ground is hostile to his release on a non-custodial sentence and similarly, the victim's family will not hear of it. Yet when the subject committed the offence he was a minor.

Under section 239 of the *Children Act* No 29 of 2022 the law provided that: -

(1) 1) Where a child is tried for an offence, and the Court is satisfied as to their guilt, the Court may deal with the case in one or more of the following ways—

- (a) discharge the child under section 35(1) of the Penal Code;
- (b) discharge the child on his or her entering into a recognisance, with or without sureties;
- (c) make a probation order against the offender under the provisions of the *Probation of Offenders Act*;
- (d) commit the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake the care of the offender;
- (e) if the child is between twelve years and fifteen years of age, order that the child be sent to a rehabilitation institution suitable to the child's needs and circumstances;
- (f) order the child to pay a fine, compensation or costs, or any or all of them, having regard to the means of the child's parents or guardian;
- (g) in the case of a child who has attained the age of sixteen years, deal with the child in accordance with the *Borstal Institutions Act*;

(h) place the child under the care of a qualified counsellor or psychologist;

(i) order that the child be placed in an educational institution or vocational training programme;

(j) order that the child be placed in a probation hostel under the provisions of the *Probation of Offenders Act*;

(k) make a community service order;

(l) make a restorative justice order;

(m) make a supervision order;

(n) make any other orders of diversion provided for in this Part; or

(o) deal with the child in any other lawful manner as may be provided under any written law. (Emphasis added)

22. The question is can a subject as herein be sentenced as to a custodial sentence. The Court of Appeal addressing that issue in the case of; *JKK v R* [2013] eKLR, stated as follows:

> " The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence." (Emphasis added)

23. I therefore believe that a lenient custodial sentence will suffice.

I sentence the subject to eight (8) years imprisonment less the one year he spent in custody. He shall therefore serve a custodial sentence of seven (7) years. Right of appeal explained.

It is so ordered.

DATED, DELIVERED AND SIGNED THIS 20TH DAY OF FEBRUARY, 2023.

GRACE L. NZIOKA

JUDGE

In presence of:

Mr Atika for the State

Mr Mururi for the subject

Ms Ogutu; Court Assistant