



**Republic v Mosonik & another (Criminal Case 9 of 2018)
[2023] KEHC 18234 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 9 OF 2018
RL KORIR, J
APRIL 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DUNCAN KIPLANG'AT MOSONIK 1ST ACCUSED

JOSPHAT KIPNG'ETICH LANG'AT 2ND ACCUSED

RULING

1. The Accused Duncan Kiplang'at Mosonik and Josphat King'etich Lang'at were charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The Particulars of the charge were that on the 9th day of January 2018, at Koiyet village, Sugumerga location in Chepalungu sub-county within Bomet County jointly murdered one Sharon Cherotich Kirui.
2. On February 24, 2023, this Court convicted 1st and 2nd Accused, in accordance with section 179 of the [Criminal Procedure Code](#) of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#).
3. On February 24, 2023, this Court directed the Probation Officer to file a Pre-Sentence Report.
4. At the sentence hearing on March 23, 2023, Mr Kenduiwo, Learned Defence Counsel submitted on behalf of the 1st Accused that he was 26 years old and unmarried, that he was remorseful concerning what happened and that he was also a first offender. Counsel submitted that the 1st Accused was a farmer and the 4th child in his family and that his parents and siblings depended on him. He further submitted that the Probation Officer's Report was favourable and that the families had begun reconciliation efforts with the victim's family.
5. With respect to the 2nd Accused, Mr. Kenduiwo submitted that was 37 years old, a first offender, married with a 7-month-old baby and was the sole bread winner of his family. Counsel stated that the



- 2nd Accused was remorseful regarding the victim's death and prayed for leniency from the Court. He further stated that the 2nd Accused was the firstborn in his family and a brother to the 1st Accused and that the Court should note that the Pre-Sentence Report was favourable and consider a non-custodial sentence. The 2 Accused individually prayed for leniency from the Court.
6. On their part, the Prosecution stated that the Court should take note that the Accused were brothers and that the Pre-Sentence Reports were a replica of one another. Prosecution Counsel also asked the Court to consider that a life was lost and therefore a custodial sentence would be appropriate under the circumstances. He submitted that the two Accused were first offenders.
 7. The Pre-Sentence Reports in respect of the 2 Accused are both dated March 16, 2023 and filed on the same date. The Probation Officer's Reports, stated that the two Accused were remorseful for their actions and that they had no intention of killing the victim. The Reports also indicated that both the parents of the 2 Accused and the victim's parents-in-law had had a good relationship in the past and continued to interact freely and positively even after the death of the victim. It was reported that the two families were planning to commence cleansing rituals and that the Accused's family prayed for a non-custodial sentence for both their sons.
 8. In terms of the Victim Impact Statement, the deceased's father-in-law stated that the deceased had left behind 5 children, two of whom were in Secondary School while the other two were in Primary School. He stated that the firstborn had also dropped out of school due to pregnancy and he now had the responsibility of taking care of the deceased's children together with the deceased's grandchild, which was too burdensome for him.
 9. The Assistant Chief and the village elder stated that the two brothers had issues related to alcoholism but had since demonstrated a positive change while they were out on bond. It was their recommendation that the two would be positively resettled and reintegrated back to the community with the appropriate interventions.
 10. Sentencing plays a critical role in the administration of justice. In the often-cited case of *Alister Anthony Pereira v. State of Maharashtra* at paragraph 70-71, the Supreme Court of India cited in *Thomas Mwambu Wenyi vs Republic* (2017) eKLR by the Court of Appeal regarding sentencing stated, it was held thus: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”
 11. The objectives of sentencing are to meet either or some of the following: -
 1. Retribution – to punish the offender for his/her criminal conduct in a just manner.



2. Deterrence – to deter the offender from committing a similar offence subsequently as well as to discourage the people from committing similar offences.
 3. Rehabilitation – to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 4. Restorative justice – to address the needs arising from the criminal conduct such as loss and damages.
 5. Community protection – to protect the community by incapacitating the offender.
 6. Denunciation – to communicate the community’s condemnation of the criminal conduct.
(See the [*Judiciary Sentencing Policy Guidelines*](#) at paragraph 4.1)
12. Further, the [*Policy Guidelines*](#) at page 49, Paragraph 23.8, suggest mitigating circumstances as follows: -
8. Mitigating circumstances warrant a more lenient penalty than would be ordinarily imposed in their absence. They include: -
 1. A great degree of provocation.
 2. Commitment to repairing the harm caused by the offender’s conduct evidenced by the actions such as compensation, reconciliation and restitution prior to conviction.
 3. Negligible harm or damage caused.
 4. Mental illness or impaired functioning of the mind.
 5. Age, where it affects the responsibility of the individual offender.
 6. Playing of a minor role in the offence.
 7. Being a first offender.
 8. Remorsefulness.
 9. Commission of a crime in response to gender-based violence.
 10. Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.
13. This Court is therefore expected to consider the circumstances of the case in arriving at an appropriate sentence.
14. In its Judgment dated February 24, 2023, this Court in reducing the charge from murder to manslaughter was convinced that the Accused did not have malice aforethought or malicious intent to kill the deceased.
15. Section 205 of the [*Penal Code*](#) with which the Accused have been convicted states as follows: -
205. Punishment of manslaughter
- Any person who commits the felony of manslaughter is liable to imprisonment for life.



16. The wording of this section of the law is such that the Court is free to depart from the sentence of imprisonment for life as it is not mandatory in nature. The East African Court of Appeal in *Opoya vs Uganda* (1967) EA 752 at page 754 paragraph B explained the terms ‘is liable’ this as follows:-

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”

17. Thus, this Court is not bound to sentence the Accused to life imprisonment. Guidance is drawn from the case of *S vs Malgas* 2001 (2) SA 1222, SCA 1235 para 25 thus: -

“What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”

18. I have taken into consideration their mitigation and the Pre-Sentence Reports as well as the fact that they were both remorseful. I have also taken note that the families of the Accused and the community are not averse to the Court granting them a lenient or non-custodial sentence. The Report states that the families of the Accused and of the deceased have continued to live harmoniously even after the incident and death of the deceased. That they have purposed to conduct traditional cleansing once the court case is over.

19. I have considered that a life was lost through the merciless blows and kicks of the Accused. I have also considered the Victim Impact Statement and specifically, that 5 children have been left orphaned without parental care.

20. In balancing the conflicting rights of the victims against those of the Accused, it is my finding that a non-custodial sentence was not appropriate in this case. Loss of life must count for something and indignation of society against senseless killings must be reflected in the sentence awarded.

21. In line with the proviso to section 333 of the *Criminal Procedure Code* and The *Judiciary Sentencing Policy Guidelines*, this Court notes that the Accused were arrested on June 16, 2018 and remained in pre-trial custody until March 29, 2022 when they were granted bail. In meting out the sentence, I have therefore taken into consideration the period spent by the Accused in pre-trial custody being 3 years and 9 months in remand which I have discounted in arriving at the final sentence.

22. In the end, the 1st and 2nd Accused shall serve 7 years imprisonment from the date of this sentence.

23. Each Accused has 14 days’ right of Appeal against conviction and sentence.

24. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 27TH DAY OF APRIL, 2023.

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R. LAGAT-KORIR

JUDGE



Ruling delivered in the presence of 1st and 2nd Accused, Mr. Wainaina holding brief for Mr. Njeru for the State, Mr. Kenduiwo for the 1st & 2nd Accused, and Siele (Court Assistant).

