



**Republic v Ithae (Criminal Case 23 of 2020)
[2023] KEHC 21514 (KLR) (16 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 23 OF 2020
EM MURIITHI, J
AUGUST 16, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARTIN THIAINE ITHAE ACCUSED

RULING

1. The accused was convicted on his own plea of guilty for manslaughter contrary to section 202 as read with 205 of the [Penal Code](#) following a plea-bargaining agreement dated May 23, 2023. The accused has been in pre-trial detention since April 20, 2020 awaiting conclusion of his trial as bail was denied upon negative recommendation by Probation Officer in a pre-bail report dated June 15, 2020.

Mitigation

2. Counsel for the accused prayed for a second chance in life pleading that he had been in custody for over three years during which time he has been rehabilitated after undergoing prison programmes making him a better person and he may, as an ambassador of the court, preach to the Meru Community against involvement in drugs. Urging that the Accused was a first offender and remorseful for his action in a fight that led to the death of the deceased nephew in circumstances amounting to self-defence, counsel prayed for a non-custodial sentence as recommended by the Probation office to give he accused a second chance in life. Counsel further urged that from the Presentence report it was clear that the mother of the deceased and the community have pardoned him and as well say they are ready to receive him back.
3. The accused himself prayed that the court considers that eh incident was caused by drunkenness and that he had children and ailing mother for who he provides and that having qualified in bible studies he should be able to go and preach to the society.
4. For the DPP, it was urged that a probation sentence was not appropriate in the matter, and that the court should take manslaughter seriously and show that it is a serious offence by custodial sentence.



It was pointed out that the weapon used was a hammer which inflicted injury on the deceased's head causing death. Countering the submission of a second chance for the accused, the Prosecution urged that the deceased also had a right to life and it was the act of the accused that cut it short. It was urged that the court ought to balance the accused's rights and the right of the deceased's family who seek justice from the court. Counsel argued that 'justice requires a custodial sentence so that the accused will know what he did was wrong and it will not be tolerated. Proper reform and rehabilitation will begin once the sentence has been meted out. He will be guided on how to behave among his peers; how to react if someone annoyed him; what he needs to do upon being annoyed and also report to police for investigations and not for him to take the law into his hands.'

Plea Bargain Agreement

5. The facts of the case of which were set out in paragraphs 9-14 of the Plea bargain agreement as follows:

' Part 3. Factual Basis Of Offence(s) Charged

9. This is a case of murder contrary to section 203 as read with section 204 of the penal code. The brief circumstances surrounding this case are that on February 11, 2020 at around 2000 hours, at the homestead of one Elizabeth Nkomo where the deceased met his death after an argument arose between the deceased and his uncle namely Martin Thiane (accused) which escalated into a fight.
10. The argument came up after the two (accused and deceased) started to instruct Elizabeth Nkomo who is the mother of the accused on how to prepare tea for them and since the deceased does not take tea with milk, he requested Elizabeth Nkomo to put just a little milk. It is at this moment when the accused asked the deceased why he was instructing Elizabeth Nkomo on how to make tea yet he was the one who bought the milk. The two (accused and deceased) started to insult each other until when they walked outside the house of Elizabeth Nkomo and started fighting.
11. As they were fighting, the deceased plucked a stick from a nearby sheep shed and the accused went to his house and got a hammer and hit his brother Stephen Mwenda on his head left side where he sustained a deep cut wound and was later rushed and treated at Muthara sub-county hospital.
12. After the accused inflicted injuries on his brother, he proceeded to hit the deceased on his head and he fell on the ground where he remained motionless when Elizabeth Nkomo walked out of the house while screaming for help and the neighbour's responded and found the deceased lying down bleeding from his head.
13. Neighbour's assisted the deceased by ferrying him to the hospital using motor vehicle registration number xxxx while the accused was standing there while holding the hammer, he used to hit his brother and the deceased.
14. Upon arrival at Muthara sub-county hospital, the doctor on duty confirmed that the deceased had already passed on and the body was later transferred to Miathene hospital mortuary awaiting autopsy.'



Pre-sentence probation officer's report

6. The presentence report by the Probation Office filed on July 5, 2023 recommended a probation sentence as follows:

' Conclusion

The Offender before the honourable court is 40 years old. He is a resident of Tigania East Muthaara location, Athanja sib-location, Mailuni village. He is the last born in a family of seven siblings. He reached STD 8 but he says that he did not continue his education due to the terminal illness that got his late father. He has done casual jobs in Nairobi and Malindi and at home. Though he says that he had married and had children, the family members said that they do not know of his marriage nor his dependants. The offender is said to have had a fight with the deceased and hit him with a blunt object on his head which caused a fatal injury which he succumbed to in Nairobi. The offender seems to have come to his senses and he is praying for pardon and says that he did not intend to harm the deceased but circumstances led to this fate. He is hoping that he may benefit from non-custodial sentence.

The Community speaks well of the offender and state that he has been a good person who has been putting up well with his family members and the community. The area administration state that he has been a good person and they have no previous criminal records. The family is positive about him. They have indicated that he has been a good person all along. They blame the whole incident to the deceased saying that he is the one who was a trouble maker though he did not deserve to die. They cite this whole episode as quite an unfortunate event. The secondary victim who is the mother of the deceased says that she has healed from the loss. She has no ill feeling against the offender. She feels that though the deceased did not deserve to die, he might have contributed more to the fateful episode due to his persistent violent behaviour, a behaviour he might have developed in his touting work. She prays that his brother (sic) may be given a non-custodial sentence to go and help their elderly and sickly mother. She adds that her other brother at has been a nuisance and a trouble maker and is not helping their mother at all.

Recommendation

Your Lordship, the offender is praying to be pardoned; the mother of the deceased who is a sister to the offender prays that the offender be placed on a non-custodial sentence. The family and the community echo the same feelings. The offender is said to have had a good relationship with people before the fateful incident. The area administration has also echoed that same perspective.

It is our opinion that the offender may be given a chance to reform through a probation sentence.

Charles Kanga, Probation Officer, Meru

Dated July 6, 2023.'

7. The court notes the recommendation for probation sentence and the factual background thereof which casts the deceased in bad light and portrays him as the aggressor in the incident leading to the death. It also set out irrelevant information as to the nuisance of the accused other brother who does not help their elderly and sickly mother at all. The report is so colourful as regards the character of the deceased as to cause suspicion on its motivation! The court is not able wholly to rely on the Probation Officer's Report (see *Kyalo v R (2009) KLR 325, 329*) especially where the facts of the case set out



therein conflict with those pleaded in the facts of the case set out in the plea bargain agreement upon which the accused was convicted on his own plea of guilty after admitting those facts. The Prosecution will not have had a chance to disprove the facts set out in the Pre-sentence report. The sentence must be based on the facts accepted by the accused and which were basis of the conviction and not untested facts set out in the Probation officer's pre-sentence report.

8. Probation officers who give presentence reports must be warned to be wary of creating stories on facts contrary to the finding of the court in the judgment upon full trial or upon admission of facts set out by the Prosecution. A pre-sentence report is not a forum to re-working the facts of the case but a social-worker's advisory to record important mitigating as well as aggravating circumstances factors surrounding a case as well as the impact of the offence on the victims and the society. In the same way that it cannot for the adverse facts set out therein be a basis for conviction of the accused, it should be used wittingly, or unwittingly, to alter or doctor the facts of the case already established on conviction.
9. To the extent that the presentence report contains at length a version of facts contrary to the evidence before the court, the court must base its sentence on the facts in the plea bargain agreement and to the same extent reject the pre-sentence report based on the facts not before the court.

The facts of the case

10. The facts of the case as accepted by the accused and which were the basis of the conviction are the facts set out in the Plea bargain agreement as the truth of what had transpired. It is set out in the paragraphs 10, 11 and 12 of the Plea bargain agreement that the argument came up after the two (accused and deceased) started to instruct the mother of the accused on how to prepare tea for them and when the deceased asked her to put just a little milk, the accused picked a quarrel with the deceased for asking his mother to put just a little milk in their tea yet he is the one who bought the milk and when a fight ensued, the accused went for a hammer from his house using it to hit his brother on Stephen Mwenda on his head left side where he sustained a deep cut wound and after the accused inflicted injuries on his brother, he proceeded to hit the deceased on his head and he fell on the ground where he remained motionless and was pronounced dead on arrival at the Muthara sub-County hospital. There is not a portrait of a blameless victim of an attack who reacts in self-defence and unfortunately kills his assailant in ensuing fight, as the defence counsel and the probation officer seek to present the accused!

Appropriate sentence

11. The Court considers that the prevalence of drink-driven fatal fights with dangerous weapons calls for a deterrence measure over and above any anti-drug preaching campaign. A custodial sentence is appropriate in this case so as to harness the institutional prison programmes for the discipline, correction and reform of the accused, as well as serve as deterrence. The time that the accused has been in custody will, as prescribed in section 333 (2) of the *Criminal Procedure Code*, be factored in the sentence.
12. At the age of 40, the accused has opportunity to be reformed through prison discipline and correctional activities under a sentence of imprisonment of seven (7) years and be released still as a relatively youthful person who may be rehabilitated, reintegrated and meaningfully contributed to the society.

Orders

13. Accordingly, having convicted the accused Martin Thiaine Ithae for the offence manslaughter contrary to section 202 as read with 205 of the Penal Code on his own plea of guilty on the facts set out in the plea bargain agreement herein, the Court now sentences him to an imprisonment for seven (7) years.



14. Pursuant to section 333 (2) of the Civil Procedure Code, the sentence of seven years shall commence on April 20, 2020 when the accused was remanded to await his trial.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr., Masila for the DPP.

Mr. Hiram Kirimi for the Accused.

