



**Republic v Tonui (Criminal Case E020 of 2022)
[2023] KEHC 22844 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE E020 OF 2022
RL KORIR, J
SEPTEMBER 29, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES KIPNGETICH TONUUI ACCUSED

JUDGMENT

1. Charles Kipngetchi Tonui (Accused) was charged with the offence of murder contrary section 203 as read with Section 204 of the *Penal Code*, Cap 63 Laws of Kenya. The particulars of the offence were that on 21st day of July 2022 at about 2200hrs at Matarmat Village in Merigi Location within Bomet County murdered Mercy Chemutai.
2. The Accused took plea on 19th September 2022 and denied the charge. At the pre-trial session on 19th October 2022, defence counsel informed the court that the Accused wished to plea bargain with the Prosecution. The plea negotiation dragged on until 16th May 2023 when the parties filed a duly executed plea agreement. The court found the Agreement acceptable.
3. The Accused took plea on the lesser charge of manslaughter on 24th May 2023 and pleaded guilty.
4. The facts of the case, were read by the prosecutor as follows: -

“On 21st July 2022 at around 10.00am, the accused arrived home tired from work. He found his wife Sharon Tonui asleep in their matrimonial house while their young children, Mercy Chemutai, Brian Kiprono, Damaris Cheruto and Jalody Cherotich were sleeping in the kitchen. He awoke and knocked on the kitchen door but the young children who were apparently deep asleep took time to open.

The accused got irked because he was exhausted and hungry and decided to join his wife in ordering his daughters to open the door. They continually knocked the door was opened by



the deceased Mercy Chemutai. Immediately the accused who was drunk (according to his daughter Jalody Cherotich) and was holding a small traditional tebwengwet stick descended on the children ostensibly to discipline them. He hit the deceased on the backside and she started crying. The mother assumed that this was normal but a little while later the minor started oozing foam from the mouth and nose. The two parents realized that it was serious and decided to take their child to hospital. They then boarded the accused's probox vehicle and proceeded to Merigi dispensary where they were referred to Tenwek Hospital. There, they were informed that their daughter was dead. The cause of death was later established to be trauma to the cervical spine.

The family of the accused have confirmed to the state that they have conducted the traditional rites and forgiven him. The prosecution accepts that the accused, a tired, hungry and frustrated father resorted to discipline his children, which action unfortunately led to the demise of one of them.”

5. The Accused accepted the facts as true and was consequently convicted on his own guilty plea of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code* on 14th June 2023.
6. At the sentence hearing learned defence counsel Mr. Kenduiwo told the court that the Accused was married to one Sharon with whom they had five children including the deceased who was their 3rd born child. Counsel submitted that the Accused was remorseful and regrets the unfortunate loss of the life of his daughter. That the Accused was an evictee from Mau Forest and his community purchased some half acre of land and built him a house to enable him bury the daughter there. Counsel further stated that the family had forgiven him and were ready to accept him back home if he was given a non – custodial sentence. Counsel prayed for a non- custodial sentence to enable the Accused continue taking care of his immediate family and aged parents.
7. Given an opportunity to address the court, the Accused told the court that he wished to be forgiven.
8. Prosecution Counsel submitted that the Accused was a first offender and that the State was not opposed to a lenient sentence.
9. The *Judiciary Sentencing Policy Guidelines (2016)* outline the objectives of sentencing at paragraph 4.1 as follows: Retribution, Deterrence, Rehabilitation, Restorative justice, Community Protection and Denunciation.”
10. In the often cited case of *Thomas Mwambu Wenyi v Republic* (2017) eKLR, the Court of Appeal gave a comprehensive guide on sentencing as follows: -

“As for the sentence, the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* at paragraphs 70-71 had this to say on sentencing:-

“70. Sentencing is an important task in the matters 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 strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.



71. 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. I have considered the objectives of sentencing alongside the circumstances of this case. Section 205 of the Penal Code provides: -

Any person who commits the felony of manslaughter is liable to imprisonment for life.

12. In this case the Accused assaulted his child causing her death. It was clear from the facts of the case that he had no pre-planned intention to cause her death or harm her. What is clear to the court is that he dealt with his children in a barbaric way. He got home after the children had gone to sleep and when they took too long to open the kitchen door for him to be served food, he descended on them with a beating. Such an act cannot be described as discipline but disguised cruelty to children. This court wonders whether young children are expected to sit up late in the night waiting for their father to arrive home whether from work or drink. What is perplexing about this case is that the Accused’s wife was already awake and had let him into the main house when he decided that the poor children had taken too long to open the kitchen door.

12. I have considered the pre-sentence probation officers report. It speaks positively of the Accused. That the Accused was a hard-working family man and a good and lawful member of the community. The Report states that the family and the community had forgiven the Accused and were ready to accept him back into the community. It singles out the family as having forgiven the Accused and was ready to accept him back. The Accused’s wife was keen to have him released so as to continue providing for the family. The report recommends a non-custodial sentence.

12. I have also considered the mitigation of the Accused. I have taken note that he was first offender and also saved precious judicial time by plea bargaining. I am persuaded that the Accused deserves a lenient sentence particularly because he must have paid the psychological and emotional price of losing his young daughter and causing pain to his wife and children.

12. This Court however believes that the Accused would benefit more from a rehabilitative sentence that would teach him patience in handling his children. A prison sentence would serve a deterrent purpose and dissuade like-minded parents from arriving home drunk in the night to inflict fatal injury in the name of discipline on their helpless sleepy children.

12. The Accused is sentenced to serve 3 years imprisonment. The prison term shall run from 14th August 2022 being the date of his arraignment in court and pre-trial custody.

Judgement delivered, dated and signed this 29th day of September, 2023

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Mr. Kenduiwo for the Accused, Mr. Njeru for the State, and Siele (Court Assistant)



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