



**Republic v Kinyua (Criminal Case E015 of 2017)
[2023] KEHC 24393 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E015 OF 2017
HM NYAGA, J
OCTOBER 26, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID NJUGUNA KINYUA ACCUSED

RULING

1. The accused was initially charged with Murder contrary to Section 203 as read with 204 of the [Penal Code](#). The particulars were that on February 4, 2017 at Engarusha in Nakuru North Sub-County within Nakuru County he murdered Antony Wachira Kariuki.
2. On June 7, 2017, he was examined by Dr. Njau a consultant psychiatrist at the Rift Valley Hospital. He was found unfit to plead and he was placed on treatment as required and recommended by the Doctor as shown by the medical report dated 12th June, 2017. A further report dated 6th March, 2018 found the accused fit to plead and the charges were read to him. He pleaded not guilty. The accused through his advocate then sought to engage in a plea bargaining agreement, to which the prosecution consented.
3. Thereafter, the parties entered into a plea bargaining agreement pursuant to the provisions of section 137A to 137E of the [Criminal Procedure Code](#) duly signed on 20th February, 2020.
4. The charge of manslaughter was then put to the accused who pleaded guilty and subsequently accepted the facts as set out in the plea bargain agreement and stated before the court, where upon the court convicted the accused on his own plea of guilty.
5. While awaiting sentence hearing, a further report was done on the accused. It is dated March 15, 2023. The doctor found the accused was unfit to plead and recommended that he undergoes treatment.



6. In view of the above, the court on 28th March, 2023 invoked its powers under section 164 as read with section 162(2) of *Criminal Procedure Code* and directed the accused to be taken back to the hospital for treatment and his conditions to be reviewed after 3 months.
7. On July 27, 2023, the accused person's mother told the court that the accused has had mental issues for over 10 years. That he became violent and gave out all his belongings claiming that he had been employed by Kenya Defence Forces. She said his father attempted to hit him with an axe and he took an axe and hit his father with it. She said she is able to take care of the accused at home.
8. I then directed parties to submit on sentencing.
9. The Accused filed his written submissions on 21st September, 2023 whereas the prosecutor submitted orally on the same date.
10. The counsel contended that the accused has a history of mental illness as evidenced by the medical reports on record. Citing section 11 and 12 of the *Penal Code* the counsel argued that the accused is absolved of criminal responsibility since at the time of committing the act, due to defect of reason or disease of mind, he did not know the nature and quality of his act or did not know that the act was wrong.
11. He submitted that the accused was mentally unstable at the time of commission of the offence and has been in custody for six (6) years now.
12. He asked the court to take note that the accused was provoked by the deceased, he is a first time offender and is deeply remorseful.
13. He urged this court to impose a non-custodial sentence. To support his submissions, the counsel relied on the cases of *Republic v Kennedy Matiba Oketch* [2015] eKLR, *Republic v Caren Kerubo Omosa* [2016] eKLR and *Republic v Ephantus Karanja Wangari* [2016] eKLR.
14. In both Kennedy Matiba and Caren Kerubo's cases the accused had pleaded guilty to manslaughter. The courts took note of the time spent in custody, 3 years in Kennedy Matiba and 1 year in Caren Kerubo's case. The trial court convicted Kennedy Matiba to 3 years supervised probation, and Caren Kerubo was sentenced to 1-year probation.
15. In Ephantus Karanja's case, the accused pleaded guilty to manslaughter following a Plea Bargain Agreement. The court noted that the death of the deceased followed a very brief confrontation where the accused head-butted the deceased; that the accused exhibited true remorse as he addressed the victim's family in court; and the court noted that the incident "was the product of a momentary lapse of judgment". That court also considered the probation report at length and determined as follows on sentence:

“..... after considering all these factors, I have come to the conclusion that it will serve no useful purpose for the Accused Person to be sent to prison on a custodial sentence. I have noted that the Accused Person was in custody for five months. The context and circumstances here point to a non-custodial sentence. I am satisfied that the Accused is willing to comply with the conditions of any probation order imposed. The Accused Person is hereby sentenced to be under probation for a period of three (3) years.”
16. The state counsel opposed the release of accused for reason that he is a danger to society. She prayed that the accused be committed to Mathare Hospital under Section 162(5) of the *Criminal Procedure Code*.



Analysis & Determination

17. The only issue for determination is what would constitute an adequate, appropriate and just sentence in the circumstances of this case?

18. The Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“(71) ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- 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. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

19. The Supreme Court in *Muruatetu Case* (supra) appreciated that:

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v Republic* Criminal Appeal No 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

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 other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his 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. 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.



5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.”
20. I have considered the circumstances of the case, the submissions by the State Counsel and the mitigation by the defence counsel.
 21. According to the facts of the case, the accused on 4th February,2017 wanted to take some maize to the posho mill but had a disagreement with his father. The deceased picked an axe and slightly cut the accused and the accused in turn picked a Jembe and fatally assaulted the deceased. A post-mortem was conducted and it confirmed the deceased died as a result of severe head injury.
 22. In terms of section 202 as read with section 205 of the *Penal Code*, the accused upon being convicted is liable to serve life imprisonment. However, this represents the maximum sentence which is usually reserved for the most aggravated of such cases. I do not consider this to be a case falling in the said category.
 23. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses' demeanour. The discretion must however be exercised judiciously. In the persuasive Nigerian case of *African Continents Bank v Nuamani* [1991] NWLI (parti86)486, it was observed that,

“The exercise of court's discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”
 24. The mitigating factors that I have taken into consideration are, first, that the accused readily pleaded guilty and thus saved the court on judicial time. Secondly, the facts narrated by the state counsel reveal that the killing was not premeditated. It was instigated by the deceased who slightly cut the accused with an axe following a domestic disagreement. Thirdly, the accused has also expressed his remorse and he is a first offender.
 25. I have also considered the fact that the accused suffered from a mental illness. According to the medical reports dated June 12, 2017 by Dr. Njau, the accused was found to be suffering from a delusional disorder. He had perception problem where he could hear voices advising him on what to do or commenting on his actions. He was treated and a further assessment by the same Doctor on March 6, 2018, the accused was found fit to stand trial. A subsequent report by Dr. Karanja dated March 15, 2023 found the accused not fit to stand trial as he was suffering from Schizophrenia. The accused seems to drift from a moment of lucidity to his prescribed condition.
 26. According to the presentence report dated October 12, 2022 by Salim A.G, the accused is aged 35 years old and he schooled up to class eight then dropped out due to lack of interest. At the time of arrest, he was operating a barber shop. The accused indulged in excessive bhang abuse which led to mental illness that was treated in 2015. It is stated that due to his indulgence in substance abuse, his character displeased his father who attacked him using an axe. His family acknowledged the accused suffers from mental problem and they have forgiven him. The area chief stated the community members would



not harm the accused as reconciliation agreement was initiated by the deceased significant others. The accused pleads for leniency stating that he committed the offence while defending himself. The probation officer recommends a probation sentence for a maximum period of three years.

27. I must reiterate the dilemma the court finds itself in, given the circumstances of the case. While I would want the accused to atone for his actions, I am also keen not to punish him for something he did without full control of his senses.
28. I note that the accused has been in custody since February 2017, almost six (6) years to this day. If it is retribution, then he had duly paid his dues.
29. This is a special case that requires special attention and in the circumstances, I am convinced that, a non-custodial sentence is the best way to handle this accused.
30. The accused is on medication and his mother stated that he is able to take care of him. Therefore, I will concur with the Probation Officer and place the accused on Probation as recommended. He should be closely monitored so that he does not lapse into the mental condition he was in at the material time.
31. In conclusion, I place the accused on probation for three (3) years.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 26TH DAY OF OCTOBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Ms Murunga for state

Ms Cherutioh for accused

Accused present

