



**Republic v Chepkwony (Criminal Case 18 of 2019)  
[2022] KEHC 12722 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 12722 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 18 OF 2019  
GWN MACHARIA, J  
MAY 26, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EMILY CHEPKOECH CHEPKWONY ..... ACCUSED**

**RULING**

1. The Accused, Emily Chepkoech Chepkwony was charged with the offence of Murder contrary to section 203 as read with 204 of the [Penal Code](#). The Particulars of which were that the Accused on the night of October 19, 2019 and October 20, 2019 at Kasarani area in Naivasha sub county within Nakuru County murdered Benson Eris.
2. A plea bargaining agreement dated November 1, 2021 and received into court on November 9, 2021 between the Accused and the Republic was entered and filed in court. The Plea Bargaining Agreement was made pursuant to section 137A-O of the [Criminal Procedure Code](#). The Accused agreed to plead to a lesser charge of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#). She accordingly pleaded guilty to this offence. The Plea Bargaining Agreement was witnessed by the Accused, the Advocate for the Accused and the Office of Director of Public Prosecution on behalf of the State.
3. The Accused now faces the charge of manslaughter contrary to Section 202 as read with 205 of the [Penal code](#) of which particulars of the offence were that on the night of October 19, 2019 and October 20, 2019 at Kasarani area in Naivasha Sub-County within Nakuru County killed Benson Eris.
4. The Accused having pleaded guilty offered mitigation which is in the form of undated written submissions but received into court on the December 17, 2022.



5. The Plea was obtained voluntarily and freely. The mitigation submissions were filed by the Accused person's counsel, Mr. Waigwa Ngunjiri. It was prayed that a non-custodial sentence be imposed in light of the following:
  - a) The accused is from a very humble background where she even with her siblings dropped out of school in class five and that her single parent is also sickly and required accused's close attention and support.
  - b) The accused is a single parent with a 20-year old daughter who is entitled to parental support.
  - c) The accused has been and continues to be in remand for over three years and while in remand has undergone major surgical procedures for removal of uterine fibroids and facial mass.
  - d) The accused person pleaded guilty to the charge of manslaughter thus saved precious judicial time in not going through a full trial.
  - e) The accused is remorseful and regrets the commission of the offence herein but further urges the court to consider that the offence was committed in circumstances where accused was resisting gender violence visited on her by the deceased.
  - f) The family of the victim has forgiven the accused as they clearly stated in the plea bargain negotiations.
  - g) The deceased suffered from a single stab wound inflicted by the accused in efforts to resist gender violence occasionally visited on her by the deceased.
  - h) The accused person is willing and ready to abide by any conditions the court may impose.
  - i) The accused young age of 39 years is productive in nation building if applied positively.
  - j) The forgiveness from the family of the deceased is positive for her re-absorption back to the society.
6. The Accused at the time of the commission of the offence was 39 years old, the third born in her family of origin. The Accused admitted to over-indulging in alcohol consumption and had no previous criminal record. The Accused also states that she will not go back to consuming alcohol again considering that she has been sober for two and a half years.
7. It is also noted that the Accused has been having health challenges for the last nine years of which her daughter indicated, as per the Probation Officer's report. She had surgery in her abdomen while in custody in January 2020 and another in February, 2020 to remove facial mass and is currently on medication. She has been receiving medical care at the Naivasha Sub-county Referral Hospital as patient number 063987/21.
8. A Probation Officer's Report was filed on March 30, 2022. It indicates that the Accused and the deceased were in a relationship and used to indulge in alcohol. The report indicates that the deceased was often violent towards her and on that fateful day came home drunk and beat her up and in the altercation she took a knife in self-defense and stabbed him. The Accused pleads for leniency as she did not intend to end the Deceased's life.
9. The Report also indicates that the area chief from where the Accused hails from does not oppose a non-custodial sentence. He however put a rider that the Accused may not be safe staying within Kasarani area for fear of reprisal from the victim's brother who lives 200 meters from their house. In this regard, the Accused's family members are not opposed to her relocating to her Ainamoi, where



her sister lives. The area sub-chief of Ainamoi one, David Cheruiyot is unopposed to her relocation to the area. The Offender's family have also stated that they must carry out a cleansing ceremony at her maternal's uncle's place as the offence is considered taboo in their community.

10. The victim's family, his father and brother were interviewed and stated that they had forgiven the Accused for her action against their kin and are not opposed to her serving a non-custodial sentence. The other family member however were opposed to the Accused serving a non-custodial sentence.
11. The Probation Officer's Report indicates that the Accused comes from a very poor background and had an abusive relationship with the deceased. She had never had a criminal record prior to this incident and is a first offender. She has faced a myriad of complex health issues and her family has agreed to offer her psycho-social support to facilitate her rehabilitation. The probation Officer's personal opinion is that the Accused would best be suited for a non-custodial sentence.
12. Under Section 205 of the Penal Code, manslaughter carries with it a maximum sentence of life imprisonment. This is, however, the maximum penalty that is ordinarily reserved for the most serious of such situations. From the foregoing, nothing from the court record offers any aggravating circumstances that would render this instant case as meriting life-imprisonment. I surmise that the absence of aggravating circumstances disqualifies life-imprisonment as a suitable sentence. The State has stated that the accused is a first-time offender.
13. The Judiciary Sentencing Policy Guidelines are silent on the path to take in manslaughter cases. I have taken the liberty to do comparable analysis in decided case. For a charge of Manslaughter, a sentence of ten years in jail was meted out by the Court of Appeal in Mombasa Criminal Appeal 118 of 2014 *VMK v Republic* [2015] eKLR where a dangerous weapon was used in the commission of the crime. The courts have inclined to sentence the offender to life in prison if the use of a dangerous weapons was used. A dangerous weapon as per Black's Law Dictionary is defined as follows:

One dangerous to life; one by the use of which a serious or fatal wound or injury may probably or possibly be inflicted. In context of criminal possession of a weapon can be any article which, in circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury. *People v. Green*, 4 Dept, 124 A.D.2d 725, 508 N.Y.S.2d 725, 726.

What constitutes a "dangerous weapon" depends not on nature of the object itself but on its capacity, given manner of its use, to endanger life or inflict great bodily harm. *U.S. v. Bey*, C.A.Ga., 667 F.2d 7, 11.

As the manner of use enters into the consideration as well as other circumstances, the question is often one of fact for the jury, but not infrequently one of law for the court.
14. A kitchen knife is a dangerous weapon when wielded in a manner other than its natural use. To wit, for kitchen and food preparation purposes and thus it can be fatally wielded such as in this instant scenario. There is proof that the Accused utilized such a weapon in this case but submits that that it was in self-defense as the deceased habitually visited physical violence upon her body in the past.
15. As per the holding in *R v. Fearon* [1996] 2 Cr. App. R (S) 25 CA when a judge considers that a plea of guilty has been entered, it's critical that the accused states so unequivocally. In this particular case the Accused has pleaded guilty and this court ought to take into account the accused's willingness to plead guilty as one of the elements lowering her punishment/sentence.



16. In the case of Kajjado Criminal Case No 4 of 2016 [Republic v Ismail Hussein Ibrahim](#) [2018] eKLR, the court acquitted the accused in lieu of having him charged with a lesser offence of manslaughter for he was acting in self defence.
17. In the High Court in Siaya Criminal Case 9 of 2016 [Republic v Collet Thabitha Wafula](#) [2016] eKLR the Offender was accused of killing her husband. She entered into a Plea Bargaining Agreement to reduce the charge of murder to manslaughter. In this case, the deceased returned home on May 7, 2016, intoxicated and accused the Defendant (Accused person) of infidelity. A violent domestic fight ensued and the Accused used a kitchen knife to fatally stab the deceased. The Accused was also injured by the deceased during the altercation. The Accused asked the court for a non-custodial sentence based on a number of mitigating circumstances including the fact that the offender was the primary caregiver of her three children with the deceased, aged five, three, and one. Relatives and friends of the deceased confirmed that he was verbally and physically abusive to the Accused and the killing occurred in “the heat of the moment.” Furthermore, the Accused had no prior criminal record, demonstrated remorse, and the deceased’s family and the community had forgiven her and were willing to help her raise her children. The High Court agreed that these factors merited a non-custodial sentence, adding that the offender was both the Accused and the victim, and was acting in self-defense even though she used excessive force. The court handed down a three-year non-custodial sentence.
18. The case [[Republic v Collet Thabitha Wafula \(supra\)](#)] reflects in similitude to the circumstances facing the Accused herein. In both cases, both women faced an aggressor who often picked violent altercations after imbibing alcohol and many of these instances saw the women being physically attacked by their co-habitators/lovers/husbands leaving them with physical injuries.
19. Similarly, in this case, the Accused reached out to the nearest available object in self-defense from the attack of her aggressor who unfortunately succumbed to the injuries dealt from the knife stab wound. Further, the family of the deceased was ceased of the acknowledge that the deceased person was violent to the Accused after consuming alcohol. Additionally, the deceased’s father and brother have forgiven the Accused person.
20. My analysis is that this is clearly a case of self-defense. It is a case in which the Accused was faced with the dilemma of either awaiting death by her partner or when attacked, strikes to remove the threat of death. I pose the following questions. How can this be faulted? Probably only by using excessive force? But again, wasn’t the deceased already armed with the excessive force which was to result in the death of the Accused somehow?
21. In an effort to answer these questions, I borrow insight from Criminal Case E011 of 2020 [State v Truphena Ndonga Aswani](#) [2021] eKLR where the court cited from Loraine Patricia Eber who writes as follows in The Hastings Law Journal Volume 32 Issue 4 Article 71-1981 on “[The Battered Wife’s Dilemma: To Kill or to Be Killed:](#)”

“Cumulative terror” by some writers, and one attorney who represents battered women has called the husband’s constant battering “murder by instalment.” These terms accent the fact that the battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating. The battered wife thus is literally faced with the dilemma of either waiting for her husband to kill her or striking out at him first.



22. I now turn to what the law provides as regards self-defence. As per section 17 of the [Penal Code](#) states:

“ 17. Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in defence of person or property shall be determined according to the principles of English Common Law.

23. In short, at Common law, defence of self-defence allows one to use reasonable force to:

1. defend oneself.
2. prevent attack of another person.
3. defend their property.

24. The common law position as regards the defence of self-defence was well articulated by the Court of Appeal in Nairobi in Cr App No 414 of 2012 [Ahmed Mohammed Omar & 5 others v Republic](#) [2014] eKLR as follows:

25. “The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in *DPP v Morgan (supra)* it was held that:

26. “.....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

25. In [R v Williams](#) [1987] 3 ALL ER 411, Lord Lane, C J held:

“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

26. It is acknowledged that the case of [DPP v Morgan \(supra\)](#) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one.

27. Section 17 of the [Penal Code](#) subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In applying the subjective test and



taking into account the particular circumstances of this case, I opine that the accused person acted in self-defense when she killed the deceased as he had come home drunk and was beating her up when she took the knife and stabbed him, occasioning his demise in the process. The Accused was not going to wait until she was the deceased herself.

28. In Machakos Criminal (Manslaughter) Case 21 of 2017 *Republic v Juliana Wanza Mulei* [2020] eKLR a case with similar facts as with the instant case before this court it was revealed that the accused and deceased had some tumultuous relationship punctuated with numerous fights fueled by alcohol. The court adopted a starting point of two years' imprisonment. But applied 333(2) of the *Criminal Procedure Code* by taking into account the period spent in the remand custody. She was set free accordingly.
29. In view of the foregoing, and having come to the conclusion that self-defense contributed to the death of the deceased, the fact that the Accused is remorseful, has health issues, her family his ready and society are ready to re-absorb her back into the society, the family shall accord her psycho-social support and the closed members of the deceased's family have forgiven, I sentence her to two years imprisonment.
30. Applying the provisions of section 333(2) of the *Criminal Procedure Code*, I take into account the that Accused has been in custody for 2 years and 5 months. She has therefore served her sentence in excess of 5 months. I therefore order that she be forthwith set free unless otherwise lawfully held. She is however advised to relocate from the place of the incident to Ainamoi to live with her sister.
31. It is so ordered.

**DATED AND DELIVERED AT NAIVASHA THOS 26<sup>TH</sup> MAY, 2022.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

In presence of:

1. Mr. Ngunjiri for the Accused person.
2. Ms. Serling for the Republic.

