



**Republic v Masinza & 3 others (Criminal Case 79 of 2016)
[2022] KEHC 11625 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 79 OF 2016
EKO OGOLA, J
MAY 26, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

KEVIN AMUKONYE MASINZA 1ST ACCUSED

JOSPHAT SHAYO 2ND ACCUSED

PATRICK MAKOKHA 3RD ACCUSED

PASCAL OPUKO ORONO 4TH ACCUSED

JUDGMENT

1. The 2nd and 3rd accused persons herein Josphat Shayo and Patrick Makokha were charged together with the 1st accused and 4th accused, with offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63 of the Laws of Kenya. The particulars of the charge are that the 2nd and 3rd accused person herein in the company of the 1st and 4th accused not before the court murdered Harun Musa. The 2nd and 3rd accused persons pleaded not guilty to the charge. However, in the cause of the proceedings and pursuant to the Plea Agreements dated November 1, 2021 and filed on November 2, 2021 made pursuant to section 137 A-O of the [Criminal Procedure Code](#), Cap 75 Laws of Kenya, the 2nd and 3rd accused entered into a plea bargain with the Director of Public Prosecutions and agreed inter alia as follows:
2. The 2nd and 3rd accused persons plead guilty freely and voluntarily without promise or benefit of any kind, other than as contained in the plea agreement and without threats, force, intimidation, or coercion of any kind. They knowingly, voluntarily, and truthfully admitted the facts contained in the said plea agreements, and agreed to plead guilty to the Offense of Manslaughter Contrary to section 202 as read with section 205 of the [Penal Code](#). The 2nd and 3rd accused persons admitted that they are



guilty of unlawfully causing the death of Harun Musa and that the maximum penalty under the law is life imprisonment.

3. The 2nd and 3rd accused persons understood that the sentence to be imposed is solely at the discretion of the court. They understood that by entering into the pleas agreement, they are waiving their right to appeal except as to the extent or legality of the sentence. They further agreed that if the court rejects their plea of guilt subject to these plea agreements, these plea Agreements shall be rendered null and void and no party shall be bound by them.
4. According to the said plea agreements accused persons have been advised of their constitutional rights, including their right to plead not guilty and having already so pleaded to persist in that plea, their right to be presumed innocent until proved guilty, their right to remain silent and not to testify during proceedings, their right not to be compelled to give self-incriminating evidence, their right to a full trial, their right to legal representation and their right to examine in person or by their legal representatives, the witnesses called by the prosecution before court and to obtain attendance and carry out examination of witnesses to testify on his behalf before court on the same conditions as those applying to witnesses called by prosecution.
5. The facts accepted by the accused persons upon their plea of guilty are set out at Paragraph 11 of the plea bargain agreement as follows:
6. On the November 14, 2016 at around 1:00am the deceased, Harun Musa returned home and picked a quarrel with his wife one Esther Korir over food. He beat his wife using blows and kicks and the fight extended outside the house. The said Esther Korir screamed for help and one Kevin Amukonye (who is the first accused in this matter and has since been convicted and served sentence and released) came to her rescue. Kevin was a neighbour who lived about 200 meters from the deceased's homestead and had an affair with the deceased's wife. The deceased stopped fighting her and started fighting with Kevin. The deceased's wife got a chance to escape and hide in the nearby banana plantation. Kevin was joined by Josphat Shayo (the second accused) and Patrick Makokha (the third accused) in fighting the deceased. The deceased got a chance to escape and went inside his house, took a jembe, and went back outside. On seeing this, Kevin instructed the second accused to get hold of the deceased and ensure he didn't escape. The second and third accused got hold of the deceased and ensured he did not escape. The second and the third accused got hold of the deceased again and started fighting. They were armed with wooden sticks and a sword which they used to assault the deceased. They then tied the deceased's hands and legs with a rope and dragged him outside the compound near a railway line where by Kevin and the 3rd accused set the deceased on fire. But while the deceased was burning, the two changed their minds and put out the fire. They then dragged the deceased to Kevin's doorstep and Kevin hit the deceased on the head using a wooden stick. The deceased succumbed to his injuries. The second and third accused person then left to their respective houses.
7. Kevin went and reported the matter to the police at Lumakanda Police Station. The officers proceeded to the scene, collected the deceased's body which was partially burned and took it to Kimbilio mortuary awaiting post-mortem. At the scene, the police officers also collected a sword and blood stained wooden stick that was used to assault the deceased. The second and third accused persons were arrested on the same day after tip-off by members of the public.
8. The post-mortem was conducted on 19th November, 2016 to ascertain the cause of death and the same was confirmed to have been caused by cardiopulmonary arrest due to severe head injury and extensive first degree burns and soft tissue injuries due to assault.
9. On 21st November, 2016 the accused persons were charged with offence of Murder which the state later substituted with that of Manslaughter.



10. Ms. Okok for the Director of Public Prosecutions submitted that the accused persons herein are first time offenders and have no previous record of crime. In the circumstance of the case and bearing mind how the deceased met his untimely death, Ms. Okok between 7 and 10 years.
11. In mitigation Mr. Oduor Counsel, for the accused persons submitted that the 2nd Accused person holds a certificate of Bible course and that forgiveness starts with acceptance and the 2nd accused person has accepted that he committed the offence. Counsel further submitted that the court is at liberty to jail the accused to life imprisonment but also has the discretion to jail the accused to time already served. Counsel further submitted that the 2nd accused person has children in form 2 and standard 8.
12. Mr. Oduor holding brief for Miyianda, submitted that forgiveness starts with acceptance and that the 3rd accused person has accepted that he committed the offence. Counsel submitted that the 3rd accused person has been in prison since 2016 and has learnt in prison and has an SDA certificate and also holds a certificate in religious studies and teaches in prison on the use of drug and substance abuse and is now reformed. Counsel submitted that the pre-bail report filed herein indicate that the society where the accused person lived is willing to have him back. Counsel further submitted that the 1st accused person has since been released and is living peacefully in the community. Counsel submitted that the accused is father of a (5) year old son and that his son was only 2 months at the time of his arrest.
13. The Probation Officers' Pre-Sentencing Report filed on November 30, 2020 states that the 2nd accused is suitable for non-custodial sentence and proposed Probation sentence for period of 3 years.
14. I have carefully taken into account the mitigation, the pre-sentence report, the prosecution counsel remarks and the circumstances of the offence as set out in the plea-bargaining agreement. From onset it is worth noting that life is sacrosanct and no person has a right to take away another person's life except where it provided for by the law. The 2nd and 3rd accused persons herein are first time offenders. They were caught up in unfortunate and the untimely death of the deceased herein when they were called upon by the 1st accused person to intervene in a fight that was predicated upon domestic violence and a love affair involving the deceased, his wife and 1st accused person. The accused persons beat up the deceased person causing him to succumb to death due to the injuries sustained during the said incident. They are remorseful for their actions and regret committing the offence.
15. What the accused persons have been convicted of is a serious offence, for which offence the drafters of the [Penal Code](#) provided a maximum sentence of life imprisonment. However, weighing one factor after another I find some mitigating features to persuade me to tamper with the maximum life imprisonment sentence. I hereby sentence the 2nd and 3rd accused persons to serve a custodial sentence of ten (10) years each from 14/11/2016 being date of their arrest.

DATED, SIGNED AND DELIVERED THIS 26TH OF MAY 2022.

E. K. OGOLA

JUDGE

JUDGMENT 2

