



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 36 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS KIPKEMOI CHIRCHIR.....1ST ACCUSED

EDNA TOWETT.....2ND ACCUSED

SHARON CHELANGAT.....3RD ACCUSED

RULING

1. The three (3) accused persons are mother (2nd accused), daughter (3rd accused) and son (1st accused). Nicholas Kipkemoi, Edna Towett and Sharon Chelangat. They are jointly charged with the Murder of Wesley Kiptoo Towett on the 20th July 2019 contrary to section 203 as read with s. 204 of the Penal Code.

2. On 4th September 2019 they each pleaded not guilty to the charges. Mr. Siah, Ms. Sabaya and Ms. Cheruto appeared for the accused persons respectively. Ms. Murunga appeared for the state.

3. Despite numerous hearing dates the matter did not take off for various reasons, and on 25th May 2021, the accused persons made a proposal to enter into a Plea Agreement Negotiation as provided for under **Section 137A of the Criminal Procedure Code** thus;

“137A. Plea agreement negotiation

(1) Subject to section 137B, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of—

(a) reduction of a charge to a lesser included offence;

(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

(2) A plea agreement entered into under subsection (1) (a) or (b) may provide for the payment by an accused person of any restitution or compensation.

(3) A plea agreement under subsection (1) shall be entered into only after an accused person has been charged, or at any time before judgement.

(4) Where a prosecution is undertaken privately no plea agreement shall be concluded without the written consent of the Director of Public Prosecutions.”

4. On 16th November 2021 the plea agreement negotiations were concluded and the prosecution substituted the charge of Murder with the charge of **Manslaughter Contrary to Section 202 as read with 205 of the Penal Code.**

5. The three (3) accused persons were charged that on 20th July 2019 they jointly caused the unlawful death of Wesley Kiptoo Towett at Mosop Village, Kuresoi South Sub County Nakuru County. They pleaded guilty.

6. The particulars were that on that night the deceased went to the house of Jaqueline Sirma to look for Sharon the 3rd accused, who was his girlfriend. It was about 11.00 p.m. He called out for her. She was not in that house. It was then that deceased hit the door, forcing it open. Jaqueline was afraid because she was alone at home with the children. She told the deceased that Sharon had slept and began to raise alarm. It was at this point that the 1st accused and 2nd accused woke up and went to house of Jaqueline. It was Nicholas the 1st accused who took a piece of wood and began to hit the deceased. He also kicked and boxed the deceased. He was joined by 2nd and 3rd accused persons. The deceased was bleeding from the mouth. One William Towett came to the scene and told them to stop. They did so and left him outside the house of Jaqueline lying on the ground.

7. The following morning at around 5.00 a.m. Jaqueline went to check where they had left the deceased but he was not there. About 8.00 a.m. she learnt that someone had assisted him to go to hospital, but by the time he got there he was dead. The post mortem examination revealed that he had died from the injuries sustained from the beating; fractured frontal temporal and parietal bones, massive intracranial bleeding, scalp bleeding. Cause of death, severe head injury secondary to massive intra cranial hemorrhage from blunt head trauma.

8. The accused persons pleaded guilty to the facts and each was convicted on their own plea of guilt.

9. In mitigation for the 2nd accused Ms Sabaya submitted that she was the mother to the two (2) other accused persons, was a 1st offender, and prior to this incident, had been of sterling character. That her only mistake was to take the role of Mama Bear to protect her daughter. That it was she and her now deceased husband who had escorted the deceased to hospital. That the two (2) families had conducted traditional family cleansing, healing ceremonies. Ms Sabaya submitted further that the 3rd accused was still a student, who had a little baby at the time of the offence, that the baby had been in custody with the mother for over two (2) years, and if released it would be the duty of the 2nd accused to care of the child as the 3rd accused continued with school. That a non-custodial of about two (2) or three (3) years sentence for both the 2nd and 3rd accused would be beneficial to the entire family as the 2nd accused would be able to continue taking care of the family, while the 3rd accused continued with school. In addition, the 2nd accused had been widowed while in custody, and her other child, a minor, a daughter, needed her.

10. Ms. Cheruto added that the 3rd accused was remorseful, and had undergone rehabilitation during the period she had been in custody.

11. For the 1st accused it is submitted by Mr. Kenda in mitigation that he was very remorseful, and was committed to repairing what he had harmed. That there was no bad blood between the two (2) families.

12. That the first accused had acted in reaction to the act of Gender Based Violence against another person, that this was an isolated incident, and therefore a non-custodial sentence would suffice.

13. The Pre-Sentence Reports by Probation and After Care Services were filed on 7th December 2021, and I have considered each one of them.

14. The only issue is what sentence is suitable to each of the accused persons. The Probation Officer suggests non-custodial sentence of two (2) years.

15. Let me start by pointing out that this case presents everything that is wrong with our society and the criminal justice system as it stands now. A young girl has a boyfriend who comes home drunk looking for her. He usually sneaks into the house where she sleeps. On this night he is unruly, he causes a scene, forces a door open and hell breaks loose. The brother to the girl attacks him viciously with a piece of wood and the family descends on him. The girl, her brother, their mother and the girl's baby end up in custody. A mother, her two (2) children and a grandchild, all end up in prison custody, for the murder. Yet it is evident from the facts that what happened was as a result of the actions provoked by the deceased in his attempts to forcefully access the house of Jaqueline Sirma in search of his girlfriend, who by all standards was a minor.

16. Due to the poverty levels in the some of our rural areas, they cannot raise bond, while they are all in custody, the family patriarch dies, and the minor daughter who had been left at home with the father ends up in the care of relatives. This innocent baby ends up spending two of his formative years in remand custody, while the minor daughter of the 2nd accused and the youngest child in the family is suddenly bereft of mother, elder sister and brother, literally her mother and all her siblings.

17. Even in this our adversarial system, the circumstances of this case and the parties involved are ought to move the prosecution to be proactive, to initiate the Plea Agreement negotiations at the earliest so as to take care of the best interests of the innocent children involved and avoid the long unnecessary pretrial incarceration. Surely nothing stands in the way of the prosecution to take the lead, particularly in the interests of justice, in addition to avoid congestion in remand, and reduce the remand periods for murder suspects while protecting the rights and welfare of the innocent children of accused persons.

18. That said, the accused persons have been in custody since 2019, for over two years. That period of time will be taken into consideration as is required by **Section 333(2) of the Criminal Procedure Code** in its proviso.

19. It is evident from the facts that the 1st accused person took the lead in attacking the deceased. In fact, from the post mortem it is this hitting with the piece of wood that caused the fracture of the deceased's scalp leading to his death. The 1st accused must carry the greater blame. True, he is remorseful, he is a first offender, but there does not appear in the facts to be any reason that called for the use of that much force against the deceased.

20. For the 2nd and 3rd accused persons, it is evident that they joined in the fight because the deceased had tried to forcefully enter the house where 3rd accused was said to be sleeping.

21. For the 1st accused he is sentenced to serve five (5) years imprisonment from the date of remand.

22. For 2nd and 3rd accused, I consider the custodial period served in remand to be sufficient. The 2nd accused has become a widow while in custody and never got the chance to bury her husband. Her last born child was without her mother's comfort at that time. Each will be placed on Probation Supervision for two (2) years. Each must comply with the Probation Order or face the consequences of breach.

23. Probation & Aftercare Services Nakuru Office be served with this order promptly for compliance.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2021.

MUMBUA T MATHEKA

JUDGE

In the presence of:

CA Lepikas

CA Jennifer interpreter (Kiswahili/Kipsigis)

Ms. Murunga for state

Mr. Kenda for 1st accused

Ms. Sabaya for 2nd accused

Ms. Cheruto for 3rd accused

1st, 2nd and 3rd Accused persons present virtually