



**Republic v Makutwa (Criminal Case 14 of 2021)
[2025] KEHC 187 (KLR) (21 January 2025) (Sentence)**

Neutral citation: [2025] KEHC 187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 14 OF 2021
JN KAMAU, J
JANUARY 21, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPHAT ANIBUBI MAKUTWA ACCUSED

SENTENCE

1. The Accused person was convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) on 27th November 2024. The court then directed that a Pre-Sentence Report be filed to assist it in meting out an appropriate sentence.
2. A Pre-Sentence Report by Oliver Simiyu Probation Officer Vihiga dated 29th December 2024 was filed on 10th January 2024. In the said Pre-Sentence Report, the Accused person denied having killed the deceased. He prayed for leniency on account of the welfare of his children and the disintegrated family that he wished to reunite. His family pleaded with this court to give him a non-custodial sentence as his mother who was currently aged eighty (80) years was unable to take care of his children.
3. On the other hand, the deceased’s family which was distantly related to him, harboured a lot of bitterness against him for having killed the deceased. It called for the excommunication of his family after he was sentenced because there was no hope of reconciliation.
4. The community was also very bitter about the incident and burnt down the Accused person’s house. This was a sign that he stood excommunicated from the society. He was said to have been abusing drugs and alcohol which led him to commit the offence. The community and the local administration opined that the only suitable sentence would be for him to be imprisoned as the community was not willing to re-integrate him. They asked the court to mete out a stiff sentence on him to deter him from possible re-offending.



5. The Probation Office opined that the Accused person had weak social ties as a result of which community-based rehabilitation was not tenable. It left the matter in the court's hands to mete out an alternative appropriate sentence.
6. In his mitigation, the Accused person said that he was a family man aged fifty -one (51) years old with six (6) children who were currently staying with his paternal mother who was aged eighty (80) years. He stated that he facilitated the needs of his family when he was out on bond. He averred that his wife left He said that he was remorseful of what happened to the deceased who was his neighbour. He said that this was his first offence and the same was not planned offence. He averred that the deceased was his neighbour and he had tried to make amends with the deceased's family. He prayed for a non-custodial sentence to enable him to continue his duties.
7. On its part, the Prosecution indicated that the Probation Officer opined that a non-custodial sentence was not possible because the Accused person had denied committing the offence and was therefore not remorseful. It asserted that the secondary victims, especially deceased's wife was bitter for the way the Accused person killed her husband and sought a custodial sentence. It indicated that both the deceased and the Accused person were neighbours but there had been no attempt for reconciliation. It therefore prayed for a custodial sentence.
8. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation, and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
9. It was also important that the sentence communicate to the community, condemnation of his criminal act. The sentence would indirectly send a strong signal to deter would-be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.
10. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of the offence at the time of sentencing the offender, chances of the offender being reintegrated in the society would be next to impossible as there were possibilities of being harmed. It was not lost to this court that the deceased's family still harboured a lot of resentment against the Accused person.
11. Indeed, killing is an abomination in the society. That could explain why the Accused person's house was burnt down and why the deceased's family wanted his family excommunicated from the community.
12. Notably, Section 206 of the Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

 1. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not (emphasis court);
 2. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference



whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused (emphasis court).”

13. The Accused person’s version that he did not kill the deceased was negated by the evidence of witnesses who testified how the Accused person hit the deceased twice with an axe as he tried to separate him and one Aggrey Etale who were fighting over who owned a site of termites. He may not have intended to kill him but he died out of an injury that was grievous.
14. The Postmortem Report showed that the deceased died due to a severe head injury secondary to blunt force trauma with resultant epidural haematoma. He was admitted at the ICU in Aga Khan Hospital. The fact that he did not die immediately after the incident was evident that he suffered greatly before he died.
15. It was evident from the Pre-Sentence Report that the 2nd Accused person was not remorseful. As he did not appear to see the wrong that he did, this court agreed with the Probation Office that he was not a suitable candidate to be given a non-custodial sentence. The facts of the case pointed to poor judgment and lack of anger management. He was indifferent to having caused the deceased’s death and was likely to re-offend in future.
16. A perusal of the said Pre-Sentence Report showed that he had anti-social behaviours that caused him to loss community ties. His family had relocated to their new abode after being excommunicated from their ancestral home on allegations of a murder having been committed. A deterrent sentence was therefore most suitable herein to deter him and other would-be offenders from committing a similar offence. The sentence also needed to be retributive. The deceased’s family ought to feel that the perpetrator of their kin’s death paid for his death somehow.
17. It was immaterial that the Accused person’s mother could not take care of his young children due to her advanced age. It was unfortunate that he had left his mother to suffer with the huge burden of raising his children and also leaving his children without a person who could fend for them. However, justice not only needed to be done, but it also had to be seen to be done.
18. Accordingly, having considered the facts of this case, her mitigation, the Prosecution’s response thereto, the Pre-Sentence Report and bearing in mind that sentencing was the sole discretion of the court, this court came to the firm conclusion that a sentence of five (5) years imprisonment was suitable and adequate. This sentence was influenced by the fact that the Accused person did not set out to kill the deceased but that he was caught up in a fight. Indeed, this court struggled with the circumstances of the case which in its mind, bordered between murder and manslaughter. It is what could be referred to as a lesser degree of murder.
19. Going further, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
20. The said Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).



21. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

22. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

23. The Accused person was first arraigned in court on 11th December 2018. He was able to raise the bond immediately and conducted his trial while out on bond. He was only entitled to the period between 27th November 2024 when he was convicted and before he was sentenced.

24. The Accused person was convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) on 27th November 2024. The court then directed that a Pre-Sentence Report be filed to assist it in meting out an appropriate sentence.

25. A Pre-Sentence Report by Oliver Simiyu Probation Officer Vihiga dated 29th December 2024 was filed on 10th January 2024. In the said Pre-Sentence Report, the Accused person denied having killed the deceased. He prayed for leniency on account of the welfare of his children and the disintegrated family that he wished to re-unite. His family pleaded with this court to give him a non-custodial sentence as his mother who was currently aged eighty (80) years was unable to take care of his children.

26. On the other hand, the deceased's family which was distantly related to him, harboured a lot of bitterness against him for having killed the deceased. It called for the excommunication of his family after he was sentenced because there was no hope of reconciliation.

27. The community was also very bitter about the incident and burnt down the Accused person's house. This was a sign that he stood excommunicated from the society. He was said to have been abusing drugs and alcohol which led him to commit the offence. The community and the local administration opined that the only suitable sentence would be for him to be imprisoned as the community was not willing to re-integrate him. They asked the court to mete out a stiff sentence on him to deter him from possible re-offending.

28. The Probation Office opined that the Accused person had weak social ties as a result of which community-based rehabilitation was not tenable. It left the matter in the court's hands to mete out an alternative appropriate sentence.

29. In his mitigation, the Accused person said that he was a family man aged fifty -one (51) years old with six (6) children who were currently staying with his paternal mother who was aged eighty (80) years. He stated that he facilitates the needs of his family when he was out on bond. He averred that his wife left He said that he was remorseful of what happened to the deceased who was his neighbour. He said that this was his first offence and the same was not planned offence. He averred that the deceased was his a neighbour and he had tried to make amends with the deceased's family. He prayed for a non-custodial sentence to enable him continue with his duties.

30. On its part, the Prosecution indicated that the Probation Officer opined that a non-custodial sentence was not possible because the Accused person had denied committing the offence and was therefore not



remorseful. It asserted that the secondary victims, especially deceased's wife was bitter for the way the Accused person killed her husband and sought a custodial sentence. It indicated that both the deceased and the Accused person were neighbours but there had been no attempt for reconciliation. It therefore prayed for a custodial sentence.

31. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
32. It was also important that the sentence communicate to the community, condemnation of his criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.
33. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of the offence at the time of sentencing the offender, chances of the offender being reintegrated in the society would be next to impossible as there were possibilities of being harmed. It was not lost to this court that the deceased's family still harboured a lot of resentment against the Accused person.
34. Indeed, killing is an abomination in the society. That could explain why the Accused person's house was burnt down and why the deceased's family wanted his family excommunicated from the community.
35. Notably, Section 206 of the Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

 1. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not (emphasis court);
 2. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused (emphasis court).”
36. The Accused person's version that he did not kill the deceased was negated by the evidence of witnesses who testified how the Accused person hit the deceased twice with an axe as he tried to separate him and one Aggrey Etale who were fighting over who owned a site of termites. He may not have intended to kill him but he died out of an injury that was grievous.
37. The Postmortem Report showed that the deceased died due to a severe head injury secondary to blunt force trauma with resultant epidural haematoma. He was admitted at ICU in Aga Khan Hospital. The fact that he did not die immediately after the incident was evident that he suffered greatly before he died.
38. It was evident from the Pre-Sentence Report that the 2nd Accused person was not remorseful. As he did not appear to see the wrong that he did, this court agreed with the Probation Office that he was not a suitable candidate to be given a non-custodial sentence. The facts of the case pointed to poor



judgment and lack of anger management. He was indifferent to having caused the deceased's death and was likely to re-offend in future.

39. A perusal of the said Pre-Sentence Report showed that he had anti-social behaviours that caused him to loss community ties. His family had relocated to their new abode after being excommunicated from their ancestral home on allegations of a murder having been committed. A deterrent sentence was therefore most suitable herein to deter him and other would-be offenders from committing a similar offence. The sentence also needed to be retributive. The deceased's family ought to feel that the perpetrator of their kin's death paid for his death somehow.
40. It was immaterial that the Accused person's mother could not take care of his young children due to her advanced age. It was unfortunate that he had left his mother to suffer with the huge burden of raising his children and also leaving his children without a person who could fend for them. However, justice not only needed to be done, but it also had to be seen to be done.
41. Accordingly, having considered the facts of this case, her mitigation, the Prosecution's response thereto, the Pre-Sentence Report and bearing in mind that sentencing was the sole discretion of the court, this court came to the firm conclusion that a sentence of five (5) years imprisonment was suitable and adequate. This sentence was influenced by the fact that the Accused person did not set out to kill the deceased but that he was caught up in a fight. Indeed, this court struggled with the circumstances of the case which in its mind, bordered between murder and manslaughter. It is what could be referred to as a lesser degree of murder.
42. Going further, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
43. The said Section 333(2) of the Criminal Procedure Code provides that:-
- “Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
44. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide that:-
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
45. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
46. The Accused person was first arraigned in court on 11th December 2018. He was able to raise the bond immediately and conducted his trial while out on bond. He was only entitled to the period between 27th November 2024 when he was convicted and before he was sentenced.



Disposition

47. Accordingly, it is hereby directed that the Accused person be and is hereby sentenced to five (5) years imprisonment to run from the date of this Sentence.
48. For the avoidance of doubt, the period between 27th November 2024 and 20th January 2025 be and is hereby taken into account while computing her sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
49. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 21ST DAY OF JANUARY 2025.

J. KAMAU

JUDGE

