



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Luseno (Criminal Case 22 of 2021)
[2025] KEHC 8125 (KLR) (10 June 2025) (Sentence)**

Neutral citation: [2025] KEHC 8125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 22 OF 2021**

JN KAMAU, J

JUNE 10, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

JOFETHA KHAYEGA LUSENO ALIAS GEOFFREY MAYUNGU ACCUSED

SENTENCE

1. The Accused person herein was initially charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). He entered into a Plea Bargain Agreement on 9th June 2025 whereupon this court convicted him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
2. The facts of the case were that on 24th October 2020 at about 1800hrs, Patrick Tembete (hereinafter referred to as “the deceased”) had a quarrel with the Accused person, his brother because of a boundary dispute. The quarrel persisted and a scuffle ensued leading to a fight. The Accused person then removed a knife from his coat and stabbed the deceased on the stomach in the presence of their grandchildren who rushed to call their parents who were attending a funeral at the neighbourhood while the accused then fled from the scene after realizing what he had done.
3. Stanley Anyika Khayega, son to the Accused person who was in his house also heard the commotion went out only to find the Accused person with blood on his face and clothes while the deceased, his uncle, was lying down on the ground. He rushed to get a motor cycle to take deceased to hospital but on returning he found him already dead while the Accused person was nowhere to be found.
4. Nancy Musozi, sister in law to both deceased and Accused person and Adelaide Mukari, daughter to deceased, arrived at the scene after being informed of what had happened by the children and found the deceased lying down while accused person was going towards his house while armed with a knife.



5. The Police officers were informed and they went to the scene, found the body of the deceased lying in a pool of blood at the gate to his compound and they removed the body to Jumuia Hospital mortuary. On the same date, police officers arrested the Accused person with the help of members of public and investigations commenced.
6. On the 2nd November 2020 a post mortem was carried out on the body of the deceased and the pathologist formed the opinion that the cause of death was asphyxia secondary to pneumo-hemothorax following stab wound.
7. Having entered into a Plea Agreement, the Accused person proposed that he serves a sentence of five (5) years while the Prosecution recommended a sentence of fifteen (15) years imprisonment.
8. In his mitigation, the Accused person pointed out that he was remorseful of what transpired during the incident. He informed the court that he acted out of self defence and had never been a threat to society. He asserted that he had always been of good conduct and that it was his first time he had offended the law. He averred that while the society was angry with what he did, if given a non-custodial sentence, he had a place to relocate to and did not have to go back to the village where the incident happened. He stated that he understood the incident and the gravity of the offence and prayed for leniency.
9. On its part, the Prosecution said that the Accused person should be given a custodial sentence because of his own safety and further because the Pre-Sentence Report had indicated that there was animosity within the family and he had been isolated by his immediate family and the community. It averred that the deceased was his brother and that despite the boundary issues, he should have approached the matter differently. It urged this court to look at the objectives of sentencing and dispense justice to him, his family and the deceased's family.
10. According to the Pre-Sentence Report of J. Sahani, Probation Officer, Vihiga County that was dated 14th March 2025 and filed on 25th March 2025, the Accused person was born and raised at his ancestral home in Idunya Area. He attended Kaptech Primary School and proceeded to upper primary. However, he did not pursue any vocational training. Instead he sought paid labour moving to Nairobi where he worked as a waiter in hotels and later in Mombasa as a farmhand. He had a history of substance abuse particularly alcohol and had been convicted three (3) times at Hamisi Law Courts.
11. He was married to one Esther Mudeizi and together they were blessed with fourteen children, three (3) of whom had since passed. His wife passed away in 2021, shortly after the incident herein but as they had been banished from the community, she was buried at her last born son's home in Musasa.
12. The Accused person was in good health until the time of the incident when he sustained an injury to his right eye which impaired his vision. He also sustained injuries that maimed his left- hand fingers which could no longer function properly. He had also been diagnosed with a hernia which has caused a swollen stomach and was awaiting surgery.
13. The Pre-Sentence Report pointed out that he and the deceased had the same father but different mothers. Differences arose between them after the elders sub-divided the ancestral land they inherited from their father, equally. However, the deceased disputed the sub-division on the ground that the Accused person had received a larger share. The disagreement was said to have led to the deceased repeatedly altering the land boundary encroaching on the Accused person's portion.
14. On the said date of the incident, the Accused person queried the deceased why he was interfering with the boundary without his involvement but the deceased who was armed with a knife charged towards him. During a scuffle that ensued, the deceased cut the Accused person on the left hand. The Accused



person overpowered him, took the knife from him and stabbed him on the neck. The Accused person then ran away to Muhudu Police Post where he reported the incident.

15. The Accused person stated that he acted in self defence and that had he not done so, he could have been the one to lose his life. He expressed regret that the incident had resulted in him being banished and unable to enjoy any family relationships as he was excluded from participating in family gatherings or functions.
16. The eldest son of the deceased, one Stanley Khayega, stated that the father's death was outright murder as the surrounding circumstances clearly pointed to this fact. He blamed the Accused person for repeatedly encroaching on the deceased's land, ultimately taking nearly half of it. He expressed deep anger stating that he was orphaned in a cruel manner and demanded true justice. He asserted that if justice was not served, he would await divine justice.
17. The Village elder said that the root cause of the disagreement between the Accused person and the deceased was a boundary dispute. He noted that the deceased was the aggressor on the material day as he chased the Accused person with a machete. He said that the Accused person did not have any criminal history and that in fact he was the one who used to write minutes and reports during community hearings.
18. The Local Administration blamed the deceased for having been confrontational and aggressive which actions were exacerbated by alcoholism.
19. The Pre-Sentence Report recommended a non-custodial sentence of two (2) years on account of the Accused person's advanced age, ongoing health issues and the fact that he was not a high risk-criminal to enable him undergo the necessary rehabilitation and reintegration into the society.
20. 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.
21. 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.
22. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the Accused person being reintegrated in the society would be next to impossible as there were possibilities of being harmed.
23. Killing someone is an abomination in the society and that explained why the deceased's family and community did not want him released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.
24. It was clear from the facts of the case and the Pre-Sentence Report that the Accused person killed the deceased who was his step-brother. However, the deceased was blamed for having been the aggressor on the material date. He attacked the Accused person first and caused him knife injuries in his eye and cut his fingers which the court noted were now deformed.



25. The Accused person was advanced in age and could not have run fast to evade the deceased. The action of grabbing the knife from the deceased appeared to have been in self-defence as the deceased intended to harm him and perhaps even kill him.
26. If the deceased had not attacked the Accused person, the Accused person may not have found himself in the situation that he now found himself in. He and his family had been ostracised and banished from the community. This meant that they could not participate in social gatherings. The Accused person's houses were also demolished and property seized leaving him without any shelter. The deceased's son had also put an injunction on his land as a result of which it remained idle without being cultivated.
27. It would be a travesty of justice to impose a stiff sentence on him as the deceased started the fight and further, because he was of advanced age, eighty one (81) years, and of ill-health. He was said to be undergoing a surgery soon and hence, a custodial sentence would cause him to suffer unjustifiable hardship and further cause hardship to fellow inmates as they would have to take care of him as he recuperated.
28. This court also took judicial notice that the policy in the County Government of Kakamega where the Accused person would be incarcerated had a policy that sick inmates were responsible for their medical expenses. In view of the impending surgery, it was best that the Accused person serves a non-custodial sentence to avoid hardship in facilitating his treatment.
29. In arriving at this conclusion, this court had due regard to the Sentencing Policy that provides as follows:-

“ 3.3.1. There are two dimensions worth considering. Firstly, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody and whether the conditions in custody would be termed inhuman bearing in mind the offenders' state.¹²⁶ Secondly, whether the offender's condition is one that would cause undue burden on other offenders and/or prison officers taking care of them.

3.3.2 Article 57 of *the Constitution* affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.

Situational Analysis

3.3.3 The Kenya Prisons Service has made a good attempt at addressing the needs of HIV/AIDS positive offenders. However, other offenders with terminal illnesses such as those in need of chemotherapy for cancer treatment; hypertension; diabetes or other chronic illnesses, are not adequately catered for and face undue hardship while in custody.

Policy Directions

3.3.4 When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.



3.3.5 Non-custodial sentences – or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.”

30. Having considered the facts of this case, the Accused person’s 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 non-custodial sentence of three (3) years’ Probation Sentence was suitable and adequate herein purely because the Accused person entered into a Plea Bargain Agreement. If the matter had proceeded as a murder case and he was found to have been the aggressor leading to the deceased’s death, this court would have meted out on him a stiffer sentence that could even have been a custodial sentence irrespective of his advanced age.
31. In view of the nature of non-custodial sentence, the period the Accused person spent in remand while the trial was ongoing was rendered moot.

Disposition

32. Accordingly, it is hereby directed that the Accused person be and is hereby sentenced to three (3) years’ Probation sentence to run from the date of this Sentence.
33. It is hereby directed that the Accused person be and is hereby released from custody forthwith and released to the Probation Office with a view to commencing the Probation Sentence.
34. As the Accused person has since been banished from his community, the Probation Office be and is hereby directed to liaise with him on the issue of his relocation from the ancestral land to ensure that he completes his Probation sentence without being harmed and causing disaffection in his family and the community.
35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 10TH DAY OF JUNE 2025

J. KAMAU
JUDGE

