



**Republic v Kirumi (Criminal Case 99 of 2017)
[2024] KEHC 425 (KLR) (23 January 2024) (Sentence)**

Neutral citation: [2024] KEHC 425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 99 OF 2017
EM MURIITHI, J
JANUARY 23, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOSES KIMATHI KIRUMI ACCUSED

SENTENCE

Conviction

1. The accused was on 17/3/2022 convicted by this court (PJ Otieno J.) of Manslaughter under section 202 as read with 205 of the *Penal Code* following a plea bargain agreement dated 21/5/2021 that reduced the initial charge of Murder to Manslaughter. The Court ordered the filing of a presentence report and victim impact statement and served mention for compliance on 24/5/22.

Sentencing proceedings

2. The sentencing proceedings were protracted on account of requests by the accused for second and third pre-sentence reports urging that the reports did not capture the accused family’s side of the story and they were prejudicial to the accused. The delay in conclusion of the sentencing was occasioned by the said intervening applications by the Accused counsel relating to the Probation officer’s presentence report. Between 17/3/2022 and 13/7/22, the matter did not come court following the transfer of the trial judge. When the present Court took the matter on 13/7/22, the accused, who was out on bond did not attend court. Not knowing that the accused was out on bond the court issued a production order for 5/10/2022. On that date, the court made an order for the filing of the Pre- sentence probation officer’s report. After five mentions when presentence report was not ready, the Presentence report was eventually filed on 25/5/2023 which was negative for non-custodial sentence on the accused, and sentencing proceedings were set for 13/6/2023.



3. On that date on account of absence of counsel for the accused sentencing proceedings were set for 6/7/2023. On this day, Counsel for the accused asked that the Probation Office “files a report after interviewing persons from Kaaga where the accused states he hails from”.
4. The second Probation Officer’s report was filed on 10/8/2023. On that date Counsel for the accused said:

“I pray for another probation Officer to do the report as it is prejudicial in that it is giving information contrary to the position that the accused has accepted manslaughter. It also fails to disclose that the accused has 2 children Eros Karimi and Eric Mwenda.”
5. He also asked that the probation officer be called for cross-examination, and the matter was set for 16/8/2023. When, on cross-examination, it was put to her that she had not captured the fact that accused had a family and that she had included information that the accused did not tell her that he still refutes the killing, the Probation Officer Mrs. Alice Mugambi told the Court that-

“I interviewed the accused’s relatives. I can update my report. As to being remorseful, I explained that he said that he was not interested in reconciliation and that he was fearing for his life. He said he is single.”
6. The Court then directed the Probation Officer to file her updated presentence report by 28/8/23. The Report dated 23/8/2023 having been filed the court then set the matter for mitigation and sentencing proceedings for 20/9/2023, 3/11/2023 and 27/11/2023 when Counsel for the accused was unavailable, and eventually taking place on 18/12 2023 and ruling was reserved.

Mitigation

7. During mitigation and sentencing proceedings, the accused’s counsel, accused and the Counsel for the DPP respectively urged the court as follows:

“18/12/2023

Mr. Mutuma

In mitigation, we urge the court to be lenient in sentence. The accused is remorseful. He did not belabour the court with lengthy hearing. Paragraph 8 of the Plea bargain Agreement indicated affray between deceased and accused as they haggle over 1000 shillings at a drinking den. At some point deceased even grabbed the collar of the accused and they struggled. Accused then let himself free and took a stone with which hit the deceased. There was no prior intention to commit the offence. He is 33 years of age with 2 children in the custody of the mother. Before accused was granted bond for the better part of last year, he was in custody for 2 years before the bond. We ask the court to consider that the death was not intentional. He prays for non-custodial sentence.

Accused

I have 2 children and the mother had left. I was the one who was staying with them. They are in school. After my arrest, I do not know where they are.

Mr. Masila

This is a matter in which there were three pre-sentence reports which are all instigated at the instance of the defence. All the reports were negative for accused’s non- custodial sentence.



I am guided by the report of 23/8/2023. The antecedents of the accused's conduct is not good. He abuses alcohol. The community all said he abuses drugs. He is irresponsible both at home and within the community. All this is in the Presentence report. The victim was a teacher who left behind 2 children. They have suffered emotionally because of the death of their father. If the deceased were alive today he would have been productive in terms of invigilation during examinations and also on the aspect of hoisting of standards to High School.

Sentence of the court needs to take into consideration gravity of the offence. Sentence has maximum of life imprisonment. The death occurred just because the accused failed to refund money in which he was handed over to him by the deceased leading to the accused taking a stone which he then threw at the deceased hitting him on the head and fatally injuring him. The accused requires rehabilitation from his alcoholism - that is one of the objectives of sentencing.

The community needs to feel that he is a changed person when he goes back. He is the offender and should be punished for what he has done and it should not be taken lightly. For deterrence, a severe sentence is necessary. With his rehabilitation while in custody he will be given guidance on how to act in a fit of anger, and he will be able to reintegrate into society upon release. I urge a custodial sentence.

Mr. Mutuma in reply:

The Court should note that the Prosecution is conceding that the deceased was irresponsible. The deceased was also irresponsible as he was at the liquor den.

The Provocation, as per the facts, came from the deceased not the accused. If there was no provocation, the case would not have transpired.

The accused has been in custody for 2 years, then out on bond for another two years and no incident has been presented before the court. The Prosecution agrees that he is a first offender and there is no evidence of like offence by the accused was placed for non-custodial sentence. The two children are aged 8 and 4 should not suffer yet the accused has shown remorse and has reformed for the period he has been in custody.

Court:

Ruling on sentence on 23/1/2024 at 2.30pm.”

Probation Officers' Reports

8. The first Probation officer's report dated 25/5/23 had recommended that the accused is not suitable for noncustodial sentence since he has no known fixed abode and his relatives are not known. On request by counsel for the accused being dissatisfied with the report, a second one was ordered which was filed by a different officer, the in-charge Meru County.

9. This second Probation officer's presentence report filed on 10/8/2023 recommended as follows:

“Summary of findings.

The offender continues to deny the offence committed despite having been convicted by the court.



Again, he has no remorse toward the same. On the other hand, the deceased family is still grieving the loss of their kin and are strongly opposed the possible release on a non-custodial sentence.

The local administration from Mugae did not have record of his offending prior to this incident and no hostilities towards him have been noted or expressed since the offender does not reside in the same locality as the victim's family.

Recommendation.

From the information provided and the observations drawn the offender is not suitable for a noncustodial sentence. He continues to deny committing the offence and has no single grain remorse towards the same despite having been convicted by this honorable court.

Again the offender and his family have not initiated any reconciliation with the deceased person's family.

Report compiled by:

Alice Mugambi

Probation officer

Meru.

Date: 10. 08.2023.”

10. The Probation Officer's Report dated 23/8/2023 recommended a custodial sentence and the Victim Impact Statement in-built in the views of the victim's family called for a sentence commensurate to the offence committed pointing out the impact of the offence that, “they are still suffering psychological and financial distress after the demise of their bread winner”, that the family has been financially constrained especially after the victim's 2 daughters joined the university, as follows:

“Summary.

Your Lordship before court is a 33 years old man from Kiandiu village Runogone location of Imenti-North Sub County. Going by reliable information from the deceased person's relatives, the offender and the deceased person were friends and used to frequent social drinking joints in the area together for drinking sprees. They mostly frequented areas where chang'a was sold. Whereas the deceased person was a teacher at Mumui primary school in Tigania west Sub County (his home area) the offender used to make ballasts for sale in the same area.

Also going by information from the assistant chief of Kianthae sub location and the offender's neighbours, he (offender) has no wife or children of his own. His mother also confirmed the same after the home was visited.

It is alleged that the offender has reportedly been arrested a number of times before for the offences of dealing with illicit brews and once served a jail sentence and other times paid fine upon conviction. He is also said to have been beating his elderly father when drunk. Generally, his past conduct is reportedly not good.

On his part, the offender admits pushing the deceased person to the ground after an altercation over Ksh.1000.00 that he was given by the deceased person to buy Chang'aa. He claims that the victim was hit by a stone on the head after falling down and thus sustained the fatal injuries.



He however did not exhibit any remorse towards the same but said that he committed the offence after he was provoked by the deceased person.

On the other hand, the deceased's family is still grieving the loss of their kin and are strongly opposed to the possible release on a non-custodial sentence.

Recommendation.

Your Lordship, before court is a 33-year-old man who is single and has no children of his own. He is the first born in a family of two siblings. Though he admits pushing the deceased person to the ground after an altercation where he sustained fatal injuries, he does not appear remorseful about the same. Going by information from the area assistant chief and neighbours, the offender has a constrained relationship with his father and the two reportedly fought constantly when the offender got drunk. It is also alleged that the father left home for an unknown place fearing for his life because of the offender's violent behaviour.

The deceased's family members on the other hand said that they continue to suffer and are strongly opposed to the possible release of the offender on a non-custodial sentence. They said that they are still suffering psychological and financial distress after the demise of their breadwinner.

It is thus apparent that the offender is not suitable for a non-custodial sentence.

Alice Mugambi

Probation officer

Meru.

Date: 23. 08.2023.”

11. Of course, the Court is well aware of the guidance of the Court of Appeal in *Kyalo v. R* (2009) KLR 325, 329 on the need to exercise caution not to rely on a Probation Officer's report, which contains statements which have not been tested on cross-examination as the sole basis for its decision, as follows:

“It must be considered that the probation report, though important as it leads to the court into making its mind as to whether to put a person convicted on probation, it is nonetheless composed of allegations some of which had not been tested through cross-examination in court and are matters that the person convicted has not had an opportunity to comment on and as such should not form the only basis for sentencing.”

12. The three-time presentence reports must be considered in the light of this guidance! However, all the three reports were negative for non-custodial sentence. The report of previous charges and convictions for illicit brews were not supported by records of previous convictions. These reports and the statements on the accused's assault and bad relations with his father, and general bad conduct and violent drinking habits, not being backed by previous record of convictions, are really irrelevant and will be disregarded in the spirit of *Kyalo v. R*.



Facts

13. The facts which the accused agreed by virtue of the Plea bargain agreement are set out in paragraph 8 thereof as follows:

“ 8. Had the case gone to trial, the prosecution would have presented evidence sufficient to prove the following facts beyond a reasonable doubt that:-

On the 7th day of December 2017 at around 1800hrs, the deceased, a teacher at Nkilotho primary school requested for some money from his wife Lucy Kendi who gave him Ksh.1 050/= in a one thousand and fifty shillings denomination. The deceased upon receipt pocketed it and left. The same was witnessed by his daughter Brenda Kawira. He headed to the next building where traditional illicit liquor was being sold to quench his thirst. On arrival the same was served on him by the accused person and after consuming the liquor and paying for it he headed back home. On arriving home he realized that he had mistakenly given Ksh1 000/= note instead of Ksh.50/= to the liquor seller (accused) and no refund had been given.

The deceased then accompanied by his wife went out to look for the accused to get back the refund. They found him walking along Ruiru-Isiolo road. The deceased asked for his balance from the accused and the accused denied having the same. The deceased then grabbed the collar of the accused and they struggled with each other. The accused thereafter managed to pull himself off and picked stone which he threw at the deceased hitting him on the rear back side of his head. The deceased fell down and collapsed. Lucy Kendi his wife and Brenda Kawira his 7years old daughter witnessing the same.

The deceased's wife screamed and ran to call a doctor at a nearby Mugae market. The accused who was still standing next to the deceased assisted one Boniface Kinoti in moving the deceased to a verandah in his house and thereafter both left. The medical officer arrived later accompanied by the deceased's wife but found the deceased having already passed on.

A postmortem was later carried out and the cause of death was found to be internal bleeding due to occipital injury.

It is in the light of the above that the accused pleads to the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code.”

14. The court has considered that the offence herein was as result of a confrontation over a one thousand shillings note the deceased had given to the accused to buy alcohol in the mistaken belief that it was a fifty shillings note. Such trivial source of dispute should not result in the killing of any person.
15. This court rejects the accused attempt belatedly to conjure a version of events that the deceased was fatally wounded by a stone he fell on. An accused may, of course, change his plea, any time before sentence. In that event, the case then is reset for trial on the charge facing the accused, in this case the charge of murder contrary to section 203 as read with 204 of the *Penal Code*, since he change of plea would invalidate the plea bargain agreement commuting the charge of murder to one of Manslaughter contrary to section 202 as read with 205 of the *Penal Code*.
16. In this case and at this post-conviction stage of the proceedings where the sentence is based on the facts which were the basis of the conviction, and there being no request to change the plea to one of not guilty - in which case the case would be tried under the original charge for murder - the Court is bound to consider only the facts of the case as admitted in the Plea Bargain Agreement, that it was



the accused who hit the deceased with the stone that killed him. However, the Court significantly, notes that the deceased was the aggressor who, in seeking full refund of his change from the purchase of Chang'aa from the accused, grabbed the accused by his collar leading to a struggle. There was however, no evidence as alluded to by the Counsel for the accused in reply that the accused was drunk at the time, only that he was the seller of the illicit liquor who allegedly short-changed the deceased leading to the confrontation.

17. The plea bargain in 2021 came three years after the arraignment in 2017, and no credit for not belabouring the court with a lengthy trial, as urged by the Counsel for the accused, may be given.

Sentence

18. This court, takes note of the Sentencing Policy Guidelines 2023, Gazette Notice No. 11587 of 1/9/2023, which sets out the objectives of sentencing as follows:

“ 1. 3 Objectives Of Sentencing

1. 3.1 Sentences are imposed to meet the following objectives.

There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.

 - (i) Retribution: To punish the offender for their criminal conduct in a just manner.
 - (ii) Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
 - (iii) Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
 - (iv) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.
 - (v) Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
 - (vi) Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
 - (vii) Reconciliation: To mend the relationship between the offender, the victim and the community.
 - (viii) Reintegration: To facilitate the re-entry of the offender into the society.”
19. The Court considers that, in all the circumstances of this case, a custodial sentence is necessary for the penal objectives of rehabilitation of the accused and deterrence both for him and others to prevent the prevalence of the primitive crime of killing as a means of solving social disputes involving disagreements, whether of trifling or considerable value. A custodial measure will permit the reform of the particular offender and also deter other like-minded potential offenders into a socially responsible person living by and under the law.
20. The Court finds that an imprisonment term of seven (7) years should enable the reform of the 33-year old accused and early release at an age when reformed he will take proper care for his family, guiding



them on civil ways of disagreement/dispute management and resolution, and make meaningful contribution to development of the nation and his immediate society.

21. The Court has confirmed from the Record of the Court Proceedings that the accused was arraigned in court on 13/12/2017 to face the charges herein and subsequently released on bond on 24/6/2019, a period of about one (1) year six (6) months. He was out on bond up to 16/8/2023 when he was remanded awaiting his mitigation and sentencing proceedings. In terms of section 333 (2) of the *Criminal Procedure Code*, the appropriate sentence of seven years should take into account the aggregate period of almost two years (1 year 11 months) that the accused was in remand before his release on bail and after conviction awaiting sentence.

Orders

22. Accordingly, for the reasons set out above, the Court makes the following orders:
1. The accused, having been convicted for Manslaughter contrary to section 202 as read with 205 of the *Penal Code* and, taking into account the pre-trial detention awaiting trial, is sentenced to imprisonment for five (5) years.
 2. The accused shall, therefore, serve a sentence of five (5) years commencing today, the Court having already considered and taken into account the period of pre-trial detention amounting to an aggregate of one (1) year eleven (11) months, in accordance with section 333 (2) of the *Criminal Procedure Code*.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mutuma J. Advocate for the Accused.

Mr. Masila Principal Prosecution Counsel for the DPP.

