



**Republic v Mutua (Criminal Case 7 of 2016)**  
**[2024] KEHC 1312 (KLR) (Crim) (13 February 2024) (Sentence)**

Neutral citation: [2024] KEHC 1312 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**  
**CRIMINAL CASE 7 OF 2016**

**LN MUTENDE, J**

**FEBRUARY 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CHRISTOPHER MULEI MUTUA ..... ACCUSED**

**SENTENCE**

1. Christopher Mulei Mutua, hereinafter “the Accused” was charged with two (2) counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that: On the night of 13<sup>th</sup> and 14<sup>th</sup> January, 2016 at Pipeline area in Embakasi Sub-County within Nairobi County he murdered Jacinta Ndinda Mutua (1<sup>st</sup> deceased).
2. On Count 2, on the said night and at the said place he also murdered J.M. (2<sup>nd</sup> deceased).
3. Having denied the charges the matter was set down for hearing, but later on he entered into a plea bargain agreement with the State which culminated into the accused admitting the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
4. Facts of the case were that the accused and the 1<sup>st</sup> deceased had a relationship between 2013 and 2015 which was blessed with a baby girl, identified as the 2<sup>nd</sup> deceased. They did not cohabit but the 1<sup>st</sup> deceased visited the accused regularly at his house. On the fateful day the 1<sup>st</sup> deceased had visited him with the 2<sup>nd</sup> deceased. On 14<sup>th</sup> January, 2016, the 1<sup>st</sup> deceased cousin, James Mulei received a call from the accused informing him to go and collect the child before she died and the phone went off. He called James Mutunga and the two went to the accused house, the door was locked from inside and was not opened despite several knocks. They went to Embakasi Police Station and later returned with the police who broke the padlock and found the body of a female lying on the floor oozing blood from the



- mouth; on the bed was a baby girl who had died. The bodies were identified by James and Mutunga as those of the accused girlfriend and his child aged five (5) months.
5. The accused phone was switched off and he could not be traced until 16<sup>th</sup> January, 2016 when he was arrested in Wote town in Makueni County where he was detained and later moved to Embakasi Police Station.
  6. A postmortem was conducted and it was confirmed that the cause of death in respect of the 1<sup>st</sup> deceased was head injury due to blunt force trauma, while for the 2<sup>nd</sup> deceased it was manual suffocation.
  7. The turn of events suggest that parties engaged in a reconciliation process where the accused paid Ksh 151,250/= as funeral expenses. At the time of plea bargain, a further agreement had been signed before the area chief on terms that the accused family pays the deceased family Ksh 800,000/= as blood price and compensation for the death of the deceased. The agreement is allegedly executed under Kamba customary law which both families subscribe to.
  8. In mitigation the accused prays for a non-custodial sentence on grounds that: he is a first offender without a criminal record; he is remorseful and has been in custody since 2016; he has learnt his lesson and has also reformed having participated in Christian fellowship and similarly sought counselling; and, that he has acquired paralegal training through the Justice defenders' online program.
  9. Further, he prays that the court finds that the 6 years and 6 months spent in custody is sufficient time and any additional period be served through probation sentence.
  10. The State is not opposed to the accused request for a non-custodial sentence. That both families are agreeable to the option but on condition that the accused pays the balance amount in the agreement. The prosecution prays that the court considers the payment plan reached by the two families.
  11. The Probation Officer, Ms. Abima filed 2 pre-sentence reports, the latest one supports the accused prayer for a non-custodial sentence and that the officer is willing to undertake cognitive behavioral therapy to rehabilitate the accused.
  12. I have considered mitigating factors. The provisions of Section 205 of the Penal Code refer to the relevant punishment for the offence of manslaughter. It is provided that:

Any person who commits the felony of manslaughter is liable to imprisonment for life.
  13. The main issue for determination for this court is whether the family agreement is merited and whether the accused should be discharged on a non-custodial sentence
  14. The court's role in sentencing is firstly, purely discretionary and secondly, it is bound by the law. Any action agreement or engagement taking away this judicial discretion amounts to an illegality.
  15. Plea bargaining agreements are acceptable under Section 137 of the Criminal Procedure Code. Once agreed to settle for a lesser offence and a plea of guilty entered in that respect, the courts sentencing power becomes activated. Submissions made and annexures appended are merely persuasive. Section 329 of the Criminal Procedure Code provides that, the Court may, before passing sentence:

... receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The court in passing sentence shall in addition take into account, among others, the period during which the accused person has been in custody and where necessary, and desirable, the court may in passing sentence take into account a probation officers report...



16. Compensation is recognized under the *Criminal Procedure Code* and the Judiciary Sentencing policy guidelines. However, ideally, compensation should not be available where the offence relates to felonies or aggravated degree.

Section 176 of the *Criminal Procedure Code* then reads:

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

17. The circumstances pose two justice systems, on one hand parties came to court after the accused was arrested and arraigned, on the other hand, they convened under customary practice and allegedly agreed to compensate the loss through some blood price. The latter option cannot oust this court's jurisdiction to sentence the accused. The accused having been arraigned before court, he subjected himself to the jurisdiction of the court and was bound by the statute law until final termination. It is also notable that the agreement to pay blood price has also overstepped the limits of a plea bargain as there can be no agreement on sentence.
18. That notwithstanding, Article 159 enjoins the court to consider them in exercise of its judicial functions. The mechanisms are considered as long as they do not contravene the law.
19. The customary agreement alluded to here is in breach of Article 159(3) to the extent that it is repugnant to justice and morality and contravenes the right to life. Clause 3 referred to above reads as follows:
- (3) Traditional dispute resolution mechanisms shall not be used in a way that—
- a. Contravenes the Bill of Rights;
  - b. Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
  - c. Is inconsistent with this Constitution or any written law.
20. In this matter, the offence committed was grave and two lives were lost. It is an injustice and betrayal to the right if price tags can be attached to life or where blood price can be paid in exchange for freedom. A party must never have the liberty to take away life without suffering the consequences. There is nothing persuasive in such custom. The parties have also not proved the alleged custom they claim to be subject to. The relationship of the signatories to the alleged customary arrangement is not indicated, the parents of the deceased should have been involved.
21. The prosecution is amenable to the accused proposal; however, the main complainant remains to be the republic. Like all serious offences, there are more intervening interests beyond the private desires of parties thus the important role of the court as the custodian of justice. Therefore, adopting the agreement defeats the purpose of protecting the right to life and the call for deterrence, retribution and community protection.
22. The mitigating factors in this case are that the accused is a first offender; he has undergone certain rehabilitation measures, counselling under Safari ya mfungwa program, biblical studies and paralegal training offered at the prisons; and, he is remorseful. On the other hand, the aggravating factors must also be considered.



23. The initial presentencing report of 22<sup>nd</sup> January, 2022 captured the victim’s impact statement. It was captured thus:
- “The 1<sup>st</sup> deceased was aged 26 years and she was employed at a hardware, she went to computer college. It is stated that her death left a void and that the family was devastated. The 2<sup>nd</sup> deceased was 6 months old. The family was not ready to forgive until the offender meets the cultural demands.”
24. In that report, the probation officer recommended a deterrent sentence that would be commensurate with the offending action. It was proposed that customary demands be expedited to avoid animosity from the victim’s family and the community which threatened to avenge the death. That report is contradicted by the latest report, though the dates and circumstances are not too distant. It is notable that the sum of Ksh. 400,000/- that was to be paid in December, 2023 has not been paid it would be questionable if the other sum would be paid as well.
25. The accused pleaded guilty after 6 years following arraignment and at a time when the court had taken the evidence of 10 witnesses. Given the circumstances the accused cannot be said to have saved judicial time.
26. This is a case where the infant suffered from manual suffocation, while the 1<sup>st</sup> deceased death was caused by blunt force trauma. This was murder most brutal. The accused fled from the scene leaving the infant to die. He locked the door and by the time they were rescued both had succumbed to the fatal injuries.
27. It is trite that sentence must be commensurate with the offence. See the case of *Omuse vs R* (2009) KLR 214, where the court held that:
- “..sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence.”
28. Similarly, the court should be alert where the offence has damaging impact on the society and morality. The offence is linked to ongoing domestic disputes between a girlfriend and boyfriend but unfortunately, the woman in that relationship succumbed to physical violence.
29. The accused blames his action on drinking and bad company. However from the injuries it seems the accused had requisite malice aforethought, it is made worse by the strangulation of the 5 month old who was left to die .
30. The accused was also 26 years at the time of the offence. Youth can be a mitigating factor and a ground for leniency so that the accused is not seen to spend his youth years in jail and come out when he is less resourceful.
31. The Judiciary Sentencing Policy Guidelines defines these objectives as follows:-
1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  6. Denunciation: To communicate the community’s condemnation of the criminal conduct.



32. In *R vs. Scott* (2005) NSWCCA 152 Howie, Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

33. The accused has also spent 7 years and 9 months in custody as he was arrested on 22<sup>nd</sup> January, 2016 and was denied bond by this court. The question is whether 7 years is sufficient custodial sentence?. The answer is in the negative. In the result, I sentence the accused to twenty-five (25) years imprisonment on each count, sentences that will run concurrently from the date of arrest, the 22<sup>nd</sup> day of January, 2016.

34. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Tum for ODPP

Accused

Ms. Barasa for Accused

Court Assistant – Habiba/Hadija

