



**Republic v Wainaina (Criminal Case 23 of 2016)  
[2024] KEHC 959 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 959 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 23 OF 2016  
HM NYAGA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JAMES KAMAU WAINAINA ..... ACCUSED**

**RULING**

1. The accused was initially charged with Murder contrary to Section 203 as read with 204 of the [Penal Code](#). The particulars were that on 1<sup>st</sup> of May, 2016 at Molo Farm in Molo District within Nakuru County he murdered James Irungu Ndegwa.
2. When accused was arraigned in Court on 18<sup>th</sup> July, 2016 he pleaded not guilty to the charge. Thereafter seven prosecution witnesses testified in support of its case.
3. On 21<sup>st</sup> February, 2023, the defence sought to engage in a plea bargaining agreement, to which the prosecution consented. Thereafter, the parties entered into a plea bargaining agreement pursuant to the provisions of Section 137A to 137E of the [Criminal Procedure Code](#) (CPC), duly signed by the Prosecution and defence counsel on 4<sup>th</sup> May, 2023 and 5<sup>th</sup> October, 2023 respectively.
4. The Court examined the accused in accordance with Section 137F of the [Criminal Procedure Code](#) and established that the plea bargain was unequivocal and was entered into voluntarily, as provided for under Section 137G. It then accepted the plea agreement.
5. Thereafter the charges were reduced to Manslaughter, contrary to section 202 as read with section 205 of the [Penal Code](#). The elements of the charge were then read out to the accused who pleaded guilty and subsequently admitted the facts as set out in the plea bargain agreement. He was then convicted on his own plea of guilty. The post mortem report was produced as Exhibit No.1.



6. In her sentencing submissions, the State Counsel recommended that he be sentenced to 10 years' imprisonment.
7. The defence counsel, Mr. Ochang, in his submissions and mitigation, pleaded for leniency and stated that the accused is remorseful and has engaged the victim's family who are now uninterested with a custodial sentence. He submitted that for the period the accused has been in custody he has learnt his lesson and some skills. He stated that the accused has a family and was drunk at the time of commission of the offence and accepts responsibility. He urged the Court to be guided by the Sentencing policy to grant the accused a non-custodial sentence.
8. Presentence Report was filed on 23<sup>rd</sup> January, 2024. According to the report, the accused is the last born in a family of five siblings who are all adults living independent lives. His family has good relations among themselves and whenever there is a problem at home they deal with issues in a unified manner. There is no history of criminality in his family and the accused is the first person to be charged. The accused family plans to connect the accused with a counsellor whose speciality is on drugs and substance if released.
9. The accused schooled up to form three then dropped out due to his engagement with bhang and smoking behaviours. His family bought him a motorcycle which he operated within Molo until his time of commission of the offence. He is a father of a boy aged 6 years who stays with his mother at his maternal home in Moto. According to the accused person's family, the accused has been assisting the child with his education. They wish that the accused be given another chance in which they promise to ensure that he is closely supervised and ensure that he stays with his first born sister at her home in Maili Sita which is approximately 60 Kms away from the scene of the crime and thereafter move him to the family land in Olkalau within Nyandarua County after they have gathered funds to enable him be self-reliant. They attribute the commission of the offence to drug use. The local authority opined that if the accused does not desist from drug habits which makes him violent, he may suffer community punishment, an activity that is prevalent in the area. He opined that if the accused is granted non-custodial sentence he should relocate to another area for some time until the victim's family cool down. The report indicates that the accused doesn't seem to understand the seriousness of the offence committed and his involvement in the offence. According to the victim's family, the accused has never sought for reconciliation despite being their neighbour. They also stated that the accused took advantage of the deceased whom he knew was vulnerable with several disabilities. They are not ready to reconcile with the accused's family. They want justice served.
10. The Probation Officer's Report recommended that the accused be placed on probation for three years

### **Analysis & Determination**

11. The only issue for determination is what would constitute an adequate, appropriate and just sentence in the circumstances of this case?
12. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender
- b. being a first offender;



- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

13. The Supreme Court in *Muruatetu Case* (*supra*) appreciated that:

“In Kenya, many Courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” *The 2016 Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

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.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”

14. I have considered the circumstances of the case, the submissions by the State Counsel and the mitigation by the defence counsel.

15. According to the facts of the case, on 1<sup>st</sup> May, 2016, the accused armed himself with a harmer and went to the deceased’s home who was elderly and dumb. Without uttering a word, he attacked the deceased. The relatives who were at the scene tried to stop him but he threatened them. Neighbours who responded to the alarm tied and beat him after they realized the deceased had succumbed to his injuries. The police arrived at the scene and arrested the accused and the deceased’s body was taken to the mortuary.



16. According to the post-mortem report the deceased died as a result of severe head injury with intracranial haemorrhage.
17. In terms of Section 202 as read with Section 205 of the Penal Code, the accused upon being convicted is liable to serve life imprisonment. However, this represents the maximum sentence which is usually reserved for the most aggravated of such cases. I do not consider this to be a case falling in the said category.
18. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses' demeanour. The discretion must however be exercised judiciously. In the persuasive Nigerian case of *African Continents Bank v Nuamani* [1991] NWLI (part 86) 486, it was observed that,

“The exercise of Court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”
19. The mitigating factors that I have taken into consideration are, first, that the accused pleaded guilty before the conclusion of the matter and thus saved the Court on judicial time. Secondly, the accused is a first offender.
20. It is well settled law that a sentence must reflect the accused’s blameworthiness for the offence. See *Omuse v R* (2009) KLR 214, where it was held that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that 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.
21. In this case, there is no evidence that the deceased instigated a fight. According to the facts that were read by the prosecution and which the accused admitted to be true, the accused went to the deceased house and attacked him using a hammer. It is not clear why he did so. However, deceased was elderly and dumb. In addition, he was not armed and as such the accused was not in any imminent danger of attack from the deceased. It was therefore unnecessary for him to use excessive force against the deceased that led to his death. The accused knew or ought to have reasonably known that in using the hammer, he was likely to kill or cause grievous harm to the deceased. His actions were indeed unlawful.
22. According to the victim impact statement (VIS) contained in the pre-sentence report, the Accused Person has never bothered to express remorse to the family of the Deceased or in any way seek reconciliation.
23. The accused does not admit responsibility and in the circumstances, I find a non-custodial sentence as sought by the accused is inappropriate. The accused needs to feel the consequences of the crime he committed. A custodial sentence will rehabilitate him and send a warning to others that it does not pay to take law into one’s hands and that violence do not pay at all.
24. I have looked at cases of similar nature. I would add a rider that no two cases are identical.



25. For instance, the Court of Appeal has made its opinion known over the matter. In *Wanyonyi v The Republic* [1980] KLR 116 (Madan, Law and Potter, JJA) the appellant had been convicted on his own plea of guilty to manslaughter and sentenced to imprisonment for 8 years. The Court held as follows:-

“The sentence for eight years imprisonment can’t be said to be wrong in principle, but we feel that the appellant may have been very much under the influence of the chang’aa he had admittedly consumed on the afternoon of the crime, to the extent of influencing his resentment against the deceased. In the circumstances and having regard to the appellants previous good character and to his long period of detention before trial (fifteen months) we feel that his sentence is indeed heavy and reduce it to one of five years imprisonment.”

26. Similarly, in *Wero v R.* (1983) KLR 349, the same Court (Madan, Kneller JJA. & Chesoni, Ag. JA.) in circumstances almost similar to those herein, the accused had been charged with murder but was convicted for manslaughter and sentenced to eight year’s imprisonment, after he plead guilty to the reduced charge. The Court held that: –

“The sentence of eight year’s imprisonment where the case was on the borderline between murder and manslaughter was legal, appropriate and not manifestly excessive.”

27. In *Andrew v R* (1980) KLR 153, another case of plea of guilty to a reduced charge of manslaughter, the Court of Appeal (Madan & Potter JJA. & Simpson, Ag. JA.) Considered the period of almost one year that the appellant had been in custody and reduced a sentence of imprisonment for eleven years to five years.

28. The Court has to balance between the need to have the accused atone for his actions and the need to exercise leniency, given the circumstances of the case. In this regard I think that the sentenced proposed by the State is appropriate and within the range of sentences meted out in similar cases.

29. Having considered all the circumstances of the case I hereby sentence the accused to five (5) years imprisonment.

30. The above sentence will commence on the date of this ruling. In doing so I have duly considered the time that the accused spent in custody, that is from 17<sup>th</sup> May 2016 to 5<sup>th</sup> October 2018 and from 28<sup>th</sup> January 2021 to date.

31. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

.....

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

C/A Jeniffer

Wanjiku for State

Accused - present

