



**Republic v Kitungi (Criminal Case 8 of 2021)
[2024] KEHC 3722 (KLR) (15 April 2024) (Sentence)**

Neutral citation: [2024] KEHC 3722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 8 OF 2021**

JN KAMAU, J

APRIL 15, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

PATRICK KIGAMI KITUNGI ACCUSED

SENTENCE

1. The Accused person 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). The matter proceeded for trial when the evidence of Rose Mmbone Avedi, Avedi Lundu, Dr Masika Collins Were, Evans Endesia Kibwasi, (Rtd) Sgt Fanuel Injene Omwaka (hereinafter referred to as “PW 1”, “PW 2”, “PW 3”, “PW 4” and “PW 5” respectively”) was taken.
2. The Prosecution closed its case on 22nd June 2023. On 3rd July 2023, this court found that a prima facie case had been established against the Accused person warranting him to be put on his defence. He was accordingly put on his defence. The Defence case was set for 9th October 2023.
3. However, on that date, the Accused person’s counsel informed this court that they would not be proceeding with the defence case as the Accused person wished to enter into a Plea Bargain Agreement. The matter was therefore deferred for Plea Bargain Agreement proceedings on 12th February 2024.
4. On the said date of 12th February 2024, the Accused person entered into a Plea Agreement whereupon this court convicted him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
5. The facts of the case were that on 8th April 2018 at around midnight, the Accused person went to the house of Betty Minage (hereinafter referred to as “the deceased”) and knocked on the door. The deceased was his grandmother. His grandmother asked PW 1 who was his niece to open the door for him. He was served food and shown where to sleep.



6. After about five (5) minutes, he started making noise that he was under attack from people that he could not see. He then told the deceased that PW 1 was his wife. PW 1 feared for her life and ran to PW 2's house. PW 2 was her grandfather.
7. As she was knocking on PW 2's house, they heard screams coming from the deceased's house. They ran to her house but found that the door to her house had been locked from inside. They forced the door open and found her lying on the floor with blood oozing from her head. At the time, the Accused was standing next to the door. When he was asked why he had done it, he said that he had used an axe to cut her head.
8. Neighbours came and rushed her to Mbale Hospital where she died as she was undergoing treatment.
9. The Area Chief came to the scene. The axe was recovered at the scene. The Accused person was escorted to Kilingili Police Station. He was charged with the offence facing him on 19th April 2018.
10. A Postmortem examination was done on the deceased's body on 16th April 2018. The cause of death was ascertained to have been intracranial hemorrhage secondary to trauma. The Postmortem Report dated 16th April 2018 was produced as evidence in this court and marked as Exhibit 1.
11. Having entered into a Plea Agreement, the State urged this court to sentence the Accused person to ten (10) years imprisonment. The Accused person asked this court to sentence him to seven (7) years imprisonment.
12. In his mitigation, the Accused person said that he was remorseful and regretted having committed the offence. He stated that he used to relate well with the deceased and did not intend to kill her. He prayed that the court considers the Pre-Sentence Report and accord him a lenient sentence, preferably, a non-custodial sentence to enable him reconcile with his family.
13. On its part, the Prosecution averred that the deceased's son was still bitter with the Accused person. He informed the court that although he had told the Probation Officer that he had left the matter to the court, he prayed that the Accused person be given a custodial sentence since the families had not reconciled. It added that putting in mind the sentiments of the Probation Officer, sentencing was the sole discretion of the sentencing officer and thus left the matter to court.
14. According to the Pre-Sentence Report of Benard O. Musitia, Probation Officer, Vihiga County that was dated 3rd April 2024 and filed on 4th April 2024, the Accused person was thirty-five (35) years. He attended Mbale Primary School and Chavakali High School for his primary and secondary school education respectively. He proceeded to Kisumu Polytechnic to pursue a diploma course in Business Education and graduated in 2014.
15. He worked as a clerk at Easy Coach Bus Company Bungoma. He was in a relationship with one Rose Barasa and had been blessed with one (1) child. He used to drink spirits but later stopped due to ill health and tough economic times.
16. He told the Probation Officer that he was remorseful about the events that led to the offence and that he understood that killing was abhorred, wrong and unlawful. He stated that he was not in the right frame of mind at the material time. He claimed not to have known what was happening until he was arrested. He felt sad and pained to have been associated with the death of his maternal grandmother which he regretted profusely. He prayed for leniency assuring this court that he would not re-offend as he was undergoing treatment for the psychological ailment at a clinic in Mbale Referral Hospital and was stable.



17. His family regarded him as polite and slow to anger. They pointed out that he related well with them and had not exhibited any signs of aggression that could have turned fatal. They were still reeling from shock. They stated that the incident had brought bad blood between the two (2) families and they looked forward to mending the relationship. They sought for leniency and promised to partake in his rehabilitation.
18. The deceased's son expressed bitterness in losing a loved one. He did not wish to divulge more on the issue and thus left the matter to the court for determination. He did not indicate any commitment towards reconciliation.
19. The Local Administration regarded the Accused person on a positive light. According to them, he was sociable and honest and they had not handled any case pitting him against another person. However, they pointed out that there was likelihood of mental disturbance on the part of the Accused person that may have affected and pushed him to commit the offence. A member of the community pointed out that there were occasional incidences where his thought process appeared to have been incoherent and that during such times his actions, were unpredictable. The Local Administration did not raise any security concern pertaining his likelihood return to the society.
20. The Probation Officer asserted that in the Luhya community, the property of a person who killed another was destroyed in a tradition known as "khusoola". He pointed out that the Accused person's property was not destroyed.
21. He therefore opined that a community-based mode of rehabilitation would accord the Accused person a chance to undergo rehabilitation as well as room for cleansing as was practiced by the Luhya community or otherwise engage the church in reconciliation. He recommended that in the event the court was inclined to consider a non-custodial sanction, then a probation sentence for a period of three (3) years would be preferable.
22. 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.
23. 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.
24. 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.
25. Killing someone is an abomination in the society and that explains why the deceased's son did not want the Accused person released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.
26. Although the Accused person had never been charged with any offence prior to the incident herein and had sought leniency, the nature of the injuries that the deceased sustained showed that she must have died a harrowing death as he hit and cut her with an axe on the head after she offered him food and a place to lay his head that material night.



27. It did appear from the observations of the Local Administration and a member of the community that there were times that the Accused person may not have been in a proper state of mind which they averred could have explained why he committed the offence.
28. At the time of entering the Plea Bargain Agreement, he informed the court that he occasionally had mental issues. His case was that at the time he committed the offence, he was being attacked by imaginary people. Unfortunately, he did not adduce any documentation of his prior mental illness or that he was mentally unstable at the material time or that he was currently on treatment at Mbale Hospital.
29. The onus was on him to have provided pertinent information relating to his mental instability to enable this court make an informed decision. Notably, the Probation Officer had indicated in his Pre-Sentence report that the Accused person was said to have been in a stable psychological condition and in good health.
30. Having failed to discharge this burden, this court had no option but to treat him as a person who was aware of what he was doing at the material time. It is for that reason that this court found and held that the non-custodial sentence that the Probation Officer had recommended herein was not suitable herein.
31. Taking into consideration the facts of this case, the recommendations of the Probation Officer, the Accused person's mitigation and the Prosecution's response thereto and bearing in mind that this court has the sole discretion to determine the nature and extent of sentence to mete out to the Accused person herein, this court came to the firm conclusion that a sentence of ten (10) years imprisonment would be suitable and adequate herein purely because he entered into a Plea Bargain Agreement. If the matter had proceeded as a murder case, this court would have meted out on him a stiffer sentence.
32. 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).
33. 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).
34. 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.”



35. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.
36. The Accused person took plea on 2nd May 2018 and was released on bond on 4th June 2019. He was convicted on 12th February 2024 when his bond was cancelled and he was committed to custody while awaiting his sentence. The periods between 2nd May 2018 and 4th June 2019 and 12th February 2024 and 14th April 2024 therefore ought to be taken into account at the time his sentence is being computed.

Disposition

37. Accordingly, it is hereby directed that the Accused person be and is hereby sentenced to ten (10) years imprisonment to run from the date of this Sentence.
38. For the avoidance of doubt, the periods between 2nd May 2018 and 4th June 2019 and 12th February 2024 and 14th April 2024 be and are hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
39. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 15TH DAY OF APRIL 2024

J. KAMAU
JUDGE

