



**Republic v Mayende & 4 others (Criminal Case 6 of 2021)
[2024] KEHC 4677 (KLR) (15 April 2024) (Sentence)**

Neutral citation: [2024] KEHC 4677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 6 OF 2021**

JN KAMAU, J

APRIL 15, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ZABLON ANYULU MAYENDE 1ST ACCUSED

ZEDEKIAH AKAKA AMACHI 2ND ACCUSED

JOSEPH ASITIBA OTENYO ALIAS SMATI 3RD ACCUSED

WYCLIFFE ANG'ANA AMACHI ALIAS NEHEMIAH SIBO 4TH ACCUSED

SILAS MUGUNA ABISAI 5TH ACCUSED

SENTENCE

1. This court delivered its Judgment herein on 29th January 2024. The 1st, 2nd, 3rd, 4th and 5th Accused persons herein were found guilty of the offence of murder of Paul Muyera Barnaba contrary to Section 203 as read with Section 204 of the *Penal Code* Cap (63) Laws of Kenya and were convicted in line with Section 215 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
2. In his mitigation, the 1st Accused person told this court that he was a Community Policing Officer and had a great role to play in the society which showed that he loathed criminal activities. He asserted that at the material time, he joined a mob and failed to call for security assistance, which showed that he was shocked by the prevailing circumstances.
3. He pointed out that he had a young family that looked up to him and that he should be given an opportunity to guide his children. He therefore urged this court to mete upon him a lenient non-custodial sentence despite the Probation Officer having indicated that he was not suitable for consideration for a non-custodial sentence because such opinion was not binding on this court.



4. On his part, the 2nd Accused person adopted the mitigation of the 1st Accused person in its entirety. He added that the Pre-Sentence Report showed that he had been a person of good character. He averred that he was beneficial to the society prior to this incident and that the deceased's family must have benefited from his positive track record.
5. He stated that mob influence had no medical cure as it was something that happened at the spur of the moment and that it was like a spark of fire that led people to act without thinking.
6. He pointed out that the deceased was a thorn in people's flesh and had no respect for the law and that at one time, he even slapped the Chief. He asserted that although the deceased's family was bitter, their bitterness would subside with time. He contended that he and the deceased were family members and that being given a custodial sentence would only cause the family double jeopardy and bitterness by his family thus perpetuating suffering by his family.
7. He urged this court to mete upon him a non-custodial sentence to give him time to reconcile with the deceased's family. It was his averment that sentencing was intended to have a correctional effect.
8. The 3rd Accused person adopted the mitigation of the 1st and 2nd Accused persons. He stated that although he did not have any role in the society, he had no previous criminal records. He said that the Pre-Sentence Report had shown him as having been remorseful. He said that he was remorseful deep down. He stated that he was a relative to the deceased and they should be allowed to heal. He urged this court to mete out on him a lenient non-custodial sentence so that he could be gainfully engaged.
9. The 4th Accused person also adopted the mitigation of the 1st, 2nd and 3rd Accused persons. He stated that the relationship between his family and that of the deceased was strained and that he did not wish the relationship to be strained further.
10. He pointed out that there were times a person acts unreasonably and later regret. He said the action was spontaneous and influenced by a mob. He was emphatic that had the deceased not been involved in the incident that material night, nothing would have happened to anybody.
11. He agreed with the Probation Officer that a non-custodial sentence was appropriate in his case so as to promote reconciliation.
12. The 5th Accused person adopted the mitigation of the 1st, 2nd, 3rd and 4th Accused persons. He said that at the time the offence was committed, he was drunk, a fact that he stated had come out in the Pre-Sentence Report. He blamed substance abuse and asserted that had he been left on his own, he would not have committed the offence. He stated that he was a fit person for rehabilitation and confining him to prison would not help him. He urged this court to mete upon him a lenient non-custodial sentence in a rehabilitation centre under the supervision of an officer in the rehabilitation centre.
13. On its part, the Prosecution urged this court to mete out custodial sentences on all the Accused persons as they were not remorseful as they still denied the charges even after being convicted. It averred that they had not sought for forgiveness from the deceased's family who were their relatives. It pointed out that the deceased's family was still very bitter about the incident herein.
14. It contended that although sentencing was for correctional purposes, a custodial sentence would be a deterrent to the Accused persons and others in the society to commit a similar offence in future and to give them an opportunity to be rehabilitated in prison. It asked this court to dispense justice as the deceased's family had lost a loved one.
15. According to the Pre-Sentence Report dated 12th March 2024 and filed on 13th March 2024, by Benard O. Musitia, Pricipal Probation Officer Vihiga, the 1st Accused person was fifty (50) years old. He was



- born in 1974 at Itonye village. He studied at Esumba Primary School and Esibakala Primary School for his primary education but did not proceed to secondary education due to lack of school fees. He later moved to Nairobi where he learned carpentry through apprenticeship. He engaged in contractual casual jobs and later returned home to attend to his ailing father in 1997.
16. He was blessed with one (1) child in his first marriage. He remarried. He worked with Community Policing at Ipali location. He was a Christian who attended church of God Itonye and had no history of criminal record. He was thus a first offender.
 17. He was still in denial even after conviction and prayed for a non-custodial sentence to be able to provide for his family. His family described him as a polite person who did not cause trouble. They pointed out that he was a responsible person and a useful member of the family and community. They prayed that the court grant him a lenient sentence.
 18. The secondary victims decried the death of their kin whom they regarded as helpful at home. The deceased's grandfather noted that the 1st Accused person was their relative but did not seek forgiveness for the offence even after he had requested for a discussion concerning the matter. It was their opinion that he be imprisoned for the heinous act that took the life of their loved one.
 19. The Local Administration pointed out that the 1st Accused person was a law-abiding citizen who worked as a volunteer enforcement officer in the County Government of Vihiga at Luanda Town. It asked that he be given chance in community rehabilitation for him to continue being part of the community.
 20. The Pre-Sentence Report showed that the incident leading to the deceased's death could be traced to the 1st Accused person's home. He conceded that he could have sought intervention of the security agencies given that he was a volunteer in the security sector. Thus, he concluded that a non-custodial sentence would not be feasible in the circumstances.
 21. The 2nd Accused person was thirty-six (36) years old, having been born in 1989. He attended Esibakala Primary School for his pre-primary and primary education but dropped out of school while in class five (5) due to financial constraints. He remained at home assisting his parents in performing domestic chores as well as helping on the farm. In his adulthood, he had been doing farming activities through leasing land for his livelihood. He practiced horticulture and crop production both for domestic and commercial purposes.
 22. He had married twice and was blessed with one (1) child in each of the marriages. He did not engage in drugs and substance abuse and was healthy and spent time relaxing at home. He had no assigned role in the community other than the horticulture work and church engagements that united him with members of the community. His peers and circle of friends were persons of unquestionable character in the community. His character and behavior conformed to social norms and expectations.
 23. He denied having committed the offence even after his conviction. He said that on the material day he had gone out for his casual work engagements. He sought for leniency so as to get a chance to provide for his family. His family pointed out that he was a responsible member of the family who had not engaged in any violent activity and that his arrest and conviction hit them by surprise as he had been brought up well and had heeded to the religious teachings. They sought for a lenient sentence that would accord him the chance to return home to provide for his family.
 24. The secondary victim reported that the 2nd Accused person and his three (3) other Co-Accused persons were relatives to the deceased who had related well but after the incident, the relationship was strained. He asked that the 2nd Accused person be sentenced in tandem with the law.



25. The Local Administration vouched for the 2nd Accused person being given a lenient sentence. It opined that he was honest, hardworking and responsible and had not appeared before any of them for any accusation or engagement in criminal activities. It was categorical that he was not at risk of being harmed by the community since he related well with everyone.
26. On his part, the Probation Officer concluded that the 2nd Accused person's failure to take responsibility and consistently denying any involvement made it difficult to develop any meaningful intervention strategy for community-based mode of rehabilitation. He opined that a non-custodial sentence herein would not be tenable.
27. The 3rd Accused person was forty-seven (47) years old, having been born in 1977. He attended Esibakala Primary School for his primary education but did not proceed to secondary education due to financial constraints. He stayed at home briefly before traveling to Nairobi where he stayed for two (2) years engaging in casual construction jobs. He later returned home and engaged in timber milling for his livelihood. He married twice and was blessed with four (4) children. He engaged in alcohol consumption with his friends and would attend church occasionally.
28. He denied having committed the offence despite being convicted of the same. He sought for leniency so as to get a chance to provide for his family. His family opined that he was a responsible member of the family who had not engaged in any criminal activity previously and that they were shocked of his arrest and conviction of the offence herein. They sought for a lenient sentence to enable him return home and provide for his family.
29. The secondary victims pointed out that they had reached out for reconciliation with no success. They reported that the deceased had been supporting the home in performing domestic chores and his loss was unbearable. They urged the court to sentence the 3rd Accused person in tandem with the law.
30. The Local Administration vouched for him being given a lenient sentence. It opined that he was sociable, responsible and a law-abiding citizen who had not appeared before any of them for any accusation or having been accused of engaging in criminal activities.
31. On his part, the Probation Officer concluded that the 3rd Accused person's failure to take responsibility and consistently denying any involvement made it difficult to develop any meaningful intervention strategy for community-based mode of rehabilitation. He opined that a non-custodial sentence herein would not be tenable.
32. The 4th Accused person was thirty-four (34) years old. He was born in 1989. He attended Esibakala Primary School for pre-primary and primary education but dropped out in class eight (8) due to financial constraints. Thereafter, he remained at home assisting his parents in performing domestic chores as well as helping on the farm. He later moved to Kisumu where he engaged in small scale business while staying with his brother Joseph.
33. He trained in electrical wiring through apprenticeship and later enrolled at Nzalwa Vocational Training Centre where he intended to register for the National Industrial Training Institute examinations for a Trade Test certificate in the course. He was married and was blessed with four (4) children. He did not engage in drugs and substance abuse and his circle of friends were forthright persons.
34. He denied having committed the offence despite having been convicted. He prayed for leniency from the court so as to get a chance to provide for his family. His family described him as a responsible member of the family who had not engaged in any violent activity. They sought for a lenient sentence that would accord him the chance to take care of his family.



35. The secondary victims pointed out that they had reached out for reconciliation with no success. They asserted that since the matter was already in the hands of the law, they could not engage with him. They opined that the 4th Accused person ought to be sentenced in tandem with the law.
36. The Local Administration vouched for him to be given a lenient sentence. It opined that he was sociable, responsible and law-abiding citizen who had not appeared before any of them as having been accused of engaging in unlawful activities, thus, he was not at risk of harm from the community since he related well with them.
37. In his conclusion, the Probation Officer opined that the court could consider a non-custodial sentence on his part since it was reported that he attended the funeral of the deceased prior to his arrest thus his risk and needs assessment was rated as low.
38. The 5th Accused person was forty-one (41) years old. He was born in the year 1983. He attended Esibila Primary School and Ebuyalo Primary School for his primary education and joined Emusire High School for his secondary education where he dropped out while at Form Three (3) due to financial constraints. He stayed at home for some time before proceeding to Nairobi where he trained and acquired skills in catering as a chef and painter through apprenticeship. He married but later separated. He was blessed with six (6) children. He engaged in drugs and substance abuse that had impacted negatively on his behavior. He complained of suffering from ulcers but which he had managed through medication.
39. He denied the offence despite his conviction and prayed for a lenient sentence citing the predicaments of his helpless children. He urged the court to forgive him. His family pleaded for a lenient sentence as they were apprehensive of the well being of his children. They pointed out that their kin had never engaged in a criminal activity and that his arrest and conviction found them by surprise.
40. The secondary victims decried the death of the deceased who was helpful at home and that his death left a gap that could not be filled. They pointed out that the 5th Accused person did not seek their forgiveness until the matter proceeded to the authorities. They expressed their negative stance to the 5th Accused person and opined that he be sentenced according to the law.
41. The Local Administration reported that the 5th Accused person was to blame for the offence in that he was spotted having a metal rod which he used to hit the deceased. It stated that his conduct was questionable as he was notorious and violent. He was rude and had many land cases reported against him. It asserted that his drug and substance abuse made him a threat in the community and pre-disposed him to re-offending. It was hesitant to receive him back in the community and taking part in his rehabilitation.
42. The Probation Officer concluded that a non-custodial sentence would not be feasible in view of the strain between the 5th Accused person and the actors in community rehabilitation. He opined that the role of these actors was essential and that if they had no confidence in an accused person, then community based sanctions were bound to fail.
43. 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.



44. 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.
45. 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.
46. After serving the aforesaid sentence, the offenders are expected to rejoin the society as reformed persons having learnt their lesson and others learning from them.
47. Killing someone is an abomination in the society and that explains why the Accused persons' families and community did not want the 1st, 2nd, 3rd and 5th Accused persons released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.
48. This court looked at the Postmortem Report and noted that the cause of the deceased's death was severe head injury secondary to blunt force trauma following assault. The nature of the injuries that he sustained showed the malice that the 1st, 2nd, 3rd, 4th and 5th Accused persons had. It was evidence of their intention of killing him.
49. Although they were first time offenders with no previous records, the Probation Officer did not recommend a non-custodial sentence for the 1st, 2nd, 3rd and 5th Accused persons in view of the negative Pre-Sentence Report. He only recommended a non-custodial sentence for the 4th Accused person because he attended the deceased's funeral.
50. The evidence that was adduced during trial showed that on the material date, the 1st, 2nd, 3rd, 4th and 5th Accused persons were armed with crude weapons which they used to beat the deceased who had been accused of having stolen two (2) cockerels from the 1st Accused person's house. It was immaterial who hit the deceased. The 1st, 2nd, 3rd, 4th and 5th Accused persons were together from the time they removed him from his house until the time PW 6 begged them not to kill him in his home. They all acted in concert with each other as a result of which the injuries that were inflicted on him led to his death.
51. The 1st Accused person actually acted recklessly by taking the law into his hands despite having been a Community Policing Officer. Just as PW 1 requested, he ought to have taken the deceased to the police station. He thus abused his position of a Community Policing Officer by influencing others to beat the deceased mercilessly.
52. The fact that the 4th Accused person attended the deceased's funeral did not warrant him being given a non-custodial sentence. At the material time he was armed with a panga and participated in beating the deceased. It was for that reason that this court disagreed with the recommendation of the Probation Officer that this court metes out a non-custodial sentence on him.
53. The 1st, 2nd, 3rd, 4th and 5th Accused persons acted as the accusers, the jurors and the judges and executed the deceased. This was against the rules of natural justice. It was immaterial that the deceased was a thorn in the flesh of the society. The fact that he was a trouble maker did not mean that he deserved to be lynched by a mob on an allegation of stealing two (2) cockerel. He ought to have been processed through the judicial system to ascertain the truthfulness or otherwise of the allegations that had been levelled against him by the 1st, 2nd, 3rd, 4th and 5th Accused persons.
54. Having considered the facts of this case, the 1st, 2nd, 3rd, 4th and 5th Accused persons' mitigation, the Prosecution's response thereto, the Pre-Sentence Report and bearing in mind that sentencing was the



- sole discretion of the court and that it could mete out on the 1st, 2nd, 3rd, 4th and 5th Accused persons a death sentence for the offence of murder that was prescribed under Section 204 of the [Penal Code](#) Cap 63 (Laws of Kenya), this court came to the firm conclusion that a sentence of eighteen (18) years imprisonment for each of the Accused persons was suitable and adequate herein.
55. If the 1st, 2nd, 3rd, 4th and 5th Accused persons had entered into a Plea Bargain Agreement, this court may have considered meting out on them a less stiff sentence for having saved the court the time to hear the case. This they did not do as the matter took almost three (3) years to hear and determine this case to its conclusion.
56. Going further, this court was mandated to consider any period the 1st, 2nd, 3rd, 4th and 5th Accused persons spent in remand while their trial was on going in line with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
57. 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).
58. 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.”
59. The requirement under Section 333(2) of the [Criminal Procedure Code](#) was restated by the Court of Appeal in [Ahamad Abolfathi Mohammed & Another vs Republic](#) [2018] eKLR.
60. The 1st, 2nd, 3rd, 4th and 5th Accused persons were first arraigned in court on 8th February 2021. The 1st, 2nd, 3rd, 4th Accused person was released on bond/bail on 11th February 2021. The 5th Accused person was released on bond/bail on 15th February 2021. The 1st, 2nd, 3rd, 4th and 5th Accused persons were convicted on 29th January 2024. The period between 8th February 2021 and 11th February 2021 and 29th January 2024 and 14th April 2024 ought to be taken into consideration while computing the sentence of the 1st, 2nd, 3rd, and 4th Accused persons. The period between 8th February 2021 and 15th February 2021 and 29th January 2024 and 14th April 2024 ought to be taken into consideration while computing the sentence of the 5th Accused person.

Disposition

61. Accordingly, for the foregoing reasons, the Court having in its judgment convicted the offenders for the offence of murder contrary to Section 203 as read with 204 of the [Penal Code](#) Cap 63 (Laws of Kenya), it is hereby directed that the 1st, 2nd, 3rd, 4th and 5th Accused persons be and are hereby sentenced to eighteen (18) years imprisonment each to run from the date of this Sentence.



62. For the avoidance of doubt, the period the 1st, 2nd, 3rd and 4th Accused persons spent from when they were arraigned in court on 8th February 2021 until 11th February 2021 when they were released on bond and the period the 5th Accused person spent from when he was arraigned in court on 8th February 2021 until 15th February 2021 and the period between 29th January 2024 and 14th April 2024 in respect of the 1st, 2nd, 3rd, 4th and 5th Accused persons be and is hereby taken into account while computing their sentences in line with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).

63. Orders accordingly.

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

J. KAMAU

JUDGE

