



**Republic v Etiang (Criminal Case E008 of 2022) [2024] KEHC 4827 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE E008 OF 2022  
RN NYAKUNDI, J**

**MAY 9, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MUSEE MOSES ETIANG ..... ACCUSED**

**RULING**

1. The accused person faces a charge of murder contrary to section 203 and 204 of the *Penal code*, but the charge was reduced to manslaughter pursuant to a plea bargain agreement made on April 4, 2024. A plea of guilty was entered by the court on the said charge of manslaughter after the court accepted the plea bargain agreement in line with the provisions of section 137H of the *Criminal Procedure Code*. The court was equally satisfied with factual basis and the accused’s competence to voluntarily enter into such an agreement.
2. The prosecution was represented by learned counsel Mr. Kakoi while Mr. Ebenyo, represented the accused person. According to the accused’s submissions, he is of a young age and he lives with his wife and children in Kalokol Ward within Turkana County. Due to his young age, counsel submitted that he could be a great candidate of a non-custodial sentence.
3. It was further submitted for the accused person that he has been in custody for more than three (3) years. That he has expressed remorse for his actions and regretful for the life lost. He is now a reformed and responsible citizen ready to reintegrate back to his community in Kalokol Ward who are ready for him to be part of it.
4. Learned counsel submitted that in the plea bargain agreement, the prosecution proposed not less than a ten-year sentence but he urged the court to balance the proposals of the prosecution against the circumstances of this case and in need be sentence the accused person to a less than five-year sentence keeping in mind that the accused person has been in custody for more than three (3) years.



5. I have had sight of the Pre-sentence report which was filed on April 20, 2024 indicating that the accused is remorseful and he seeks forgiveness from the court. The report concluded that the victim's family could not be traced but the area chief said that the community will not be safe for now for the offender due to the gravity of the offence.
6. The offence of manslaughter is punishable by a maximum sentence of life imprisonment under section 205 of the penal code. The sentence is however reserved for serious cases. In the Plea bargain agreement, the prosecution proposed a sentence of not more than 15 years and not less than 10 years.
7. Resolution  

In determining the appropriate sentence in this case, I am guided by the predominant principles in *Kigula v Republic* (2009) UGSC 6 at p 41, the Ugandan court of Appeal said: “ A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But, the court is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases. In our view, this compromises the principle of fair trial.”
8. The appropriate sentence can only be achieved when this court considers the objectives of sentencing in totality and the guideline laid out in the “Muruatetu case”. The Judiciary sentencing policy guidelines are instructive. They are not elaborate as to sentences involving manslaughter, but they give a roadmap which courts ought to consider in coming up with an appropriate sentence.
9. The sentencing objectives in Kenya have been captured in the *Sentencing Guidelines 2023* to be the following: -
  - a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
  - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - e. Community protection: to protect the community by incapacitating the offender.
  - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
  - g. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - h. Reintegration: To facilitate the re-entry of the offender into the society.

Additionally, in the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- “(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.”

10. The facts leading to the offence in question are that the accused and deceased are fishermen on Lake Turkana. They normally work together on Josphine Akure’s boat. On May 9, 2022 they had come from the lake after fishing overnight. At around 9PM, the accused tried to forcefully take a radio from Alex Erupe Lodomu but he resisted and a fight arose between them. In the course of the fight, the deceased came and separated them. Josphine Akure came and took the accused to her house. The deceased followed them to the house. In the house, the accused attacked the deceased causing him severe injuries and he died on the spot.
11. It is in our criminal justice system that culpable homicide which would otherwise be murder may be reduced to manslaughter if the person who causes the death does so in the heat of passion caused by sudden provocation as the facts in the instant case does imply. This the law as provided for under section 207 & 208 of the *Penal Code*. Where on any such trial from the facts of the prosecution case, in initiating an indictment against a suspect under article 157 (6) & (7) of the *Constitution* it appears that the Act or omission causing death does not amount to murder, but does amount to manslaughter the judge presiding over that session may admit the information for a lesser offence under section 202 of the Penal Code. Here in section 207 & 208 the test is that of an ordinary man within the locality in which the incident occurred against whose power of self control in the shoes of that accused person facing the crime in question has to be tested to establish manifestation of provocation. There is no evidence in this case that the accused /convict was mentally deficient because his action of stabbing the deceased fail short of the test of a reasonable man. The view which finds favour with the case for the prosecution is excessive use of a dangerous weapon in an uncalled for circumstances. It is at once obvious that the victim did not have to die from a simple Act of declining the accompany the accused to the lake to continue fishing to enable them make more money. It was worth noting that the use of a knife targeting the head of the victim was a dangerous act on the part of the accused. So what does all this amount to? In broad terms Dr. Kidali on May 13, 2022 opined as follows: That the cause of death of the deceased was severe head injury with intracerebral Haemorrhage and Frontal subdural Haematoma. Whether the accused/convict pleads guilty to charge or his or her innocence is a subject of a full trial on the merits the centrality of proportionality in sentencing regardless of its purported objective a sentence must be imposed in the context of a just and fair punishment in relation to the crime and the offender does not offend the prohibition of cruel, inhuman, and degrading punishment. Proportionality continues to be recognized as the paramount principle in sentencing and is generally regarded as cutting across all other justifications of punishment.
12. Code. Here in section 207 & 208 the test is that of an ordinary man within the locality in which the incident occurred against whose power of self control in the shoes of that accused person facing the crime in question has to be tested to establish manifestation of provocation. There is no evidence in this case that the accused /convict was mentally deficient because his action of stabbing the deceased fail short of the test of a reasonable man. The view which finds favour with the case for the prosecution is excessive use of a dangerous weapon in an uncalled for circumstances. It is at once obvious that the victim did not have to die from a simple Act of declining the accompany the accused to the lake to continue fishing to enable them make more money. It was worth noting that the use of a knife targeting the head of the victim was a dangerous act on the part of the accused. So what does all this amount to? In broad terms Dr. Kidali on May 13, 2022 opined as follows: That the cause of death of the deceased was severe head injury with intracerebral Haemorrhage and Frontal subdural Haematoma. Whether the accused/convict pleads guilty to charge or his or her innocence is a subject of a full trial on the merits the centrality of proportionality in sentencing regardless of its purported objective a sentence must be imposed in the context of a just and fair punishment in relation to the crime and the offender does not offend the prohibition of cruel, inhuman, and degrading punishment. Proportionality continues to be recognized as the paramount principle in sentencing and is generally regarded as cutting across all other justifications of punishment.
13. In *V M K v Republic* [2015] eKLR ten years in jail was given for manslaughter. The trend has been that when the accused person uses a dangerous weapon in committing the crime, the court is likely to sentence the accused to life imprisonment. To my mind the accused person herein was so determined to cause harm to the deceased for reasons that he followed him to his house even after they were separated.



The circumstances do not allow a non-custodial sentence in my view and I am of the position that the accused person will benefit from a custodial sentence for purposes of rehabilitation.

14. I have considered the sentencing objectives in totality. The accused person is relatively a young person and it was established from the pre-sentence report that the community is still not safe in the meantime. In that regard, I find a custodial sentence to be appropriate and hereby sentence him to 7 years imprisonment.
15. According to section 333(2) of the *Criminal Procedure Code*, the court is under an obligation to consider the time spent by the accused person in custody, until one is convicted. I am conscious of the said period and the same has been factored in the final sentence. The accused is hereby sentenced to serve 7 years imprisonment. 14 days Right of Appeal
16. Orders accordingly.

**DATED AND SIGNED AT LODWAR THIS 9<sup>TH</sup> DAY OF MAY, 2024**

**In the Presence:**

Mr. Yusuf for the State

Accused

.....

**R. NYAKUNDI**

**JUDGE**

