



**Republic v Kurere & 2 others (Criminal Case 24 of 2023)
[2024] KEHC 5076 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL CASE 24 OF 2023**

RB NGETICH, J

MAY 9, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

SAMSON KORIR KURERE 1ST ACCUSED

RAEL SOTE 2ND ACCUSED

FRANCIS TANUI 3RD ACCUSED

RULING

1. The accused persons were jointly charged with the offence of murder contrary to section 203 as read with Section 204 of the [penal code](#). The particulars were that: On the 23rd day of May 2014, at Oldepes village in Mogotio District within Baringo County, jointly with others not before court murdered Christine Jemeli Koech alias Kabon Ngotoi.
2. All the accused persons denied the charge and the matter was set down for trial and by judgement delivered on the 14th day of March, 2024, Accused 1, Accused 2 and Accused 4 guilty of the offence of manslaughter contrary to section 202 as read with Section 205 of the [Penal Code](#) and convicted accordingly.
3. Before mitigation this court called for a pre-sentence report to be prepared and filed.

1st Accused’s Presentence Report

4. From the report Accused 1 Samson Kipkorir Kurere is aged 63 years old. He went to school up to class 6 when he dropped out due to ignorance on the importance of education. Once out of school, he engaged himself in livestock herding as well as subsistence farming. Later in life, he was employed as a watchman at Oldebess primary school for a period of about 4 years. He reverted back to farming



- activities until the time of his arrest. He is married to the 2nd accused and have 9 children. Accused 1 regrets the circumstances that lead to the death of the deceased. He says he did not intend to caused deceased's death and remorseful and pleads with the court for leniency.
5. The victim's family expressed bitterness towards the Accused 1 for contributing to the death of their kin. They stated that they were not ready to forgive him he has not shown any willingness to seek forgiveness and reconciliation for the entire time that they had been out on bond. They further said the victim's husband died before resolution of the matter and they demanded for justice for their kin.
 6. The accused's family stated there is strained relationship between the two families since the incidence occurred. They urged this court to be lenient with Accused since his wife is also in custody for the same offence.
 7. The area administrators indicated that the late victim and accused's family are closely related and confirmed that no reconciliatory between the two families have been made and there is bitterness on the part of the late victim's relatives. It is their view that reconciliation steps be taken for peaceful coexistence
 8. From the report the accused person is an elderly man who is aged 63 years. He is not able to explain why his relatives have not taken the initiative of reaching out to family of the victim late victim to seek for forgiveness and reconciliation. It is the probation officer's opinion that the home environment is currently not conducive for reintegration of the accused person.

2nd Accused's Pre-sentence Report

9. Accused 2 Rael Sote aged 62 years old is the wife of Accused 1 and are both blessed with 9 children all of whom are of age and independent except the last born who is currently in form four. The late victim was the wife to her brother. Accused1 had 2's family members suspected that the deceased bewitched their son Duncan Kiprono who was sick and summoned the deceased and commanded her to treat the son after locking her in their house. After two hours, she was removed from the house and beaten. The injuries inflicted on the deceased led to her death.
10. Accused 2 regrets her action and is very remorseful. She prays for forgiveness from this court and prays for leniency in sentencing and look forward seek forgiveness from victim's family.
11. The victim's family members confirmed that Accused 2 is their aunt and indicated that her family have not sought forgiveness from them and stated that they were not ready to forgive them or reconcile as they are still in pain and they lost their father also in 2022 in a similar way. The victim's children said they have gone through very tough times with some of the children dropping out of school as there is no one to take care of them. They object non-custodial sentence and wished that the court punish her for her mistake.
12. Community members interviewed talked good of Accused 2. They said she has no criminal history and they have forgiven her. The area administrator confirmed that Accused 2 has good ties with the community and are ready to accept her back. He confirmed that victim's family and the accused were all relatives but have no good communication.
13. The social inquiry revealed that she has no other record of criminality and interacted well in the community. Those who were interviewed indicated that the accused had good community ties and her family too. It was also revealed that the family had a land matter that was overdue and which could have escalated to other issues where the accused's family believed that the victim bewitched their son and one thing led to another.



14. The victim's family had no room for forgiveness and are still bitter with the accused who is their aunt. The victim's children categorically stated that they were not ready for a reconciliation and wished that the law take its course as the death of their mother has costed them a lot and are not ready to re-visit the matter.
15. The area administrator stated that the accused was a well-known person to him who had no other criminal records. She has good community ties with members of her area who have no issue with her but indicated that the accused was the aunt to the victim's children who are now orphans after having lost their father in a similar circumstance. He confirmed that the victim's children were not ready for a reconciliation.
16. From the report, accused 2 is remorseful and prays for leniency in sentencing. She prays for non-custodial sentence and promised to be a law-abiding citizen. The probation officer urged this court to exercise discretion considering the sentiments of victim's family

4th Accused's Presentence Report

17. From the report, Accused 4 Francis Tanui attended primary school up to class 8. He did not continue with secondary education due to lack of interest and financial constraints in the family. He later moved to Subukia where he was employed as a herder for a period of about 5 years before he went back home to concentrate on farming activities. He is married with 9 children with the youngest aged about 2 years.
18. Accused 4 regrets the circumstances that lead to the death of the deceased herein and says he is remorseful and he did not intend to cause the death of the deceased and pleads for leniency.
19. The victim's family expressed bitterness towards the accused for having contributed to the death of their kin. They are not willing to forgive him on ground that they have not shown any willingness to seek for forgiveness and reconciliation for the entire time that they have been out on bond. They indicated that it was more saddening for them to lose their father before this matter was resolved and prayed for justice for their kin.
20. The accused's family stated that the two families have had strained relation since the incident occurred and urged court to be lenient to the accused as he has children who rely on him.
21. The area administrators confirm that reconciliation efforts have not taken place between the two families and confirmed that the victim's relatives are still bitter. The probation officer's opinion is that home environment is currently not conducive for reintegration of the accused person.

Mitigation

22. The defence counsel Mr. Kemboi mitigated on behalf of the 3 accused persons. He submitted that the 1st accused is aged 63 years old and is the husband to accused 2 and they are both blessed with 9 children.
23. He submitted that the accused persons are remorseful for the death of deceased who is their sister in-law. He submitted that Accused 1 suffers from terminal illness related with old age and prayed for non-custodial sentence.
24. In respect to Accused 2 counsel submitted that she was in custody for more than 5 years and has suffered. He prayed for non-custodial sentence. He submitted that her last born child is in form IV.
25. In respect to Accused 4 counsel submitted that he is 50 years old; he is married with 9 children below age of 18 years. He submitted that Accused 4 is remorseful and prays for non-custodial sentence.



Determination

26. The accused committed the offence of murder. Section 204 of the Penal Code provides that a person convicted of murder shall be sentenced to death. The mandatory nature of the death penalty was declared unconstitutional by the Supreme Court in the case of *Francis Muruatetu & Another v Republic* [2017] eKLR where the court stated as follows:-

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“45. To our minds what Section 204 of the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the constitution does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the *Constitution* are not exhaustive.”

The court therefore proceeded to pronounce itself thus:

“58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the *Penal Code*. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the *Penal Code* unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of the *Constitution*.

27. From the foregoing, the supreme court did not outlaw death sentence did not outlaw the death sentence. The court has discretion to impose death sentence where circumstances of the case warrant.

28. I have considered the circumstances surrounding the offence herein and sentiments by the victim’s family, community, local administration and accused’s family. I have considered accused persons mitigation through their lawyer. The accused persons say they are remorseful yet they have been out of bond but have not made any attempts to seek forgiveness from the victim’s family. The victim’s family are still bitter towards the accused persons because they have not demonstrated any remorse. Considering sentiments by all people interviewed by the probation officer, I am of the view that non-custodial sentence will not be appropriate to the accused persons despite the advanced age of Accused 1 and Accused 2. However, while imposing sentence I take into consideration their advanced age and impose lenient custodial sentence.

29. Final Orders: -

1. Each accused person to serve 7 years imprisonment.
2. Period served in remand to be computed in the sentence above.



3. Right of appeal 14 days.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET
THIS 9TH DAY OF MAY 2024.**

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RACHEL NGETICH

JUDGE

In the presence of:

Momanyi/Elvis – Court Assistant.

Ms. Ratemo for State.

Mr. Kemboi for accused person.

Accused 1 – Accused 3 present.

