



**Republic v Luvekho & 2 others (Criminal Case E071 of 2020)
[2024] KEHC 4822 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E071 OF 2020
RN NYAKUNDI, J
MAY 9, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DANCAN MASISI LUVEKHO 1ST ACCUSED

RAJAB ONGANA LUVEKHO 2ND ACCUSED

RASHID WAWIRE 3RD ACCUSED

RULING

1. The accused persons were initially charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The charge was reduced to manslaughter upon entering a plea bargain agreement. The court has considered the Plea agreement and I am satisfied that the Accused persons understood their trial rights and process and had executed the agreement voluntarily. The court therefore finds the plea agreement acceptable.
2. The accused persons were charged with the offence of murder having unlawfully murdered Asha Fadhili on 28th November, 2020 at Milimani village, Lugari Sub-County, within Kakamega County. The accused persons were convicted on their own plea of ‘Guilty’ to the offence of Manslaughter c/s to Section 202 as read with Section 205 of the *Penal Code*.
3. During the hearing, the accused persons were at all times represented by Learned counsel Mr. Oyaro while Mr. Mugun was the prosecuting counsel for the state.
4. In the plea agreement, the prosecution proposed a sentence of five years including the period spent in custody. The defence of their part through counsel indicated that they would propose a period of five years including the period spent in custody.



5. I have also had occasion to peruse through the probation reports for all the accused persons. The circumstances of the case as per the 1st accused person are that the deceased was their father's lover. On the material day she had come home drunk and was being a nuisance in the home. In a bid to subdue her he slapped her severally and she went to the house only for her lifeless body to be discovered within the compound the next morning. The 1st accused stated that they were against her drunkenness which resulted in daily instances of noisemaking in their compound.
6. The 2nd accused person on his part stated that the deceased was a female friend to his father and she had been staying together with the father for two months before the incident. He stated that on the night preceding the discovery of the deceased within their family compound the next morning, the deceased was drunk and was making noise and together with his brother they attempted to calm her down by lightly striking her with sticks. The offender specifies that he used a lightweight stick and only administered a few strikes. Following this, the deceased fled, and they did not pursue her. He was shocked that the following morning she was found dead in their compound.
7. According to the 3rd accused person, the circumstances of the offence were that the deceased was in an intimate relationship with their father and on the material day she had come home drunk and was being a nuisance in the home. In a bid to subdue her he slapped her severally alongside his siblings and she went to the house only for her to be discovered lifeless in the morning. The 3rd accused person stated that they were against her drunkenness which resulted in daily instances of disorderly conduct in their compound.
8. The Probation officer in all the reports recommended that considering the findings of the social inquiry, should a plea bargain be entered, the offenders may be considered a non-custodial sentence.
9. At this juncture I need to point out that the offence of manslaughter does not become less of an offence when a plea bargain has been entered. The Plea agreement can only be considered as a mitigating circumstance.
10. The punishment prescribed for the offence of manslaughter is a maximum of life imprisonment under section 205 of the penal code. The maximum sentence is however appropriate in serious cases and in our jurisdiction such a sentence has been outlawed.
11. In *V M K v Republic* [2015] eKLR, 10 years imprisonment was imposed for manslaughter. The circumstances of this case in my view call for an enhanced sentenced contrary to that proposed by bot counsel. In outlining the factual matrix of this case, the plea agreement indicated that had this case gone to trial, the state would have represented evidence sufficient to prove the facts as hereunder:

On 28th November, 2020 at around 2000hrs at Milimani village in Lugari Sub-County, the accused persons took a stick and beat up the deceased. Asha Fadhili the deceased herein had been cohabiting with Iddi Rajab Luvekho, the father of the accused persons for a period of 2 months after the demise of his wife. The accused persons were against the relationship because the deceased was known to frequent chang'aa dens, was suspected to be of loose morals when under the influence of alcohol and would neglect their father. To them, these actions caused them to become the subject of ridicule in the community.
12. The accused persons hit the deceased using sticks and as their father tried to intervene, they told him to go away. He went for his panga but by the time he came back, he found that the noise had subsided and assumed that the accused persons had run away. He also confirmed that the deceased had gone back to her house. In the morning, he was awoken by one of his sons and informed that the deceased was lying at the entrance to their homestead.



13. The above facts reveal a commission by the accused persons which was uncalled for. The reasons advanced for hounding the deceased were not reasonable enough. This was purely outside their scope but they took it upon themselves and arrogantly so, in an attempt to avoid their family becoming the subject of ridicule in the community.
14. In determining the appropriate sentence, 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.
15. 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;

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- “(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.”

The [*judiciary sentencing policy guidelines*](#) states that the seriousness of the offence must be assessed before a court decides the aim of punishment of a particular case. This suggests that the decision as to which aims of punishment to pursue must be informed by the seriousness of the offence. The public interest consideration as one of the objectives of punishment should only come into play after the right sentence has been identified. In my view it must



be the last factor to consider when sentencing the offender. It is therefore a balancing Act between the objectives of punishment and sentencing principles. It is also of significance in sentencing and offender to weigh all the guidelines and objectives to avoid passing a disproportionate sentence to the offence which may be considered too harsh or too lenient. From experience the courts tend to lay more emphasis on deterrence than rehabilitation of the offender or convicts. The /court in Rep Nkoma confirmation case NO 3 of 1996 by the Malawian Court held that: “ It is not proper that the court, to achieve any of the purposes of sentencing, retribution, deterrence, incapacitation, reformation and rehabilitation, should compromise principles of sentencing, principles of sentencing as different from purposes of sentencing, normally the purposes of sentencing do not assist the court in arriving at the appropriate quantum of a sentence. An appropriate sentence must achieve proportionality, equality and restraint. The sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance.

16. I have considered the sentencing objectives in totality. The accused persons are of a young age with a whole life ahead of them and there is need to have them rehabilitated to achieve the objectives of sentencing. The court in doing so has also to consider the victim’s family and the kind of impact this has had to them. All factors considered; I find it appropriate to sentence the accused persons to 6 years imprisonment. The period shall run from the date of their arrest in the spirit of Section 333(2) of the [Criminal Procedure Code](#).

17. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY, 2024.

In the Presence of

Mr. Oyaró for the Accused

Mr. Mugun for the State

Accused

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R. NYAKUNDI

JUDGE

