



**Republic v Muyeku (Criminal Case E035 of 2019)
[2024] KEHC 4828 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E035 OF 2019
RN NYAKUNDI, J**

MAY 9, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

HENRY MUYEKU ACCUSED

RULING

1. Henry Muyeku was charged with the offence of murder contrary to section 203 and 204 of the Penal Code. The charge was reduced to manslaughter pursuant to a plea bargain agreement that was made on 6th May, 2024 and filed on the same date. 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 137A-O 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 accused person was represented by learned Counsel Mr. Maathai while Mr. Mugun represented the prosecution. I have on record the plea bargain agreement and in it the prosecution proposed a sentence of three years imprisonment less the time spent in custody. The defence on the other hand proposed a non-custodial sentence for a term of three years.
3. The Probation report is equally significant in highlighting the personal circumstances of the accused person. The accused’s family indicated that he is a humble man who has not been in conflict with the law.
4. 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 3 years less the time spent in custody.
5. The appropriate sentence can only be achieved when this court considers the objectives of sentencing in totality and the guidelines laid out in the “Muruatetu case”. Similarly, the Judiciary sentencing



policy 2023 are also instructive on this subject. 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.

6. 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.
7. Additionally, in the "Muruatetu Case 1", 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-adaption of the offender;
 - (h) any other factor that the Court considers relevant.”
8. The facts leading to the offence in question are that on 3rd May, 2019 from around 1700hrs, Rodgers Kimutai Kemboi together with the deceased and his girlfriend went to Cloud 9 within Eldoret Township to entertain themselves. They partook of alcoholic drinks and at around 0100hrs, the deceased went with his girlfriend to the dance floor. He then went back to his seat and noticed that another man was dancing with his girlfriend. He was displeased with that Act and asked the man to go away and leave his girlfriend alone. The man resisted and a commotion ensued. That is when club security (bouncers) came and managed to separate the two. The deceased was carried outside while the other man remained behind inside the club. As they were walking out towards the exit, another argument began between the accused (one of the club's bouncers) and the deceased. The accused pushed the deceased down the stairs causing the deceased to tumble and fall. In the process he landed on his head. He then started bleeding from the head and ears. The accused then informed the management



and were able to take the deceased to hospital wherein the deceased was admitted in a critical condition. He remained as such till succumbed to the injuries on 9th May, 2019 at around 1100hrs.

Decision

The foundation of criminal sentencing within our jurisdiction is always in perennial conflict, with individualized justice, fair, proportionate, consistency, and uniformity of the various verdicts on sanctions passed by the various courts dependent on specific facts of each case. The first premise of this dichotomy is that courts should impose sentences that are just and appropriate according to all circumstances of each case. The 2nd perspective is that similarly situated offences and offenders should receive similar outcomes. Unfortunately, that is not the case in our jurisprudence.

9. In homicide cases the supreme court in the *Muruatetu versus Republic 1 2017 eKLR* laid down the guidelines on sentencing to influence the discretion of the trial court in arriving at a fair and just sentence. The factors guide that in determining appropriate sentences, appropriate weight must be given to each factor more so any aggravating circumstances responsive to the accused's level of blameworthiness. It is expected of the trial court to keep a fine balance between them and it must not endeavor or underemphasize any of the factors in determining the applicable sentence.
10. The court is also called upon to exercise a measure of mercy when imposing a sentence. From the plea agreement, although it took long to enter a plea of guilty it counts for something in sentencing reduction taking the overall circumstances of this case. This is clearly a case where the accused person used violence against the deceased which was not deserving in view of the fact that the deceased was actually a victim of circumstances. On the face of it there are no compelling or substantial circumstances which could have triggered the use of excessive force on the part of the accused person as against the deceased.
11. The right to life under Art 26 of *the Constitution* is protected and guaranteed that each citizen shall enjoy the fullness of that right without limitation from another human being. The gravity of the type of crime and the manner in which it was committed is an aggravating factor which cannot be ignored by this court when exercising its discretion in passing a specific sentence against the accused. Besides entering a plea of guilty in this particular case, this court rarely finds any language in the plea agreement or mitigation which is at the core of regret and remorse on the part of the accused.
12. The comparative case in *S versus Matyityi 2011 (1) SACR 40 (SCA)* had this to say on the distinction between regret and remorse:

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of



heart; whether he or she does indeed have a true appreciation of the consequences of those actions.”

13. I have considered the sentencing objectives in totality. The accused person is relatively a young person and it was established from the probation report and the mitigation by the learned counsel Mr. Mathai. It is worthy to mention that learned counsel for the accused now a convict finds inspiration from the biblical verses in the books of Colossians 3:13 and John 1:9. These two books from the wholly bible speak to compassion and forgiveness. The submissions by learned counsel Mr. Mathai in entrenching mitigation on behalf of the accused also reason it well with the readings in the book of Zachariah 7:9 which states: This is what the Lord almighty says: Administer true justice: Show mercy and compassion to one another.in your heart do not think evil of each other. The bible regularly pairs justice with acting righteously and behaving with mercy, love, kindness, and compassion. This means that if the accused person had demonstrated love, kindness and compassion, towards the deceased person the outcome of it would not have been escalated to the premature termination of his right to life. That aside, I must not lose sight of the fact that in a social setting particularly in an alcoholic club the test of a reasonable man in the shoes of the accused/convict must weigh in in the court exercising discretion when evaluating one’s conduct in particular scenarios and surroundings. In arriving at the verdict of this case, I draw inspiration from the principles in the comparative jurisprudence in Malawi whom we share the common law heritage. Republic vs Ferix Madalitso Keke Confirmation Appeal No 404 of 2010. “ Considerations of the public interest when sentencing offenders must go beyond considerations that the Public whose interest the sentence wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest: they are likely are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society’s continuum.”
14. This is also a case the deceased was killed from the act of protecting his girlfriend from stranger intruders in an unlikely surroundings which was meant to be a bonding social evening at Cloud 9 within Eldoret. Furthermore, as opposed to acting within a spur of a moment, the accused had enough time to cool and reconsider his wrongful act after discovering that the lady had not to the club to hook up with men as she was safely under the protection of her boyfriend, the deceased. The formulation of self defence in Section 17 and provocation under Section 207 & 208 of the Penal Code as a justification of this offence by the accused/convict is not a construction or defence which objectively can be reframed to come to the Aid of the Accused/Convict.
15. The accused/convict did not act in self defence or provocation in committing this offence. There are other predominant factors in the plea-bargaining agreement which brings the facts of this case to have the offence of aggravated murder committed with malice aforethought be reduced to a lesser charge of manslaughter contrary to Section 202 of the Penal Code. It should be noted that self defence in Section 17 of the Penal Code differs from heat of passion to trigger provocation as defined in Section 207 & 208 of the Penal Code to definitely place an offender in the excuse or justification camp.
16. Justified conduct in criminal law refers to action that is permissible or acceptable. Looking at the framers of our constitution in Article 26 on the right to life there is a rider in sub section 3 which states as follows: “A person shall not be deprived of life intentionally except to the extent authorized to by this constitution or other written law”. What justification does in cases of homicide is that it is a defence that the victim is responsible for the alleged conduct and is an assertion that the offender has done nothing wrong by engaging in the unlawful Act.



17. The scenario here as presented by the prosecution is not a design to meet the standard of self defence or provocation to have entitled the Accused/Convict to take the deceased's life. Although from the mitigation by learned counsel Mr. Maathai on behalf of the accused/convict centered on remorse and regret the conceptualization of it fell short of a broken spirit and a contrite heart which produces dependency of a kind to yield healing on the part of the victim's family. A heart of forgiveness restores and rebuilds those relationships which have been injured as a result of unlawful act of omission or commission. I see no positive steps undertaken by the accused/convict to look beyond himself and reach out to the victim's family to truly seek reconciliation. In absence of that no offering of regret and remorse as a mitigation finds meaning in this sentencing process as against the accused/convict in the instant case. It has long been taken for granted in our criminal adjudication process that in order to achieve justice in particular cases the law and the policy on sentencing must provide consistency, parity, uniformity, proportionate, equity, and justice on the kind of sentences being passed in the decision making of judges exercising judicial power and discretion but practically there is really very little consistency, uniformity, and proportionate sentences across the contexts and substantive various of law on sentencing. Unfortunately, this might be the case in approaching this question from the perspective of the public or the victims.
18. Having considered all the aspects above, the accused is sentenced to 7 years imprisonment with a credit period of the four months spent in pre-trial detention pending trial in terms of Section 333(2) of the CPC.
19. Orders accordingly.

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

In the Presence of:

Mr. Mathai for the Accused

Mr. Mugun for the State.

Accused

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R. NYAKUNDI

JUDGE

