



**Republic v Makandi (Criminal Case 69 of 2019) [2024] KEHC 5111 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5111 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 69 OF 2019  
EM MURIITHI, J  
MAY 8, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DEBORAH MAKANDI ..... ACCUSED**

**RULING**

1. By a plea bargain agreement dated 6/11/2023, the accused initial charge of murder c/s 203 as read with section 204 of the [Penal Code](#) was reduced to Manslaughter c/s 202 as read with 205 of the [Penal Code](#). The facts of the case as set out in the Plea Bargain Agreement and accepted by the accused were as follows:

“FACTS

9. Had the case gone for trial, the prosecution would have presented evidence sufficient to prove the following facts beyond a reasonable doubt.
10. It was on the 29<sup>th</sup> day of May, 2019 at around 11:30 am, Deborah Makandi (hereinafter the accused) who is the mother to Noah Mutethia Mutuma (hereinafter the deceased) travelled from her residence at Mutuati where she stayed with her husband one Dominic Mutuma Jacob D-3 to Meru, Mulathankari location so as to visit her mother Purity Mukiri D-2.
11. The accused carried the deceased with her who was in good health condition.
12. However, on arrival at her mother’s home, the accused realized that the deceased had diarrhoea while changing his cloths. The accused handed over the stained clothes to her mother D-2 to wash them for her. By this time, the accused was at her mother’s house and in the company of her siblings Amos Ndereva D-5 and cousin Maryanne Naisherua D-4.



13. D-4 excused herself and proceeded to her grandmother's house leaving behind the accused, D-1, D-2 and D-5.
14. Later, D-2 decided to send D-5 to his grandmother's house to get some bananas for the accused to eat.
15. On coming back D-2 again sent D-5 to the shop to go and purchase some food, which she wanted to use in preparing a meal for the accused and thus leaving the accused and D-2 in the house together with the deceased.
16. When D-5 came back to the house he found the accused and D-2 leaving the house in a hurry while carrying the deceased whose condition they claimed to have worsened and that they were rushing him to Meru Teaching and Referral hospital for treatment.
17. D-4 followed them moments later and they all boarded boda bodas to the said medical facility.
18. On arrival at the hospital, the accused and D-2 proceeded to the outpatient centre where they both claimed that the deceased was briefly assessed before entering the doctor's room. The doctor pronounced the deceased dead.
19. D-4 then called D-3 to inform him about the death of his child but he disputed the cause of death claiming that the deceased had on the material day left home with his mother while in a stable condition and had not exhibited any symptoms of diarrhoea.
20. D-3 communicated the matter to Isaiah Mwonera Rukaria D-6 to whom he came to learn that he was in an earlier relationship with the accused and also laid claim to the paternity of the deceased.
21. D-3 and D-6 opted for a post-mortem to be conducted on the deceased to ascertain the cause of death.
22. On 3<sup>rd</sup> June 2019, the post-mortem was performed by Dr. Stephen Chege D-8 who formed an opinion that the cause of death was due to asphyxiation secondary to manual neck strangulation.
23. D-3 subsequently made a report at Meru Police Station where investigation commenced. From the investigations it was established that the deceased was manually strangled on the neck and had suffered from diarrhoea as alleged by the accused and D-2.
24. The deceased was in good health condition upon leaving Mutuati and as such the death of the deceased took place between Meru, Mulathankari location and before arriving at the hospital.
25. Moments before the death, the deceased was in the hands of the accused and D-2.
26. There was no sufficient evidence to sustain a charge as against D-2.



27. That it is in light of the aforementioned that the accused pleads to the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
28. The accused person shall at all times give complete, truthful and accurate information and testimony, and he agrees not to commit, or attempt, any act in furtherance of the offence being the subject of this plea agreement.
29. The accused person understands that this Plea Agreement does not protect him from prosecution for perjury, should he testify untruthfully at any proceeding, or for making false statement.
30. Should the accused person fail to comply with the terms and conditions set forth in this Plea agreement, the state may fully prosecute the accused person on all criminal charges that can be brought against him or her.
31. In the event that the accused person does not plead guilty to the new charge as agreed herein above the state shall revert back to the original charge.”

2. The Probation Officer’s Pre-sentence report dated 29/4/2024 recommended a non-custodial sentence as follows:

“Summary

Your Lordship, before this court is a 28 year old woman who is single and whose mother is bedridden due to cancer sickness. She is a for four leaver who scored a C- grade but did not do any course s a result of financial constraints at home.

She killed her son due to pressure from her two boyfriends who elt cheated by the offender on the paternity of her child.

She is remorseful of the offence and regrets her action.

The secondary victims and local administration interviewed were not opposed to non-custodial sentence if the honourable court grants the same ot the offender.

She is the only hope to her mother who is suffering from cancer. She has been obedient for the period sha has been out on bond for she attended court as required and therefore the likelihood of obeying the [probation] order if placed on the same.

Recommendation

Your Lordship, from the above findings I am of the opinion that the offender is suitable for release on a custodial sentence. Probation sentence is therefore recommended.

Charles Kanga

Probation Officer

Meru

29/4/2024.”



3. In mitigation, Ms. Musyimi Counsel for the accused urged the court to consider the accused's remorse and other responsibility for the care of her other child and her sick mother as follows:

"I agree with the Presentence report. The report indicates that the accused has a mother diagnosed with cancer and has a brother and she is taking care of both of them. She is remorseful. We pray for a probation sentence so that she can take care of the mother, brother and her own child who is 10 months old."

4. For the DPP, Mr. Masila relied on a theory of post-partum depression, which was however not raised or supported on the facts of the case presented to the court, and urged a non-custodial sentence as follows:

"I do not wish to call any evidence by way of victim impact statement.

Plea bargain was instigated by the Defence. We accepted.

There is a delicate balance in that the deceased was 6 months old whose mother is the accused. Deceased had a right to life to be protected and nurtured by the accused pursuant to Article 53 of *the Constitution*.

On the other hand, the accused is a lactating mother and as a vessel of the other child she is nursing. Sentencing Guidelines of 2023, advocates for leniency for lactating mothers and usually three years and below.

How is the court to make the right balance? One child was killed by the mother and on the other hand there is a living child. To make the balance the accused will forever live with the guilt of killing her child, and later giving birth to another child.

Post partum depression. We considered that this was a case of post partum depression, although there is nothing in the Plea bargain agreement on post partum depression.

I submit that this is a case in which the court should mete out a probation sentence and let the accused face the guilt of killing her six month old baby and the court to give her an opportunity to care for her other child."

### **Principles of sentencing**

5. In considering the appropriate sentence the Court has considered the facts of the case, the mitigation of the offender and the submissions of counsel for the DPP and the accused against the principles of sentencing and relevant law and a probation officer's presentence report.

6. The Kenya Judiciary Sentencing Guidelines of 2023 (The Kenya Gazette 1st September, 2023 Gazette Notice No. 11587) prescribes as follows on the offence of manslaughter:

"Manslaughter

5. 2.6 Where an unlawful killing is done without an intention to kill (or cause grievous bodily harm?), the offence of manslaughter may be made out. In sentencing such cases, as with murder, the focus must lie primarily upon culpability. With manslaughter cases, the degree of culpability may vary widely, from the 'one punch' manslaughter to the case involving a prolonged campaign of domestic violence which ultimately results in the victim's death. The focus must be on the offender's actions and intentions at the time of the crime in assessing the degree of culpability. Sometimes a nuanced approach is called for.



5. 2.7 In addition to the generic features contained in the GATS, some features that are relevant to assessing culpability in manslaughter cases include, but are not limited to the following:

- i. Where death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling short of grievous bodily harm e.g., one punch that caused the victim to fall and suffer a catastrophic and fatal brain injury.
- ii. Where death was caused in the course of an unlawful act that carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender e.g., driving a motor vehicle dangerously through a crowded street.
- iii. Where death was caused in the course of committing or escaping from a serious offence.
- iv. Where the offender tried to conceal the offence by concealing, dismembering, or destroying the body.
- v. Where death was caused in the course of self-defence or defence of another (though not amounting to a defence).
- vi. Where there was no intention by the offender to cause Any Harm And no obvious risk of anything more than minor harm e.g., the offender pushed the victim out of the way and the victim fell and suffered a fatal injury.
- vii. Where the offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity.  
  
Examples might include the woman who suffers severe postnatal depression, or the war veteran who suffers posttraumatic stress disorder to the extent that he behaves in a way that is erratic and violent in the face of ordinary day-today stressors.
- viii. Where there has been a history of violence towards the victim by the offender, this might be relevant to sentencing.
- ix. Significant mental or physical suffering caused to the deceased.
- x. Where the offence involved use of a weapon.
- xi. Offence committed in the presence of children (particularly relevant to domestic violence deaths)."

7. The 2023 Sentencing Guidelines further prescribes in cases of lactating mothers such as the offenders in this case as follows:

“ 3. 5 Pregnant And Lactating Female Offenders

3. 5.1 The law protects pregnant offenders from receiving the death penalty. The decision on the appropriate sentence for a pregnant offender usually raises



issues related to the welfare of the unborn child. Thus, the best interest of the child becomes an important consideration.

#### Situational Analysis

3. 5.2 There are pregnant and lactating offenders who are imprisoned yet are suitable candidates for non-custodial sentences.

The majority of pregnant and lactating offenders are imprisoned for terms of three years and below.

3. 5.3 The Kenya Prisons Service seeks to offer reasonable services to pregnant offenders and the children born in custody.

However, there are financial challenges and significant concerns concerning the upbringing of children born and raised in the prison environment.

#### Policy Directions

3. 5.4 Where the court is satisfied that an offender is pregnant or lactating, and in the absence of any aggravating features, it should consider imposing a non-custodial sentence unless the seriousness of the offence and other factors demand a custodial sentence for justice to be served. This is in keeping with international conventions and best practice on the topic.
3. 5.5 The court should direct that a file is opened for a child of a lactating offender to go hand in hand with the criminal file for purposes of keeping track of the child.”

### **Suspended Sentence**

8. The Sentencing Guidelines notes that the prescription for suspended sentences as follows:

#### “2. 11 Suspended Sentences

2. 11.1 Section 15 of the Criminal Procedure Code allows the court, when it passes a sentence of not more than two years imprisonment, to suspend a sentence of imprisonment for a fixed period of time. If the offender does not commit an offence during the fixed period, then the sentence does not take effect. In the event that the offender commits an offence during the fixed period, then the sentence takes effect and the sentence for the second offence runs consecutively with the original sentence.

#### Situational Analysis

2. 11.2 There is no guidance on the criteria that would justify the imposition of a suspended sentence of imprisonment. As a result, the use of this option is limited and open to abuse.
2. 11.3 The lack of digital records at police stations and courts may enable offenders on suspended sentences who offend during the operational period of that suspended sentence, to get away without serving their original sentence.

#### Policy Directions



2. 11.4 Before imposing a suspended sentence, the court must be satisfied that the case meets the criteria for an immediate term of imprisonment. i.e. the offence is so serious that neither a fine nor a community sentence can be justified.
2. 11.5 Suspending that period of imprisonment may then be considered where there are exceptional circumstances that would justify that suspension. Examples may include undue prejudice or injustice to the offender or his dependants or other compelling factors that would make the punishment unduly harsh when measured against the objectives of sentencing set out in these Guidelines. Examples may include where the offender is the sole provider or has a disability that would make a custodial term extremely difficult.”

### **Appropriate sentence**

9. Although cited as the basis for plea bargain negotiation by the DPP, the presence of post partum/ natal depression is not borne out in evidence or any medical report and it is inconsistent with the presentence report that “she killed her son due to pressure from her two boyfriends who felt cheated by the offender on the paternity of her child”. The Court has warned itself of the danger of relying wholesale with a probation officer’s report as counselled in *Kyalo v. R* (2009) KLR 325, 329. The Court, however, considers that in the circumstances of this case, where the offender appeared to commit the offence of child killing in reaction to the uncertainty as to the paternity of the child, a custodial sentence is necessary for deterrence as a certain and tangible punishment of the offender as opposed to the assumed lifelong guilt expected to be suffered by the offender for killing her own child. However, considering the circumstances of the offender who has to provide for her other lactating child and sickly mother who according to documents presented to court suffers a case of invasive carcinoma condition of the breast , the offender should only suffer the punishment if she defies rehabilitation and commits an offence within a period of three years.
10. The Court will consequently impose a custodial sentence of two years which shall be suspended for three years in accordance with section 15 of the *Criminal Procedure Code*.

### **Orders**

11. Accordingly, for the reasons set out above, the Court having convicted the accused for the offence of manslaughter c/s to section 202 as read with 205 of the *Penal Code* sentences the offender to serve two years imprisonment, which will be suspended for a period of three years in accordance with section 15 of the *Criminal Procedure Code*.

Order accordingly.

**DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF MAY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Mr. Masila for DPP/Prosecutor.

Ms. Musyimi Advocate for the Accused.

