



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Osman (Criminal Case E007 of 2021)
[2024] KEHC 7873 (KLR) (21 June 2024) (Sentence)**

Neutral citation: [2024] KEHC 7873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE E007 OF 2021**

JN NJAGI, J

JUNE 21, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

ABDIJABIR RASHID OSMAN ACCUSED

SENTENCE

1. The accused was facing a charge of murder that was reduced to manslaughter after a successful plea bargain agreement between the accused and the prosecution. The accused then pleaded guilty to a charge of manslaughter contrary to section 202 as read with section 203 of the *Penal Code*. The matter is now coming up for the court to determine the most appropriate sentence on the accused.
2. The facts that the accused pleaded guilty to for the offence of manslaughter are that the deceased herein, the accused and the accused's father were all enlisted as members of National Police Reservist (NPR) at Elwak in Mandera County. That on the 27th May 2021, the deceased and the accused's father were within the vicinity of Elwak Police Station. An altercation ensued between them and the deceased assaulted the accused's father. He then attempted to snatch the gun that the accused's father was carrying. Police officers who were within intervened and the deceased was placed in the cells at the police station. An assault case was opened against him. Two days later on the 29th May 2021, he was released from custody.
3. That on the same day at 4pm the accused was on his way to a place called Eresuki where he had been assigned duty to guard a Safaricom kiosk. He was armed with an AK 47 rifle issued to him by the relevant authorities. He was riding a motor cycle. On reaching Lala Salama Lodge area within Elwak town, he found the deceased at a tea kiosk. Accused parked his motor cycle outside the kiosk. The deceased told him that he, the accused, and his father were forcing NPR to work by force. The deceased went to say that if it were not for the fact that he had been disarmed, he would have killed the accused's father and another NPR colleague, Cpl Abdullahi. An altercation ensued between the accused and the



deceased. The deceased threatened to kill the accused and his father. In the process, he made an attempt to grab the firearm that the accused was carrying. This led to the accused shooting the deceased on the head and lower chest. The deceased fell down dead. The accused escaped on foot while shooting in the air to scare away a crowd that was threatening to lynch him. He later surrendered to the police.

4. After the accused was charged with murder, his family and that of the deceased entered into discussions for a reconciliation. A meeting was held on the 19th March 2024 presided over by the Chairman of Bana Clan Council of Elders to which the deceased belonged and the Chairman of Tharawa Clan Council of Elders to which the accused belonged. There were 30 elders in the meeting. Both families settled the matter and reconciled. The family of the deceased was paid Ksh.1,500,000/= in compensation in “blood money” in accordance with Borana tribe traditions and customs. The elders present signed minutes of the meeting that were produced before this court after the plea bargain agreement was accepted by the court. The chairmen of the two clans appeared before the court and confirmed the reconciliation. They pleaded with the court to be lenient to the accused since both families have reconciled and the family of the deceased have forgiven the accused.

5. The prosecution told the court that they had no previous records of the accused person and asked that he be treated as first offender.

Counsel for the accused, Mr. Halake, mitigated that the accused is remorseful. That the deceased provoked the accused when he threatened to kill him and his father and tried to grab the gun from the accused. Counsel urged the court to take into consideration the payment of compensation and give the accused a non-custodial sentence.

6. Counsel submitted that “blood money” is rooted in many cultures around the world. That it signifies forgiveness and reconciliation instead of retribution.

7. Counsel submitted that the testimony of the elders who appeared before the court showed that the accused has strong family and community support that is crucial in his rehabilitation to the community. That imprisonment may not serve the purpose of rehabilitation for a first offender but non-custodial sentence can promote healing and peace within the community and help the accused to integrate into the society. More so that a non-custodial sentence will respect the wishes of the victim’s family and align with principles of restorative justice.

8. Counsel submitted that the accused has been in custody since the time of his arrest which has given him time to reflect and change for the better.

9. The court called for a pre-sentence report that was prepared by a Probation Officer Mr. Peter Kamande. The report indicates that the accused is aged 24 years and has a wife and one child. That the family of the deceased and the family of the deceased are living harmoniously after blood money was paid to the deceased’s family. The area chief reported that the accused is of good character as he had been recommended to be enlisted with NPR. The report recommended that the accused be placed on probation for a period of 2 years.

10. Sentencing is a matter that lies within the discretion of the trial court. The court in exercising that discretion is required to consider all the circumstances of the case and determine the most appropriate sentence. In *Farah Abdi v Republic* (2006), Makhadia J. (as he then was) held that:

Sentencing is generally a matter for the discretion of the trial Court. The discretion must however, be exercised judicially and not capriciously. The trial Court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the Appellate Court would be entitled to interfere with the sentence imposed by the trial Court if it is demonstrated that the sentence



imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the Court acted upon wrong principle, took into account irrelevant and extraneous factors and finally if the Court exercised its discretion capriciously.

11. In *Republic v Titus Ngamau Musila* [2018] eKLR, Wakiaga J. cited The Supreme Court of India in the case of *Antony Pereira v State of Maharashtra* (2 AIR 2012 SC 3802) where the Court stated the following on objectives of sentencing:

“70. Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles; twin objective of the sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence . . .”

12. The *Kenya Judiciary Sentencing Policy Guidelines*, 2016 outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

“Sentences are imposed to meet the following objectives:

- (1) Retribution: To punish the offender for his/her criminal conduct in a just manner.
- (2) Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- (3) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
- (4) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
- (5) Community protection: To protect the community by incapacitating the offender.
- (6) Denunciation: To communicate the community’s condemnation of the criminal conduct.



13. I have considered the mitigation by the accused person. I have considered that he is a young man of 24 years of age with a young wife and one child.
14. I have considered that the circumstances under which the offence was committed which were unfortunate as the deceased attempted to snatch a rifle from the accused. Nobody knows what the deceased would have done with the rifle if he had managed to snatch it from the accused.
15. I have considered that the family of the accused has paid the traditional “blood money” compensation to the family of the deceased. This will enable the two families to come together and reconcile themselves to the offence committed and the need to rehabilitate the accused to the community despite the gravity of the offence. In my view restorative, justice is more important than retribution. It enables the offender and the victims to heal. In this case it has been reported by the Probation Officer that the two families are living harmoniously after compensation was paid. The community has no objection to the accused being given a non-custodial sentence.
16. Article 159(2)(c) of Constitution of Kenya 2010, behooves courts of law to promote traditional dispute resolution mechanisms as long as they respect the Bill of Rights, are not repugnant to justice and morality or inconsistent with the Constitution. This is one such case where community elders brought the two families together and reconciled them on payment of the traditional “blood money”. I am satisfied that the elders considered the gravity of the offence and all parties were satisfied with the outcome. Such dispute resolution mechanism is recognized by the Constitution and is therefore within the law.
17. Considering all the circumstances of the case I am persuaded that the accused can benefit from a non-custodial sentence. A non-custodial sentence will respect the wishes of the two families and will further cement and promote reconciliation between them. On the other hand, a custodial sentence will destroy the good will and rapport that has been built between the two families. From the report of the elders and the probation officer, it is clear that the accused has a strong community support that will help in his rehabilitation. Considering that he has been in custody for a period of three years, there is no need to met out a custodial sentence. That is sufficient time in custody.
18. In view of the foregoing, I sentence the accused to serve three years` probation under the supervision of the Probation Officer, Marsabit.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 21ST JUNE 2024.

J. N. NJAGI

JUDGE

In the presence of;

Mr. Otieno for Prosecution

Mr. Halake for Accused

Accused present

