



REPUBLIC OF KENYA



**Republic v Chisa & 2 others (Criminal Case E012 of 2023)  
[2024] KEHC 7116 (KLR) (13 June 2024) (Sentence)**

Neutral citation: [2024] KEHC 7116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE E012 OF 2023  
JN KAMAU, J  
JUNE 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NICHOLAS MUSEVENI CHISA ..... 1<sup>ST</sup> ACCUSED**

**RACHAEL NZAVAYE ..... 2<sup>ND</sup> ACCUSED**

**PETER KILUNDU ..... 3<sup>RD</sup> ACCUSED**

**SENTENCE**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons herein were initially charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 (Laws of Kenya). However, on 11<sup>th</sup> April 2024, the Prosecution applied for nolle prosequi in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons and the court after considering the said application, released the 1<sup>st</sup> and 2<sup>nd</sup> Accused person in line with Section 82(1) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
2. On his part, the 3<sup>rd</sup> Accused person, entered into a Plea Agreement on the same date whereupon this court convicted him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#).
3. The facts of the case were that on 19<sup>th</sup> July 2023, at around 10.00am, Deresha Kagema Mbogani, daughter of Stella Mmboga (hereinafter referred to as the “deceased”), was at her home when she was informed by her nephew one Victor that he had gone to the deceased’s house and found it locked and that when he called out her name, she did not respond.
4. The said Deresha Kagema Mbogani then proceeded to the deceased’s home and found that the door had been locked from the outside. When she opened and went up to the bedroom, she found the



- deceased lying on the floor while unconscious and half naked. She also noticed the deceased's head was swollen and blood-stained. She raised an alarm and phoned neighbours and her brothers.
5. She checked the other rooms and she found out that they had been ransacked and clothes had been strewn all over. With the help of neighbours, she dressed the deceased. In the process, she realised that the deceased had been raped. They took her to Mungoma Hospital at Majengo for treatment but were referred to Vihiga Referral Hospital where she was admitted.
  6. On 20<sup>th</sup> July 2023, Linet Aseyo, a daughter to the deceased, made a report at Tambua Police Post that the deceased had been attacked and gang raped by unknown people.
  7. Police Officers from DCI Hamisi visited the scene and recovered a blood-stained white and dark grey head wrap, cracked wooden jembe stick, a blood-stained cream undergarment and a torn yellow and pink dress.
  8. The deceased died on 21<sup>st</sup> July 2023 while undergoing treatment. When the said Deresha Kagema Mbogani returned to the deceased's house on the same date, she noted that the assailants had gained entry by digging a hole into the wall. She established that several household items including deceased's mobile phone Itel 2160 in make had been stolen. She therefore proceeded to make a report at Tambua Police Station and investigations commenced.
  9. The Investigating Officer managed to track the deceased's mobile phone which was recovered in the possession of the 1<sup>st</sup> and 2<sup>nd</sup> Accused herein who were husband and wife. The recovered mobile phone had two (2) sim cards registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons which were actively in use. The two (2) were arrested.
  10. On 10<sup>th</sup> September 2023, Moses Lungasi Mufunzo, son to the deceased, positively identified the recovered Itel mobile phone as the one he had bought the deceased. He availed a cash sale receipt dated 8<sup>th</sup> November 2022. Later, the 1<sup>st</sup> and 2<sup>nd</sup> Accused led police officers to arrest the 3<sup>rd</sup> Accused who had sold them the phone. On interrogation, the 3<sup>rd</sup> Accused could not give a satisfactory account of how the mobile phone came into his possession. As there was evidence of recent possession of the deceased's phone by the Accused person, he was charged with the offence of murder.
  11. The cause of the deceased's death was determined to have been severe head injury secondary to trauma caused by blunt object. The Postmortem Report dated 7<sup>th</sup> September 2023 was produced as evidence in this court and marked as Exhibit 1. The copy of the cash sale receipt of the mobile phone Itel 2160 and the said mobile phone were also produced as Exhibit 2A and 2B respectively.
  12. Having entered into a Plea Agreement, the State urged this court to sentence the 3<sup>rd</sup> Accused person to twenty (20) years imprisonment while he sought for fifteen (15) years imprisonment.
  13. In his mitigation, the Accused person's advocate pointed out that although the Accused person was not remorseful of the offence that he committed, he ought to be considered for a lenient sentence based on the fact that he was still young and a first offender and could therefore be rehabilitated through the different programmes in prison. Although he acknowledged that sentencing was a discretion of the court, he nonetheless urged the court to consider the fact that he had saved the court's time by opting for a plea bargain instead of a full trial.
  14. On its part, the Prosecution prayed for a custodial sentence due to the gravity of the offence. It averred that the deceased was an elderly lady and an icon in the society. It added that her family was traumatised by the incident. It was its contention that a custodial sentence would be a deterrent sentence to him and others. It pointed out that whereas sentencing was the discretion of court, it ought to sentence the Accused person to twenty (20) years imprisonment.



15. According to the Pre-Sentence Report of Mariam Korir, Probation Officer, Vihiga County, dated 5<sup>th</sup> June 2024 and filed on 7<sup>th</sup> June 2024, the Accused person was twenty-three (23) years old. He attended Vihiga Primary School but dropped out in standard four (4) due to lack of interest in formal education. He was married and was expecting a child. However, his wife left when he was incarcerated.
16. He was a motor cycle rider and engaged in casual jobs within the village to supplement his farming income. He had no health complications or disability. He professed Christianity and used to abuse drugs such as alcohol and bhang.
17. He denied having committed the offence even after pleading guilty in plea bargain. He pointed out that he only did that for the charge to be reduced to manslaughter which attracts a lesser punishment than murder. He pointed out that it was the mobile phone that placed him in the crime but he got it through gambling.
18. However, the social inquiry indicated that he had pleaded guilty to the offence and had mentioned that he was with another person who he did not disclose. He was not remorseful but sought for leniency. He pointed out that he was a young man who could rebuild his life again.
19. His family reported that the offender had a normal childhood life but after dropping out of school, adolescent social conflict led him to abuse of drugs and negative peer influence. They believed that he may have shown negative character and committed other offences but he was innocent about this murder case. They pleaded for a lenient sentence and believed that the prison rehabilitation program would help him after completing his sentence.
20. The deceased's family was bitter, fearful, insecure and were opposed to the offender being given a chance in community rehabilitation.
21. The Local Administration viewed him as a mean, troublesome and a dangerous person in the society. They pointed out that he had a previous criminal history and had been arrested for the offence of gang rape and defilement but had never been convicted because the complainants in those cases got lost.
22. They were emphatic that he was a social misfit who did not get along with anyone. They stated that the community were not assured of safety when he was around. They confirmed that he was linked to an organised gang and may cause more harm when released to the community. They were opposed to him being given a non-custodial sentence.
23. The Probation Officer opined that the offender did not meet the threshold for consideration on community rehabilitation. She recommended that the court metes out alternative sentence in line with appropriate laws.
24. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
25. It was also important that the sentence communicate to the community, condemnation of his criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.



26. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the Accused person being reintegrated in the society would be next to impossible as there were possibilities of being harmed.
27. Killing someone is an abomination in the society and that explains why the Accused person's family and community did not want him released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.
28. Although the Accused person had never been convicted of any offence previously prior to the incident and the fact that he had sought leniency, it appeared that he was not remorseful of the offence that he committed as he denied the same despite having entered into a Plea Bargain Agreement. He waived his right to a full trial and could not be heard to say that he only entered into the Plea Bargain Agreement to escape the death sentence that could have been meted upon him if the court found him guilty and convicted him of the offence of murder.
29. He not only robbed the deceased but he also injured her leading her to lose her consciousness and also raped her. She died a harrowing death while receiving treatment. He had also been engaged in other gang rapes for which he was never charged in court as had been indicated in the Pre-Sentence Report.
30. The sentences that were prescribed for the offences murder and robbery with violence under Section 204 and Section 296(2) of the *Penal Code* was death. The sentence for rape that was prescribed by Section 5 (3) of the *Sexual Offences Act* No Cap 63A (Laws of Kenya) was not less than ten years' imprisonment which could be enhanced to imprisonment for life.
31. This court was functus officio and could not revisit the reasons why the Accused person entered into a Plea Bargain Agreement as this court had satisfied itself that he voluntarily entered into the Plea Bargain Agreement and was not coerced to do so by his advocate as he had told the Probation Officer.
32. Having considered the facts of this case, the 3<sup>rd</sup> Accused person's mitigation, the Prosecution's response thereto, the Pre-Sentence Report and bearing in mind that sentencing was the sole discretion of the court, this court came to the firm conclusion that a sentence of eighteen (18) years imprisonment was suitable and adequate herein purely because the Accused person entered into a Plea Bargain Agreement. If the matter had proceeded as a murder case, this court would have meted out on him a stiffer sentence as there were aggravating circumstances in this case.
33. Going further, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
34. The said Section 333(2) of the *Criminal Procedure Code* provides that:-

“Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
35. Further, Clauses 7.10 and 7.11 of the *Judiciary Sentencing Policy Guidelines* provide that:-

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody



during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

36. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR.
37. The Accused person was first arraigned in court on 27<sup>th</sup> August 2023. He was convicted on 11<sup>th</sup> April 2024. This was a period that therefore ought to be taken into consideration while computing his sentence.

### **Disposition**

38. Accordingly, it is hereby directed that the Accused person be and is hereby sentenced to eighteen (18) years imprisonment to run from the date of this Sentence.
39. For the avoidance of doubt, the period from when he was arrested on 27<sup>th</sup> August 2023 until 12<sup>th</sup> June 2024 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
40. Orders accordingly.

**DATED AND DELIVERED AT VIHIGA THIS 13TH DAY OF JUNE 2024**

**J. KAMAU**

**JUDGE**

