



**Republic v Tallam & another (Criminal Case 20 of 2023)
[2024] KEHC 8246 (KLR) (11 July 2024) (Sentence)**

Neutral citation: [2024] KEHC 8246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL CASE 20 OF 2023**

**RB NGETICH, J
JULY 11, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS KIPROTICH TALLAM 1ST ACCUSED

MAXWELL KIPTOO KOSGEI 2ND ACCUSED

SENTENCE

1. The accused Francis Kiprotich Tallam And Maxwell Kiptoo Kosgei Had been jointly charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 16th day of December,2017 at Kamasaba village, Poror Arama Sub-Location Koibatek Sub-County within Baringo County, the accused persons jointly murdered Samson Kipkemei Kesses.
2. The accused persons denied the charge and the matter was set down for full trial but on 16th November,2023, Ms. Ratemo representing the state informed the court that though she was expecting 4 witnesses, an agreement had been reached by the family of the accused and the family of the deceased which was to be availed once the witnesses arrived in court. The defence counsel Mr. Akango said the court could give further directions upon the prosecution having time to look at the agreement.
3. Plea agreement was executed on the 11th June, 2024 resulting in the murder charge being reduced to manslaughter contrary to section 202 as read with section 205 of the Penal Code. Upon the lesser charge of manslaughter being read over and explained to the accused persons, they pleaded guilty and they were jointly convicted on their own plea of guilty.



Brief Facts Of The Case

4. On 16th day of December 2017, the deceased SAMSON KIPKEMOI KESSES who appeared drunk was at Kamasaba trading center and due to intoxication, he started singing initiation songs normally only sang by tugen boys during initiation ceremonies usually held in secluded areas like forests; and according to Tugen culture, it is a taboo to sing initiation songs in public places such as trading centers and anyone found singing the songs would require to be cleansed by the elders.
5. While the deceased was singing the said initiation song, the accused 1 Francis Kiprotich Tallam and accused 2 Maxwell Kiptoo Kosgei who were at the trading center heard the deceased singing and apprehended and escorted him to the forest where boys who were undergoing initiation ceremony were camping a distance of about 2km from the trading centre.
6. The witnesses stated that while on the way to the forest, the two accused persons assaulted the deceased by slapping, kicking and beating him up with sticks. On reaching the forest, the accused persons tied up the deceased to a tree using a rope which they had used to tie his hands and legs after which they continued beating him using sticks. The deceased who was in a lot of pain shouted for help and the noise attracted passersby who went to the scene and advised the two accused persons not to kill the deceased.
7. One Robert Kemboi who operates a hotel business within Kamasaba trading center stated that he saw the accused persons beat and drag the deceased towards the forest and called Nicholas Kirui Kipkemboi who proceeded to the forest where he witnessed accused 1 and accused 2 beating the deceased with sticks while his hand and legs were tied to a tree using a rope.
8. Joshua Kipkorir who is the owner of the forest learnt that a person had died on 17th December, 2017 at around 0300hrs near the initiation camp and went to the scene where he confirmed that the deceased was Samson Kipkemboi Kesses. Together with Joshua Kimutai Kerich they reported the matter at Eldama Ravine Police Station.
9. Police officers from Eldama Ravine Police Station visited the scene where they found the body of the deceased half naked with visible bruises all over. The scene was photographed and the body was moved to Eldama Ravine Sub County hospital mortuary for preservation pending postmortem. The officers recovered a nylon rope and a piece of a climber rope from the scene which were kept as exhibits.
10. On 18th December 2017, the accused persons surrendered themselves to police at Eldama Ravine Police Station and were placed in custody. On the 21st of December 2017 post mortem was conducted on the body of the deceased at Eldama Ravine Sub County Referral Hospital by doctor Mwaura upon identification of the deceased's body by Vincent Kiprono Tallam and Francis Kipchirchir Kesses to be that of Samson Kipkemoi Kesses. The doctor formed the opinion that the cause of death was due to severe head injury. The police file was compiled and accused persons were charged with the offence of Murder now reduced to Manslaughter upon request for Plea bargain.
11. Upon the facts being read over to the accused persons, they admitted the same as being true and the court proceeded to convict them of manslaughter on their own plea of guilty. The prosecution informed the court that the accused be treated as first offenders.



Presentence Reports

1st Accused pre-sentence report

12. From the report, the 1st accused is aged 42 years old. He attended Arama Primary school where he sat for his Kenya Certificate of Primary Education examinations in 1999. He proceeded to Eming High School where he acquired a mean grade of C plain in his Kenya Certificate of Secondary examinations of 2003. He thereafter did not obtain any formal skills. He opted to engage in farming and selling stone bricks from his own quarry. Before his arrest, he occasionally drank alcohol. He is married with five children. Two of his siblings had been fined in court for contravening Forest Management and Conservation ACT.
13. He said after work, he went to drink with the 2nd accused at the trading centre when while there, he heard the victim singing circumcision songs in a place not allowed by the Kalenjin culture. He said they were pressurized by the community members to take action against the victim and as it was circumcision period, they used a motor bike to take the victim to where the initiates were being taken care of so that he could sing where the Kalenjin culture allows and for him to receive disciplinary measures from his age set. He said the disciplinary measures included beatings. He stated that they did not stay long with the victim but they left him in the hands of the community members while they were still disciplining him and that he heard about the victim's demise the next day. He went to police station to record statement and was subsequently charge with the offence of murder.
14. The accused prays for leniency, he regrets his action and promises not to reoffend. He said that he diligently committed himself to appear before court having been out of bond since out 2018.
15. The victim's family revealed that the accused's family supported in the burial of the victim and is a close neighbor. The two parties agreed that the accuseds' families compensate the victim's family with 5 cows as per the Kalenjin culture and the first 2 cows was paid on 20th January 2024 and the remaining 3 cows on 16th April 2024. The victim's family have no objection to a lenient sentence being imposed against the accused persons. The accused's family confirm that they have fully been involved in the reconciliation process with the victim's family for the sake of harmonious co-existence and they are now in good terms.
16. The local administrators confirmed that the victim's family have been compensated and the accuseds' families and victim's family have forgiven each other and live in harmony. They commit to participate in reintegration of the accused persons in the community.

2nd Accused pre-sentence report

17. From the Report, the accused is aged 29 years old. He dropped out while in form 2 due to socio-economic challenges. He has no formal skills. He is single. He does not abuse drug and substances. He helped his father in taking care of his livestock and he used to get support from him. At the time of his arrest, he was engaging in food crop farming to earn a living. He does not abuse drug and substance. His relationship with the family and community members has been good.
18. He stated that he belonged to the same age set with the deceased. He revealed that together with Accused 1 and other persons, they succumbed to the pressure of people to take the victim to a place where the initiates were being taken care of to sing initiation songs there And receive disciplinAry measures for going against societal norms of singing circumcision songs at a trading centre.



19. He stated that the victim was disciplined by the young men who had assembled at the venue where the initiates were and he left the victim while still being disciplined and went home. The following day, he learnt of his demise. He was subsequently arrested and charged with the offence of murder which was reduced to manslaughter following plea bargain.
20. He regrets committing the offence and prayed for leniency. He is apologetic to the victim's family for losing one of their members. He revealed that he has been out on bond since 2018 and has neither failed to attend court as instructed nor interfered with the witnesses.
21. The local administration and victim's family gave similar sentiments as captured above under report in respect to accused 1.

Mitigation

22. The accused persons mitigated through the defence counsel Mr. Akango. He submitted that the accused persons are remorseful, they regret the loss of life and regret that whatever started as a normal practice within the community turned tragic and led to loss of life. He stated that they take full responsibility for whatever followed. Counsel submitted that the accused persons immediately they learnt of the death, cooperated with the law enforcement agencies and participated in the whole process including taking the initiative to reconcile and getting an amicable settlement to enable the good neighborliness is not prejudiced by this unfortunate incident. He stated that they reached amicable settlement that will create harmony between the three families.
23. Counsel further submitted that in line with Article 159(2)(c) of *the Constitution* which enjoins courts to promote alternative forms of dispute resolution, the court plays a critical role in connecting and facilitating Alternative Justice System (AJS) where parties are willing to do and that this is one such case which commends itself to such exercise of judicial authority.
24. He further submitted that the accused persons have no past criminal history and for that reason, they plead for leniency and submitted that in the choice of sentence, in the spirit of promoting reconciliation, he urged this court to impose non-custodial sentence as a way of ensuring that the interactions that have been going on between the families of the accused persons and the victims is promoted to take full effect. He submitted that the accused persons are ready and willing to continue engaging process and they are ready to compensate fully and observe any condition this court may impose.
25. The prosecution counsel Ms. Omari confirmed that there were reconciliation talks between the victim's family and the families of the accused persons and the victim's family have been compensated. She submitted that the social inquiry report is favorable to the accused persons and that she leaves the issue of sentence to the discretion of the court.

Determination

26. Under section 205 of the Penal Code, a person convicted of Manslaughter is liable to imprisonment for life, however the court in Julius Kitsao *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) the court of appeal declared life imprisonment unconstitutional.
27. I have considered the fact that the accused persons are first offenders. I have also considered accused persons' mitigation through defence counsel Mr. Akango. I note from the pre-sentence report that the accused persons were drunk at the time they committed the offence. Their act of trying to discipline the deceased for going against the Kalenjin culture of singing initiation songs at the wrong place led to loss of life of their neighbor.



28. I however take note of the fact that upon learning that the deceased had passed on, they cooperated with the police and pursued negotiations with the family of the deceased. This has been confirmed by the victim's family who confirmed that they have been compensated 5 cows according to Kalenjin culture. The local administration also confirmed that compensation has been done and the three families are living harmoniously. They are all agreeable to accused persons being granted non-custodial sentence.
29. In view of the above, I agree with submissions by the defence counsel that it would be in the interest of justice to allow lenient sentence so as to promote peaceful coexistence among the three families herein. From the foregoing, I am inclined to impose non-custodial sentence.

30. Final Orders: -

1. Each accused person to serve probation sentence for a period of 3 years.
2. Right of appeal 14 days.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 11TH DAY OF JULY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

* CA Elvis/Komen.

* Ms. Omari for State.

* Mr Akango for accused persons.

* Accused 1 present.

* Accused 2 present.

