Republic v Mawira (Criminal Case E029 of 2021)
[2023] KEHC 3037 (KLR) (6 April 2023) (Sentence)

Neutral citation: [2023] KEHC 3037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL CASE E029 OF 2021

EM MURIITHI, J

APRIL 6, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

KELVIN MAWIRA ..... ACCUSED

SENTENCE

1. The accused person who had been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, was convicted for the lesser charge of manslaughter c/s 202 as read with 205 of the Penal Code on his own plea of guilty upon a plea bargain agreement between him and the Prosecution.

2. The facts of the case which he accepted as true before his conviction are set out in paragraph 9 of the Plea Bargain Agreement as follows:

> " 9. This is a case of murder contrary to section 203 as read with section 204 of the *Penal Code*. The brief circumstances surrounding this case are that on 11th September, 2020 at around 1500 hours a fight ensued between the accused person, the deceased and one person namely Muriithi where they were drinking illicit brew in Kiamuri location. The accused person rushed to his homestead and armed himself with bows and arrows and came back and shot the deceased person on the neck. The accused person later went missing from that day, where the father of the deceased conducted a search but in vain. The deceased father later proceeded to Kauthene police station and made a report. Police rushed to the scene and found the deceased person lying in a pool of blood with an arrow embedded on the neck A search for the accused ensued and on 5th April, 2021 the father of the deceased found the accused at their home in Tharaka nithi. Later, he reported the matter at Mugui police base

and the accused was subsequently arrested and escorted to Kauthene police station and was charged accordingly for the offence committed."

3. In urging a custodial sentence, the Prosecution Counsel submitted that the accused was in need of reformation so as not to take the law into his own hands, as follows:

> " Circumstances of the case -
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> Accused used a bow and arrow to inflict fatal injury on the deceased. He ran away from the scene and was arrested much later by efforts of the Deceased's father. We need to take note of what happened after the offence. The Pre-sentence report recommends community service. I oppose that sentence as invalid. Life was lost in this matter and this court has a duty to protect the society.
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> There is atrend in this county where killing is taken lightly and the court has duty to pass a message to society that it is not right to take life no matter what.
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> Accused needs to be reformed and not to take matters into his own hands. Only true reform can happen when he serves custodial sentence. I urge the court to mete out custodial sentence."

4. Counsel for the Accused, Ms. Aketch, urged the court to consider the youthful age of the accused and the circumstances of the case where both the accused and the deceased were drunk, as follows:

> " Accused was barely an adult at the time of the offence. He is married with 3 children. He is remorseful and is a practical orphan who lived with grandmother and not exposed to life. He is a sole provider for his children and wife. The deceased and the accused were intoxicated as they were at the drinking joint. The court should consider a non-custodial sentence so that he can go back and raise his family and he has learnt from his mistake. He did not intend to kill the deceased. He is 22 years today."

5. With appropriate caution against wholesale reliance on a Probation Officer's report "which had not been tested through cross-examination in court" as counselled by the Court of Appeal in *Kyalo v. R* (2009) KLR 325, 329, the court has noted the conclusion of the Pre-sentence Report made by the Community Service Officer, Githongo dated 20/3/2023 with a conclusion that "Your Honour, considering the above findings the offender may serve community service order at Kiamuri Primary School."

6. The court takes this opportunity to restate the objective of sentencing that the sentence must fit the crime, and to exhort the Probation Officers to perform their duties professionally with the solemnity that the justice system demands. Section 3 (1) of the *Community Service Orders Act* is clear on the application of the Act as follows:

> "3. Community service orders
>
> (1) Where any person is convicted of an offence punishable with—
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> (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or
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> (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the

court may, subject to this Act, make a community service order requiring the offender to perform community service."

7. The offence of manslaughter is not an offence punishable with "imprisonment for a term not exceeding three years, with or without the option of a fine" and in this case not one which "the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate". The Community Service Officer could only examine the case for suitability of a community service order upon direction by the court that it had determined a sentence of three years or less." Without such directions by the court, the recommendations for community service were uncalled for!

8. Indeed, it would be a rare and exceptional circumstance that would justify a community service order in an offence of murder or manslaughter. No such circumstances were disclosed in the report in issue or the facts of the case accepted by the accused as a basis of the conviction, and where the facts as set out in a Probation Officer's Pre-sentence Report differ from the facts set out in court or in the Plea Agreement and accepted by the accused, it is the facts as recorded by the court and admitted by the accused must prevail.

9. The recommendation for community service in this case is based on an embellished version of the facts set out in the findings of Mwenda Kiriinya, Community Service Officer, Githongo, as follows:

> "FINDINGS
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> The offender was 20 years old when he committed this offence and the victim is said to be a man at 45 years old when he was killed. The offender did not receive formal education rather he left school in class two. He has been eking living by doing casual jobs especially in farms.
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> He is a father of one child who is a pupil in pre-primary school level of education. The child is now under care of his wife.
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> 'The neighbours interviewed stated that even although offender's mother does casual jobs, she does it minimally and whatever she gets is used in alcohol drinking spree. His mother is a heavy abuser of the local brew commonly known as mugacha. This has made his mother to have been neglectful of children including the offender who was involved in child labour in his childhood. The other siblings to the offender are under sponsorship of Father Gachieta who runs Shalom Children Rescue Center. The neighbours and area administration indicated that prior to offender's arrest, he chipped in providing his younger siblings.
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> The neighbors informed that the victim was a person who was easily angered and his fight were never ending. This can be affirmed by two brothers of deceased who were once charged in Githongo Law Court. Joel Njuki Kirugi one of the victim's brother was charged with grievous harm in Case number E149/2022 and Domiano Gichaku was charged with malicious damage to property in case number E252/2022. The two brothers of the victim have been in a constant fight with their father who was the complainant in mentioned cases.
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> The neighbors also indicated that the victim also was in constant fight with his father.
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> The father of the deceased confirmed indeed the deceased and his other two brothers who are his sons were persons who liked fighting and there fight would last for a long time. The two brothers to deceased could not be traced since when their cases were withdrawn through alternative dispute resolution, one of the brother is said to assaulted his wife and run away from home to unknown place.

The father of the victim Moses Kirugi aka Mutiga stated that the family of the offender have never sought reconciliation and did not seemed opposed to it. There is no bad blood established between the secondary victims and the family of the offender. The home environment is conducive for the offender being placed on non-custodial and for reconciliation between the two families.

CONCLUSION

Your honour, considering the above findings the offender may serve community service order at Kiamuri Primary School.

MWENDA KIRIINYA

COMMUNITY SERVICE OFFICER

GITHONGO

20/03/2023"

10. Apart from much hearsay evidence set out therein as cautioned in Kyalo v. R supra, the Report's recommendation for community service as the appropriate sentence for the accused in this case is rejected as wholly unsuited.

11. It is the critical role of sentencing that the court does address the objective of deterrence as well as reformation and rehabilitation of the particular offender, especially noting the many cases of killings resulting from domestic disputes country-wide over land and related resources and drink-driven quarrels, and it is a legitimate consideration in penal law to deter the commission and repeat of offences.

12. At the youthful age of 22 years, the Accused stands to benefit from the reformation and rehabilitation made possible under prison discipline and attendant trade-skills acquisition placing him in good stead for his future engagement in socioeconomic activity for personal development and nation building.

13. The court considers that an imprisonment term of seven years (7) years, taking into account the diminished responsibility occasioned by the accused's intoxication, will serve the justice of the case.

14. The court notes that the accused has been in custody since arraignment on 19/4/21 and the said period of pre-trial detention shall be taken into account in the computation of the sentence of imprisonment in terms of section 333(2) Proviso of the *Criminal Procedure Code*.

ORDERS

1. Accordingly, for the reasons set out above, the court having convicted the accused on his own plea of guilty for the offence of manslaughter c/s 202 as read with 205 of the *Penal Code* and having taken into account the pre-trial detention period of almost two (2) years that the accused was in custody before conclusion of his trial, the Court makes the following orders on Sentence: -

1. The Accused person Kelvin Mawira is sentenced to imprisonment for Seven (7) years for the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

2. The sentence of imprisonment for Seven (7) years shall commence on 19/4/2021 when the accused was arraigned in court and remanded to await his trial.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Masila, Principal Prosecution Counsel for the DPP.

Ms. V. Aketch Advocate for the Accused.