



Republic v Rotich (Criminal Case 57 of 2018) [2023] KEHC 20380 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 57 OF 2018
RN NYAKUNDI, J
JULY 17, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH KIBET ROTICH ACCUSED

RULING

1. Joseph Kibet Rotich, the convict in this matter was initially charged with an offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The brief particulars were that on the 13th day of August 2018 at Ng'enyelai Location in Eldoret West Sub county within Uasin Gishu murdered Mercy Chesang. Before the commencement of the trial of this offence Joseph Kibet Rotich moved the state to consider a lesser offence of manslaughter Contrary to Section 202 as punishable in section 205 of the *Penal Code* under the scheme of the plea bargaining agreement pursuant to Section 137(a) (b) (c) (d) (g) (h) (i) (l) (m) of the *Criminal Procedure Code*. With the leave of the court the process of plea bargaining agreement negotiations proceeded in earnest between the parties culminating in the signed plea agreement admitted by this court on 13th day of July 2023. The elements of the new information as drafted by the prosecution for a less offence of manslaughter was explained to the accused who voluntarily pleaded guilty including admission of facts on the circumstances of the offence. It was therefore the residual function of this court to consider the appropriate sentence. Towards that end the probation officer filed a presentence report dated June 9, 2023 detailing the personal circumstances of the convict, the community perception of his re-integration to the homebased rehabilitation and finally the victim impact statement on the perspective of punishment. In a nutshell the probation officer urged this court to consider a non-custodial sentence due to the fact that the victim- offender mediation had taken place as part of the plea agreement negotiations. On the other hand learned counsel Mr Ondieki for the convict offered strong mitigation on his behalf inviting the court to be persuaded by the responsive pre-sentence report. Further learned counsel submitted that due to the unfortunate incident involving the deceased being the mother of the surviving children it was necessary to grant an opportunity for the convict to take over the responsibilities as a father /mother to safeguard their best



interest. The learned prosecution counsel Mr Mugun for the state submitted on aggravating factors and more so re-affirmed that the convict has no previous conviction for any offence known in law

Determination

2. The offence of manslaughter contrary to section 202 as punishable under Section 205 is punishable with a sentence of life imprisonment on the higher scale notwithstanding that position on a case to case specifics trial court has unfettered discretion to impose a sentence which meets the objectives in our penal code, the principles in case law and the sentencing policy of the judiciary 2016.

3. Turning to the purposes of sentencing the policy identified five major objectives of punishment:Retribution:

Retribution is the notion that the guilty ought to suffer that they deserve. It is a fundamental intuitive reaction to wrongdoing. The objective of retribution is now often expressed in the concept of “just deserts”

Deterrence:

Deterrence aims to prevent future criminal activities. There are two kinds of deterrence: First specific deterrence, which aims to dissuade the offender from committing further crime, and secondly, general deterrence, which aims to dissuade others, who have been made aware of the punishment inflicted upon the offender from committing crime.

Rehabilitation:

Rehabilitation theories involve a philosophy that the offender’s behavior can be changed by using the opportunity of punishment to address the particular social, psychological, Psychiatric or other factors which have influenced the offender to commit the crime.

Incapacitation:

An offender may be imprisoned for the purpose of preventing him or her committing further offences during the period of incarceration in order to protect the community.

Denunciation:

A court may aim in sentencing an offender to make a public statement that the behavior constituting the offence will not be tolerated by society either in general, or in the specific instance. There are other fundamental principles derived from common law also outlined in the sentencing policy. They include:

- (a) Proportionality: it requires it requires that offenders should receive a punishment tht is in proportion to the gravity of their offence, neither too harsh nor too lenient.
- (b) Consistency: The court should aim for consistency in sentencing, so tht particular sentence fall within the range of sentences appropriate to the objective gravity of the offence and the subjective circumstances of the offender.
- (c) Totality: Where an offender is convicted of more than one offence in relation to a criminal event, the offender receives a sentence for each offence.

4. Base on the foregoing, the salient features of this case which invite the courts attention. The sentencing of the convict cannot escape the provisions of Article 26 on the right to life in which Sub section 3 cautions as follows:

- "3. A person shall not be deprived of live intentionally except to the extent authorized by the constitution or other written law."



5. In so far as the facts of this case are concerned there is no cogent evidence that the death of the convict spouse was justified or excusable within the provisions of Section 17 of the Penal Code. This was indeed a gender related killing in the family as the victim was a spouse to the convict. With this in mind the convict as presumptive head of the family and in line with his responsibilities he occupied a position of authority over his family as a whole. The deceased and her children looked up to him to provide the necessary guarantees on survival rights. In that dimension by killing his spouse he turned a safe haven to be the most dangerous place for his intimate family members. In broad terms this gender related killing can be defined as intention killing due to the perception that the man of the family ordains a higher authority over his wife or children. How a family conflict turns out to be a killing episode is incomprehensible given the extent of community based alternative disputes mechanisms available to resolve family related disputes. It is significant to note that in the case of the convict prior to the killing of his wife there was no evidence but he had sought to have any unfulfilled demands from the deceased be closely dealt with by the local elders. Importantly it is by no means observed that the deceased cause of death was as a result of brutal killing well calculated to inflict serious harm with minimum survival rate. The post mortem report denotes that nature of injuries were multiple and not isolated kind of harm. The pathologist opined that the deceased primary cause of death was asphyxia secondary to the collapse of the lungs followed by pulmonary arrest. At a practical level if the relationship between the convict and the deceased had irretrievably broken down, there was an option of returning her alive to the biological parents. That could have a milder punishment than taking her life prematurely.
6. In my evaluation of the facts of this case the aggravating factors on the amount of harm to the deceased, breach of trust, the motive, the degree of the gender card not normally expected from the spouse or another, the psychological stress and anguish to the children underlying the offence outweighs the mitigation offered by the convict. As a consequence, non-custodial sentence is not an option as submitted by the defence counsel and the probation officer in the presentence report. To this end given the requisite level on the plea context of the surviving children a lesser custodial sentence militates in favor of the convict. The convict also offered to plead guilty under the plea bargaining agreement which is a positive factor. Weighing one factor after another underpinned in the above objectives, principles, and the guidelines in Section 333(2) of the CPC I sentence the convict to Five (5) years imprisonment with effect September 16, 2020.

Orders accordingly

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JULY 2023

.....

R. NYAKUNDI

JUDGE

Mark.mugun@gmail.com

