



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mutiku & another (Criminal Case E013 of 2021)
[2023] KEHC 19749 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE E013 OF 2021**

TM MATHEKA, J

JULY 5, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

GODFREY KIMOTHO MUTIKU 1ST ACCUSED

JOSEPH MARTIN MUTIKU 2ND ACCUSED

JUDGMENT

1. Godfrey Kimotho Mutiku, Joseph Martin Mutiku Patrick Kiima Mutiku, are brothers in a family of 13 children. Godfrey Kimotho Mutiku the 1st accused was the 5th born, Joseph Martin Mutiku the 2nd accused the 10th born, and Patrick Kiima Mutiku (deceased), the 8th born
2. According to the Prosecution on the December 16, 2020, the deceased, Patrick Kiima Mutiku met his brother, the accused Godfrey Kimotho Mutiku at Kilyungi Market. They had an argument which led to a fight between them. Their other brother Joseph Martin Mutiku, who was in a nearby hotel, was called by members of the public to come and stop their fight. When the said Joseph Martin Mutiku arrived, he joined hands with Godfrey Kimotho Mutiku and overpowered the deceased. They seriously assaulted him with pieces of off cuts timber and kicks to the head where he sustained serious injuries.
3. Patrick was rushed to Mbooni Sub-County hospital for treatment but was referred to Machakos where after X-ray was done on him, he was referred to Kenyatta National Hospital ICU. However, he was pronounced dead upon arrival. The doctor who attended to him first confirmed that he had passed on. The post mortem examination was conducted on 21/12/2020. Deceased had a depressed skull fracture among other injuries. The cause of death was established to be head injury due to blunt force trauma.
4. The two accused person were arrested and charged with murder contrary to section 203 as read with section 204 of the *Penal Code* where it was alleged that on the December 17, 2020 at Kilyungi Location Mbooni West Sub County within Makueni County they jointly murdered Patrick Kiima Mutiku.



5. They had been charged separately but they charge was consolidated and they took plea on the 6th of May 2021 and denied the charges. However, their advocates promptly proposed a plea agreement on the June 14, 2021. It took time to settle and the same was recorded on the March 21, 2023 when the State agreed to the offence of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#) and the accused persons agreed to plead to the same.
6. Each accused was placed under oath and upon satisfying myself that each was competent to take the plea agreement as per the provisions of s. 137F and G of the [Criminal Procedure Code](#), the agree charge of manslaughter c/s 202 as read with 205 of the [Penal Code](#) was read and explained to them. The particulars were that; on 17th day of December 2020 at Kilyungi Location, Mbooni West Sub-County within Makueni County, the accused persons jointly caused the unlawful death of Patrick Kiima Mutiku. Each pleaded guilty to the charge.
7. The facts as set out herein above were presented by the prosecution pursuant to s. 137H. They pleaded guilty to the facts as well and each was convicted on his own plea of guilt.
8. Parties addressed the court pursuant to s. 137I of the [Criminal Procedure Code](#). Mr. Tanui for the State submitted that the accused persons were first offenders and no previous record.
9. I sought a pre-sentence report on each accused from the Probation and After Care Services Makueni. Upon filing of the same counsel for the accused persons Mr. Hassan submitted in mitigation stating that that both accused persons are first time offenders. That both are married with children and the sole bread winners of their families. They have been out on bond and have lived well with their family and community while this matter has been pending in court. Each is remorseful and regrets his actions. That they have also saved the court's time by plea bargain and they have been rehabilitated. He urged the court to give them a non-custodial sentence and relied on; [R-vs- Josiah Keitany Chelimo](#) [2017] eKLR and [R-vs- Emmanuel Cheruiyot Rotich](#) [2022] eKLR. He also urged the court to consider the time spent in custody before bail was granted.
10. In a rejoinder Mr. Tanui submitted that he had looked at the pre -sentence report which proposed a non- custodial sentence. He acknowledged that the deceased was a brother to the accused persons and their family had a meeting with victim's family. In addition, that there was settlement on 'blood money'. He had no objection to the proposed a non-custodial sentence.
11. The pre-sentence Probation Officer's report dated 25/04/2023 concluded as follows;

“Your ladyship, before are accused persons aged 64 years and 47 years respectively. They survive on farming to support their respective families. The problem in this family between the siblings is mainly on inheritance issue. The victim's family was reconciled with the accused and compensated the blood price ... and are living well. The extended family and clan officials are willing to engage the area Chief and the Assistant County Commissioner in bringing peace and understanding to the siblings so as to end their rivalry and also embark on succession management. The accused are remorseful over the offence and the victim's family expressed positive attitude towards them noting that they are living well.

In view of the above, it is the view of this social inquiry that the accused persons are suitable for a non-custodial sentence hence may be considered for a 3-year probation order for supervision.”

The only issue then is what is the appropriate sentence in the circumstances?



12. The objectives of sentencing, as stipulated in the 2016 Judiciary of Kenya Sentencing Policy Guidelines (the guidelines), are; retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. It is also accepted that the sentence imposed depends on the circumstances of each case. I hasten to add that sentences ought to create an atmosphere for social transformation by addressing the justice of the case. Where a sentence will serve to address the root of the cause of the offence and determine it once and for all, the court ought to be more than inclined to mete out that sentence. Retribution and punishment are good, but they ought not to be the absolute goal. In this case living with the fact of having taken the life of their own brother, the uncle to their children, the father to their nephews and nieces may be punishment. Vengeance need not carry through the generations as a case like this has the potential to grow into something like that. Hence giving parties and the community the opportunity to work out the issue can stem the foment of such a thing.
13. I have also looked at the authorities cited by counsel and especially the one of *Josiah Keitany (supra)* which had the element of provocation. The court (Muriithi J) placed the accused on probation supervision for a period of 3 years.
14. Further, the proviso to section 333(2) of the *Criminal Procedure Code* requires courts to consider the time spent in custody prior to sentencing. The record shows that the 1st accused was committed to remand on 28/12/2020 and granted bail on 24/03/2021. He was therefore incarcerated for about three months. The 2nd accused was committed on 03/05/2021 and granted bail on 14/06/2021. He was therefore incarcerated for about one and a half months.
15. Punishment for Manslaughter under section 205 of the *Penal Code* is up to life imprisonment. The accused persons did spend some time albeit not much in custody. They are aware of what it means to lose one's liberty. Taking into consideration the totality of the circumstances of this case, I am persuaded that a non-custodial sentence would serve the justice of this case.
16. Each of the accused persons is placed on Probation Supervision for three years. Each accused is to abide by the Probation Order.
17. In addition, Probation and After Care Services Makueni is to work with the accused persons the family and the local administration to ensure restoration of the family ties.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH JULY 2023

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MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Accused1.present

present

For State: Mr. Tanui

For Accused

