



**Republic v Gitonga (Criminal Case 9 of 2019)
[2023] KEHC 27345 (KLR) (2 August 2023) (Sentence)**

Neutral citation: [2023] KEHC 27345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 9 OF 2019
SN MUTUKU, J
AUGUST 2, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL GITONGA ACCUSED

SENTENCE

1. Samuel Gitonga, the accused, was initially facing two charges of murder contrary to section 203 as read with section 204 of the [Penal Code](#). He was accused of intentionally killing James Mutuku Mutangili and Esther Nkatha on May 4, 2019 at Maili Tisa in Namanga Sub- County within Kajiado County.
2. He pleaded not guilty to the two charges. The hearing commenced and two witnesses testified. After the testimony of the two prosecution witnesses, the accused, through his legal representative, offered to enter into a Plea-Bargaining Agreement with the Prosecution for the lesser charge of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#). The offer was accepted and on November 8, 2022, the accused took the plea for manslaughter.
3. He pleaded guilty to the two charges. The facts of the case were presented to the court to which the accused admitted as the true version of what had happened.

Facts of the case

4. The facts of the case showed that on May 4, 2019, the accused received information that there was a man having an affair with his wife. He went to this house in Maili Tisa and found the door to his house, constructed with iron sheets, locked. He went behind the house and cut the iron sheets to gain entry. Upon entering the house, he found his wife Esther Nkatha, victim in Count two (2), in bed with James Mutuku Mutangili, victim in Count one (1).



5. The accused attacked both using a stick and knife. He stabbed both several times and then escaped. The matter was reported at Namanga Police Station and police visited the scene where the two bodies were retrieved and taken to Kajiado Hospital Mortuary. The accused, who was at large, was later arrested. He was charged with two counts of murder, which has been reduced to manslaughter after the parties entered into an agreement.
6. The body of Esther Nkatha was examined on September 5, 2019 at Kajiado County Referral Hospital. It was found to have bruises on the occipital sculp, bruises on the neck with signs of strangulation, a cut wound on the right thigh and cut wound on the left thigh. The spinal cord had been severed and cervical spine fractured. Her cause of death was cardiorespiratory arrest due to severed cervical spine.
7. The body of James Mutuku Mutangili was examined on May 10, 2019. It had stab wounds all over his body and cut wounds at the occipital region. Cause of death was asphyxia due to strangulation.
8. It is these facts that the accused confirmed as correct.

Determination

9. After the admission of the charges and confirmation of the facts, this court found the accused guilty of the two charges of manslaughter on his own plea of guilty and convicted him. Before receiving submissions during mitigation hearing, this court called for pre-sentencing report. The report was filed on March 20, 2023.
10. I have read the report and understood it. It shows that the accused did not show remorse during the time of the interview. His attitude was that the deceased deserved what happened to them for engaging in sexual activity on the accused and Esther's marital bed. He seemed annoyed by the behaviour of his wife for disrespecting him by inviting another man on their marital bed when he was away working for the family. He equated the behaviour of the victims as suicidal.
11. During mitigation hearing Ms Wasilwa, representing the accused, told the court that the accused was remorseful for what happened; that he has three young children who are under the care of his aged mother and that he was praying for non-custodial sentence so that he can take care of his children.
12. I have considered the circumstances under which the two offences were committed. It is obvious that the accused was enraged when he entered his house and found his wife in bed with another man. This comes out clearly in the Pre-sentence report where the accused equated the behaviour of the two victims as suicidal in that what they did was akin to committing suicide because they ought to have known that the accused could come home at any time.
13. Provocation is defined under section 208(1) of the *Penal Code* as follows:
 1. The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of selfcontrol and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered
14. In *Mabanga v Republic* [1974] EA 176, the court held *inter alia* that:

"The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter....."



We have on our own revisited the content of Section 208 of the *Penal Code* and construed it. To us content of provocation means any wrongful act or insult of such a nature as to be likely when done to an ordinary person.....to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

15. To my mind the finding of the accused’s wife in bed with another man deprived the accused the power of self-control. In that state of mind, the accused viciously attacked and stabbed the two victims causing them fatal wounds from which they died. It seems that he also strangled them.
16. After taking into account all the circumstances surrounding this case, it is my considered view that for justice to be seen to have been done, it would be prudent to sentence the accused to both custodial and non-custodial sentence. I therefore sentence the accused to serve one (1) year imprisonment in each count making a total of 2 years in custodial sentence. He will also serve one (1) year non-custodial sentence under the supervision of the probation officer. During the non-custodial sentence, he will benefit from counselling.
17. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF AUGUST, 2023.

S. N. MUTUKU

JUDGE

