



**Republic v Nduma (Criminal Case 16 of 2019)
[2024] KEHC 12774 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 16 OF 2019
RM MWONGO, J
OCTOBER 24, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

NJOKA WAMAITHA NDUMA ACCUSED

JUDGMENT

Background

1. The Accused is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on the night of 17th and 18th July, 2019 at Matandara village within Kirinyaga County murdered Simon Mwangi Gachumbe.
2. On 15th August, 2019 he pleaded not guilty to a charge of murder. The hearing proceeded and ten (10) prosecution witnesses were heard. On 2nd November, 2023 through his defence counsel, the accused stated that he wished to change his plea. He pleaded guilty to murder.
3. The matter was fixed for mitigation on 8th May, 2024.

Summary of Facts

4. The facts as presented by the state are that: On the 17th July, 2019 at about 11 pm, the accused went to a joint christened Matandara bar where he found the 2nd accused and the deceased. He was drunk, and made a payment of ksh 1,000/= for the drinks, which they consumed at the bar. They then left with the 2nd accused. The deceased followed them and this infuriated the accused. He questioned the deceased as to why he was following him. The accused then picked an empty bottle of Vienna and smashed it on the deceased causing him to fall flat on the ground, unconscious. The accused requested the 2nd accused to assist him and they pulled the deceased outside the building for about 100 metres, then left him there bleeding. They left the scene.



5. The Assistant Chief received information concerning a body discovered near a Primary School and went to the scene. He noticed blood stains leading to the Accused's house. On entering the house, he found blood-soaked clothes.
6. The assistant chief picked the accused and escorted him to Kimbimbi AP Camp for fear he would be lynched by members of the public. The body was taken by the police to Kibugi Funeral Home.
7. The post-mortem Report dated 23rd July, 2019 indicates the cause of death to be severe head injury caused by heavy blunt trauma.

Mitigation

8. The accused counsel mitigation is as follows: The accused is 45 years old. He is remorseful for the offence; He regrets his actions which were due to alcoholism; He has four children and three are school going. He is the bread winner and seeks leniency. He has been rehabilitated while in prison and has been studying Christian courses. He has been in custody for 4 years and is ready to return to the community.
9. The prosecution submits that the accused intentionally killed the deceased by smashing his head with a bottle, then dragging him for 100 metres and left him for dead. He is an alcoholic and not is not a 1st time offender. He should be given a custodial sentence.
10. The Probation Officer's Pre-Sentence Report dated 2nd April, 2024 is unfavourable. The victim's family and his children are still bitter with him and request the court to pass a severe custodial sentence. The community finds him as a threat to their safety and as such they would prefer a custodial sentence for deterrence.

Issues for Determination

11. The only issue for determination is what is the appropriate sentence for the accused.

Analysis and Determination

12. The accused was convicted for murder on his own plea of guilty. Sections 203 and 204 of the [*Penal Code*](#) under which the accused is charged provide for the offence of murder and the punishment for it. The sections read as follows:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
13. The circumstances of the offence are that the accused person smashed the deceased person with a beer bottle on the head causing severe head injury that resulted in death. This cause of death has been opined by the post mortem report. These circumstances have been admitted by the accused.
14. The question is what sentence should be meted upon the accused. Under the [*Judiciary sentencing Policy guidelines*](#), the objectives of sentencing are:
 - “1. Retribution: To punish the offender for his/her criminal conduct in a just manner.



2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community Protection: to protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.”
15. The Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR outlawed the mandatory nature of the death sentence, although it did not outlaw the death sentence itself. In consequence the death sentence though worded in mandatory language is not mandatory. Murder convicts are now allowed to present mitigation prior to sentencing which should be taken into account to enable the judge exercise discretion at the meting sentence. In so doing, the death sentence is only one of the available options that can be meted.
16. In the *Muruatetu case* (*Supra*), the Supreme Court made several observations. Some paragraphs of that judgement are very helpful to the lower Courts when it comes to sentencing. At paragraph 48 the Supreme Court states as follows:
- “(48) Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right.”
17. I have noted that the accused in his mitigation stated that he is remorseful and regrets his action. Further, he has four children who will need his care and support. There is also information that the accused while in custody has attained life skills and has improved his mental wellness. This is contained in the Prison Report dated 9th April 2024 which also indicates that he has been rehabilitated. This report recommends that if given a second chance the accused will be useful to the society.
18. The Probation Officer's Pre-Sentence Report dated 2nd April, 2024 is unfavourable. It concludes that the victim and the community have demanded for a severe sentence for them to perceive that justice has been served.
19. Similarly, the prosecution seeks a custodial sentence as the accused is not a 1st offender.



20. It is well settled law that a sentence must reflect the accused's blameworthiness for the offence. In the case of *Omuse v R* (2009) KLR 214, where it was held that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence.
21. That period should also be considered in sentencing him. Section 333(2) *CPC* demands that the court do take into account the period spent in custody. In *Republic v Isaac Wanjala Murumba* [2021] eKLR it was held that accordance with section 333(2) of the *Criminal Procedure Code*, the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. The accused has been in custody since 6th August, 2019 and has remained in custody to date.

Conclusion

22. Having considered the mitigation given herein; the reports cited herein, the sentencing guidelines and the aggravated nature of the offence and the effect of the same on the family and the community, my considered view is that, the accused deserves a custodial sentence.
23. I take a cue from case of *Daniel Nzioki Mbuti & another v Republic* [2021] eKLR. It was stated:

“The evidence on record is to the effect that the petitioners herein assaulted the deceased for reasons that he was a suspected thief. They assaulted him and dragged him from his home up to Machanga market where they left him for the dead. As such, the petitioners herein killed the deceased without any legal justification... In the end, the death sentence is hereby set aside and the same is substituted with 20 years imprisonment.”

Disposition

24. Accordingly, I sentence the accused to 18 years imprisonment. The sentence to commence from August 6, 2019.
25. Orders accordingly.

DELIVERED AT KERUGOYA THIS 24TH DAY OF OCTOBER, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Mamba for the State
2. Mwangi K. for Accused
3. Accused - Njoka Wamaitha in Person
4. Court Assistant, Murage

