



**Republic v Komen (Criminal Case 35 of 2023)
[2024] KEHC 12711 (KLR) (17 October 2024) (Sentence)**

Neutral citation: [2024] KEHC 12711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 35 OF 2023
RB NGETICH, J
OCTOBER 17, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JONATHAN KIPKOECH KOMEN ACCUSED

SENTENCE

1. By Judgement delivered on the 18th day of July,2024, this Honourable court found the accused Jonathan Kipkoech Komen guilty of the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code* and convicted him under section 215 of the *Criminal Procedure Code* accordingly. The particulars of the charge were that the accused person on the night of 7th and 8th day of January, 2016 at Solian village in Koibatek Sub- County, Baringo County murdered Anita Jelagat.
2. On the said 18th July,2024, the prosecution informed this court to treat the accused as a first offender as there were no previous records. I called for a pre-sentence report which was prepared and filed on 16th September,2024.

Pre-sentencing Report

3. From the report, the accused is 41 years old. He did not proceed with education after sitting for Kenya certificate of primary Education (KCPE) in class 8. Once he attained maturity age, he engaged in casual labor within the community and prior to his arrest, he was employed as a watchman at one of the sawmills located at Solian trading centre. He is not married.
4. The accused person admits that the late victim was drunk when she approached the sawmill where he was working as a guard on the fateful night. He offered her shelter for the night since she knew her as a cousin. Unfortunately, the victim was found dead the following morning while lying within the sawmill compound where the accused person was guarding. The accused regrets the circumstances



- surrounding the death of the victim. The relatives of the accused person indicated that this was the first time the accused was charged with a criminal offence and that he did not have a negative record.
5. The relatives of the late victim expressed grief and bitterness towards the loss of their kin. They all acknowledged that the late victim was a habitual drunkard and that they knew the accused person well since he is a cousin to the late victim. They said the accused person did not have a history of past criminal activities and the relationship of the accused person to them was cordial before the incident. They further revealed that while the accused was out on bond, he was related well with them and no animosity existed between the two families.
 6. The area administrators confirmed that the accused and deceased were cousins and that the deceased was a drunkard; and accused did not have a past criminal record. They described accused as hardworking person who went about his activities peacefully. They confirmed that prior to the incident, the accused was an employee in the timber yard who was commonly referred to as 'soldier'.
 7. The prison officials stated that the accused person was well behaved for the period that he had been in prison and within the prison, he was commonly referred as 'pastor'. He related well with the inmates in prison as well as the community members while out on bond. He regrets the circumstances that led to the death of his cousin and urges this court to consider the long period he was in custody. The probation officer is of the opinion that the home environment is not hostile to the accused person as the victim's family and accused's families and area administrators are not opposed to a non-custodial sentence.

Mitigation

8. The defence counsel Mr. Mwaita mitigated on accused's behalf. He submitted that he is remorseful for the incident and he regrets it especially that it involved his cousin. He submits that he is 41 years old, single and seeks leniency from this court; that he is a partial orphan with 2 siblings.
9. Counsel submitted that before he was released on bond, the accused had been in custody for 6 years from 13th August, 2016 to November, 2021. He urged this court to consider that he has been in custody for 6 years and from conviction, he has been in custody for at least one month. He prayed that the 6 years period in custody be sufficient punishment. He prayed for a non-custodial sentence stating that from the pre-sentence report, he has related well with the victim's family. That it will also be opportunity to give back to the society accused being an energetic man. He stated that he will also get an opportunity to get married; that he has learnt his lesson and will not repeat the offence again if granted a chance to serve non-custodial sentence.
10. The prosecution counsel Ms. Omari submitted that from presentence report, the victim's family are still bitter; that the deceased was 28 years old and still had many years ahead of her. That the accused took advantage of her when she was drunk despite being a relative. She submitted that her being a relative, he should have protected her.
11. Counsel submitted that the maximum sentence for murder is 30 years though the accused has been in custody for 6 years and was not opposed to the period served in remand being considered but she submits that custodial sentence is appropriate.

Determination

12. The accused was convicted for the offence of murder contrary to Section 204 of the *Penal Code* which provides for death sentence. The mandatory nature of the death penalty was however declared



unconstitutional in the case of [Francis Karioko Muruatetu and Another -v- Republic and Others](#) 2015 eKLR.

13. The Supreme Court decision in [Francis Muruatetu & Another V Republic](#) [2017] eKLR in which the Supreme Court of Kenya while retaining the death sentence found that its mandatory nature was unconstitutional and for the purposes of this sentence had this to say: -

“ 45. . To our minds what Section 204 of the [Penal Code](#) is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the [constitution](#) does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the [Constitution](#) are not exhaustive.”

The court therefore proceeded to pronounce itself thus:

“ 58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the [Penal Code](#). We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the [Penal Code](#) unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of the [Constitution](#).

14. However, the court did not outlaw the death sentence. This has been re-affirmed by the Court of Appeal in the case of [Joseph Njuguna Mwaura & 2 Others -v- Republic](#) (2013) eKLR where the court stated that the death penalty shall continue to be imposed in a case of a conviction where the law provides.

15. The sentencing objectives in Kenya have been captured in the [Judiciary Sentencing Policy Guidelines](#) at page 15 to be the following: -

- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
- b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.



- e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
16. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
- i. Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - ii. Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - iii. Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - iv. Protection of the community:- where the offender is likely to pose a threat to the community.
 - v. Offender's responsibility to third parties:- where there are people depending on the offender.
 - vi. Children in conflict with the law:- non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
17. I have considered the sentiments by the victim's family who are also related to the accused. They are bitter for the loss of their kin. From evidence adduced, the deceased was an orphan and, in my view, the accused being a cousin, he was expected to offer protection to her having known her as drunkard but instead took advantage of her. The sentiments given by local administration and family of victim who are also related to accused are inclined towards non-custodial sentence. I am however of the view that in view of the circumstance of the offence, the accused deserves deterrent sentence so as to serve as a lesson to other would-be offenders in the society from taking advantage of the vulnerable instead of offering support. From the foregoing, I am inclined to impose custodial sentence. The accused will serve 15 years imprisonment.
18. Final Orders: -
1. Accused to serve 15 years imprisonment.
 2. Period served in remand to be computed in the sentence.
 3. Right of appeal 14 days.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 17TH DAY OF OCTOBER 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Elvis – Court Assistant.

Ms. Ratemo for State.

Mr. Mwaita for accused.

Accused present.

