



**Republic v Kivuva (Criminal Case 25 of 2016)
[2024] KEHC 15288 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 25 OF 2016
RL KORIR, J
NOVEMBER 6, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH NTHEU KIVUVA ACCUSED

RULING

1. The Accused, Joseph Ntheu Kivuva was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 16th day of June 2016 at boarder area in Kipsitet location within Soin/Sigowet Sub County in Kericho County, he murdered Chief Inspector Charles Mugambi who was then the Deputy District Criminal Investigation Officer (DCIO) in Kericho.
2. At the conclusion of the trial, this court found the Accused guilty of offence of murder contrary to section 203 as read with section 204 of the Penal Code and convicted him on 5th July 2024. The court directed the Probation Officer to file a pre-sentence report on each Accused.
3. This court conducted a sentence hearing on 22nd July 2024 where the Accused and Prosecution submitted on mitigation.

The Accused’s mitigation

4. The Accused’s mitigation was offered by his learned counsel Mr. Langat. Counsel submitted that the Accused did not dispute committing the offence and he regretted it. Counsel submitted that the Accused has reflected during the eight-year pendency of the trial and was remorseful.
5. It was counsel’s submission that the Accused had served the nation as a police officer for over three decades without any disciplinary issue and that he prayed for a chance to be reintegrated back into the



community through a non-custodial sentence. That the Accused was a family man with three children and had elderly parents who depended on him.

6. When the Accused was invited to address the court, he stated that he had nothing to add on to what his counsel had submitted.

Submissions by the State.

7. Mr. Njeru, the learned Prosecution counsel submitted that the Accused killed his boss and could not claim drunkenness. That during the duration that the Accused had been out on bond he did not make any effort to reach out to the victims and it was clear that he had no intention of so doing.
8. It was counsel's submission that although the Accused served the State for 30 years, his sentence should be proportional to the offence. Counsel asked for a custodial sentence which would address the victim's concerns for justice.

Pre-sentence Report

9. A pre-sentence Probation Officer's Report was filed on 22nd July 2024. The Report stated that the Accused was repentant and regretted the offence. That he prayed that the victim's family would forgive him. The Report further stated that even though the Accused loved his beer, he was well governed and rarely picked quarrels. That he was loved by his family members as he helped all his siblings. The family prayed for a non-custodial sentence.
10. The local community stated that the Accused was a cheerful man with no criminal record. That he was social and did not antagonize anyone. In their opinion, the Accused should be granted a non-custodial sentence.

The Victim Impact Statement

11. The victim impact statement was obtained from the deceased's second wife, brother, the local administration and community members. They stated that the death of the deceased had caused his family and parents psychological and emotional harm. The family stated that upon receiving news of the victim's death, his mother went dumb and remained so until her death in the year 2021. His father who had been depending on him for medical care was left destitute and passed on in 2017.
12. The deceased's second wife stated that the deceased was the family's breadwinner and that she had been widowed at a very young age. That she was struggling to support their children. She further stated that their children had lost a father figure and as a result, their school performances suffered and had on occasions been sent home for lack of school fees. She lamented that her son had not joined University due to lack of fees.
13. The deceased's wife stated that no reconciliation efforts had been done by the Accused's family or by the Accused himself. That she has not been able to forgive the Accused and prayed for justice to be accorded to her and her children.



Consideration by the Court

14. In meting out a sentence, this court is guided by the objectives of sentencing as set out in law and various legal texts. The Sentencing Policy Guidelines 2023 outlines the objectives of sentencing at paragraph 1.3.1 as follows:-

Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other- in so far as possible, sentences imposed should be geared towards meeting the objectives in totality.

- i. Retribution.
- ii. Deterrence.
- iii. Rehabilitation.
- iv. Restorative justice.
- v. Community Protection.
- vi. Denunciation.
- vii. Reconciliation.
- viii. Reintegration.

15. The Sentencing Policy Guidelines 2023 also outlines the principles underpinning the sentencing process at paragraph 1.2 as follows:-

- i. Proportionality: The sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
- ii. Equality/Uniformity/Parity/Consistency/Impartiality: The same sentences should be imposed for the same offences committed by offenders in similar circumstances.
- iii. Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing principles laid out in these guidelines.
- iv. Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.
- v. Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behavior as a whole.
- vi. Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote, and not undermine, human rights and fundamental freedoms. Whilst upholding the dignity of both the offender (and where relevant, the victim), the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya. Sentencing impacts on crime control and has direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.
- vii. Enhancing Compliance with Domestic Laws and Recognised International and Regional Standards on Sentencing: Domestic law sets out the sentences that can be imposed for each



offence. In addition, those international legal instruments, which have the force of law under Article 2 (6) of *the Constitution* of Kenya should be applied. There are also international and regional standards and principles on sentencing that, even though not binding, provide important guidance on sentencing.

16. The penal section that deals with murder is provided for under Section 204 of the Penal Code which provides that any person convicted of murder shall be sentenced to death.
17. While discussing the mandatory nature of the sentence as provided for in Section 204 of the Penal Code, the Supreme Court in Francis Karioko Muruatetu & another vs Republic (2017) eKLR held that:-

“Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.
18. In other words, the Supreme Court invalidated the mandatory nature of the Sentence as provided for in Section 204 of the Penal Code but maintained the death sentence as a discretionary sentence. The Francis Karioko Muruatetu (supra) was of liberating effect in allowing courts to exercise discretion in considering an appropriate sentence for murder. It allowed trial courts to impose the death penalty but also to depart from the same where circumstances of the case so demanded. I am therefore mandated to look at the circumstances of the case and take into account the mitigation by the Accused and the objectives set out in the Sentencing Policy Guidelines (2023).
19. The circumstances of the case were that the deceased Chief Inspector Mugambi and one other officer PC Andrew Mwaniki were driven to Kisumu by the Accused PC Joseph Kivuva who was the designated police driver. They were on an investigation assignment at Kondele police station in Kisumu. At the conclusion of the assignment, they were entertained by the local OCS and they all indulged in alcohol. On the way back, they stopped at Ahero where they were entertained by yet another police officer friend and they indulged in more alcohol. They finally left for Kericho and it was on the way that the Accused fatally shot his boss who had taken over and was driving the vehicle.
20. This court dismissed the Accused’s defence of intoxication. In so doing the court observed that the Accused fired several shots and even got out of the vehicle and continued shooting the deceased from the driver’s side. However, though the dead do not bear any burdens of omission, this court considers that the deceased being the person in authority ought to have regulated the social activities which led to the drunkenness and subsequent fatality.
21. I have also considered that the Accused was remorseful. His remorse is buttressed by the fact that he was willing to take responsibility for his action at the onset of the case. The record shows that he made a plea offer to the prosecution way back in 2016 soon after the charge. He has continued to express remorse after conviction and in the sentencing proceedings. He also attended court dutifully to the conclusion of the case.
22. This court therefore finds his remorse genuine. The court however observes that the Accused has never reached out to the victims of the offence to express that remorse. He ought to have done so during the time he was out on bond.
23. The Accused’s family, his counsel and his local community urged this court to grant the Accused a non-custodial sentence. On the other hand, taking a cue from the victim impact statement, the State urged



this court to hand the Accused a proportionate and custodial sentence. Prosecution counsel urged that murder was a serious offence and a custodial sentence would serve justice to the victims of the offence.

24. The Sentencing Policy Guidelines 2023 at paragraph 2.3.15 lists the factors that a court should consider when deciding to impose a custodial or non-custodial sentence. They are as follows:-
- i. Gravity of the offence: In the absence of aggravating circumstances, or any other circumstance that renders a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided with respect to sentences that have been adjudged as deserving less than three (3) years.
 - ii. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences except where the seriousness of the offence crosses the custody threshold (where the offence is so serious that neither a fine or community sentence can be justified).
 - iii. Children in conflict with the law: Generally speaking, non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law. The exception to this is 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 and would be in the child's best interest. Custodial orders should only be meted out as a measure of last resort and in accordance with the guidance provided under section 239 of the Children's Act, 2022. The court shall also issue post-committal supervision orders upon completion of the committal orders or the attainment of the age of majority where it is appropriate to so do in light of the nature of the offence and circumstances of the offender.
 - iv. Conduct of the offender: Non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - v. Protection of the community: Where there is evidence that the offender is likely to pose a threat to the community, a custodial sentence may be more appropriate. The probation officer's reports should inform the court of the risk posed by the offender to the community in order to inform sentencing.
 - vi. Offender's responsibility to third parties: Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons who depend on them, a court should consider if, in light of the nature and seriousness of the offence, the objectives of sentencing can be met with a non-custodial sentence. The court should enquire into the offender's personal circumstances and, where appropriate, seek the assistance of a pre-sentence report.
25. I have taken into account the fact that the Accused was remorseful and desired to plea bargain at the outset. I have also considered that he had no prior criminal record. Indeed the probation report painted him as an amiable and social person who lived well in the community. Both prosecution and the defence counsel also submitted that he was a police officer who had a clean record of approximately 30 years. I have considered that his conviction may lead to the automatic loss of his job and attendant benefits which also serves as punishment.
26. Finally, I have considered that the trial in this case has taken an unduly long time for reasons not attributable to the Accused. Although the Accused was out on bond, the trial must have hung over his head like a sword causing him extreme anxiety.
27. Weighing all these factors, it is my finding that the Accused deserves a lenient custodial sentence. The Accused Joseph Ntheu Kivuva is sentenced to serve 10 years' imprisonment.



Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 6TH DAY OF NOVEMBER, 2024.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Accused, Mr Njeru for the State, Ms. Chirchir holding brief for Mr. Langat for the Accused and Siele (Court Assistant).

