



**Republic v Bilali (Criminal Case 23 of 2020)  
[2024] KEHC 13326 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 23 OF 2020  
RN NYAKUNDI, J  
NOVEMBER 4, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SHABAN MARROW BILALI ..... ACCUSED**

**JUDGMENT**

1. The accused person in these matters was sentenced to murder contrary to Section 203 of the penal code but under the guidelines of Section 137 (A)-(O) of *Criminal Procedure Code*. He entered into a plea-bargaining agreement to voluntarily plea to a lesser offence of manslaughter contrary to Section 202 as punishable with Section 205 of the *Penal Code*.
2. The brief facts which formed the basis of the offence are as captured in the plea agreement which I reiterate in a summary as follows:

“That on 23<sup>rd</sup> day of March, 2020 at around 1400HRS, the accused person and the deceased, his wife, had a disagreement about suspected infidelity by the wife. The suspicion had a risen after the accused saw videos of a person who appeared to be the wife engaging in sexual relations with other man he was unfamiliar with. The deceased vehemently denied that she had been in an adulterous relationship and maintained that she was not the one in the video. In order to drive a confession out of her, the accused person decided to beat her using a walking stick. Under the pain of the assault, the deceased admitted that she had an adulterous relationship with the man who was her ex-boyfriend and that was before she got married to the accused. The accused then stopped beating her and gave her some pain-killers. The deceased went to rest on their bed while the accused remained outside washing clothes. After a while, the deceased called him inside while complaining of pain. The accused made



arrangements to take her to the nearby Chepkigen Health Centre where she was treated and after about an hour, she passed on.

3. The court having convicted the accused person on his own plea of guilty for the less offence of Manslaughter contrary to Section 202 as punishable to life imprisonment, in exercising that jurisdiction, it was incumbent upon the parties to file their respective submissions on mitigation and aggravating factors. In addition, the social inquiry reports were made available by the children's officer and the probation officer covering various aspects on sentencing. In brief the probation officer's report dated 23.11.2023 conducted an inquiry on the personal history of the accused, circumstances of the offence, attitude of the offender towards the offence, victim finally attitude and final recommendations which guide as follows:

“Your Honour, the offender before this honourable court is a Kenyan man aged 45 years, who has been convicted for the manslaughter c/s 202 of the penal code. From our conclusion, it is our prudent observation that the offender be granted a chance to serve a non-custodial sentence. By this sentencing option, the offender will continue fending for his children. On the same note our office shall strive to guide and counsel the offender on grief for him to accept the situation parenting skills in taking up his children and anger management. We shall also endeavor to foster reconciliation between the offender and the deceased family for the peaceful co-existence. We therefore recommend that, he placed on a probation sentence for a period of three years subject to the discretion of this honourable court.

4. In addition, the Director of Children Services under the *Children's Act* filed the following report involving the victims being children born within the marital union between the accused and the deceased namely: Aisha Bukaku: Age 14 years: Class: Completed Std 8. Zuleka Akelo, Age: 12 years, Grade 8, Farouk Bilali Age: 8 years, Grade 2. Having conducted the Social Inquiry on the welfare and best interest of these children, the children's officer made the following recommendations. Your honour, the subject are children in need of care and protection. The minor are still young and needs guidance, love, affection and attention from the parent (father) left after the demise of the mother. The minor requests to be allowed to live with their father even though they know he is facing charges. The children's department requests your honourable court to allow the minors to stay with their father as he serve a non-custodial sentence. By opting this, the minors will be provided with their father, as our office will monitor the minors well being, education and parenting skills.

## Decision

5. The offence of manslaughter provides for a maximum sentence of life imprisonment as regulated by Section 204 of the Penal Code. However, the trial court is clothed with discretion to pass a sentence which is fair, proportionate, dependent upon the circumstances of each case. Having interacted the various scholarly works and guiding principles on sentencing the purposes and objectives may overlap or indeed conflict. The court therefore has to undertake a balancing Act to arrive at a just sentence for the offence. There are many actors involved who may be directly or indirectly affected by the commission of an offence. In the instant case, there are two category of victims that is the family to the deceased and secondly her own children as identified by the children's officer. It is also not very remote to mention by the accused himself has lost a companion by dint of this death given that she was the mother of his children.
6. There are various principles and legal text which ought to be appreciated before imposing the final verdict as against the accused person. First in *Veen v The Queen* (No 2) (1988) 164 CLR 465, Mason CJ Brennan Dawson and Toohey JJ said at 476: “ Sentencing is not a purely logical exercise, and the



troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions. Secondly in *R v Engert* (1995) 84 A crim R 67 at 68 Gleeson CJ observed “Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable factors and circumstances of individual cases and the application to those facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might at the same time mean that the protection of society is of greater importance. It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

7. The sentences imposed by the trial courts against any convicted offender, are aimed at and purposed to achieve the following objectives:
  - 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 criminal disposition and become a law-abiding citizen.
  - d. 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.
  - e. Community protection: to protect the community by incapacitating the offender.
  - f. Denunciation: To communicate the community’s condemnation of the criminal conduct.”
8. The court is required to weigh and balance a variety of factors as outlined in the *Francis Muruatetu case* (2017) eKLR to determine the measure of the blameworthiness of the accused person. As developed by the Supreme Court on the Muruatetu case, the court has to consider inter-alia:
  - a. Age of the offender
  - b. Being a first offender
  - c. Aggravating factors
  - d. Mitigation factors
  - e. Whether the offender pleaded guilty
  - f. Character and record of the offender



- g. Commission of the offence in response to gender-based violence
  - h. Remorsefulness of the offender
  - i. The possibility of reform and Social re-adaptation of the offender
  - j. Any other factor that the court considers relevant e.t.c
9. In approaching this matter, I bear in mind Section 4(3) of the children's Act which provides as follows: That a judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child. In Article 3 of the
  10. CRC provides that: "In all actions concerning children, whether undertaken by public or private social welfare institution, courts or law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. The same provisions are also stated in Article 4 in the African Charter on the Rights and Welfare of the Child. United Nation Children's Fund in cooperates some key principles of the convention of the right of the child. On the other hand, Article 53 (d) ( e) and 2 expressly provide as follows: That every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour, to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not, (2) A child's best interests are of paramount importance in every matter concerning the child.
  11. The concept of the best interests of the child has got to be understood and considered in its breadth and width in an approach which takes into account primarily all those guides under Section 8 of the children's Act and Article 53(1) of *the constitution*. This case is not about the children in conflict with the law but it is on the centrality issue likely to affect their right to life under Article 26 (1) of *the constitution*, right to dignity in Article 28, and right to security in Article 29 of *the constitution* besides the plethora of rights re affirmed in the children's Act and other enabling policy instruments governing their rights in Kenya. This is the lens the case before me must be determined. From the Social Inquiry Reports by the children officer and the probation officer respectively, there are high chances that the rights of the accused children and the deceased are likely to be impaired in the event the only surviving biological parent is sentenced to a custodial sentence of whatever period the court might decide.
  12. The country is going through a turmoil season in which femicide and other violent crimes against women is on the rise. It looks like if the newspapers and other media print is anything to go by the fate of the women in Kenya may be in the hands of the creator given the increase of crime which women and girls are victims. The women in this country may it be in a relationship set up, family, or marital union are entitled to the protection of their rights as premised in *the constitution*. They need to find peace, love, happiness, security, dignity, and integrity, within their work places, matrimonial homes and other environmental habitation in which they feel free and free indeed to enjoy their human rights. It must be emphasized that in a marriage union parties are exercising their constitutional rights of association and conscience. None of the spouses comes to the marriage union with superior rights to be invoked to rule over the other on the basis that he is the head of the family. There are many ways for married couples to seek forgiveness, communicate, sensibly and deeply on the issues they care about without engaging in violence of any nature, for this is the catastrophe facing our communities and society at large. The level of trust in relationships has diminished the quality and enjoyment of life between men and women who have covenanted to cohabit together as husband and wife. This is the scenario the accused person and the deceased found themselves culminating into the lose of life of the deceased at her prime age. Her dreams were shuttered and her children orphaned. The sentencing courts have to be conscious of this social evil in our society of high incidents of domestic violence.



13. As for the accused person I have considered the mitigation, the social inquiry reports and the aggravating factors of this offence. It is also a fact that the accused is a first offender with no previous conviction. This is a case no doubt the court should pronounced itself fairly, firmly, and proportionately in imposing the sentence of a lengthy period of imprisonment for reason of the test and frame of the offence having been committed within the scourge of domestic violence. The gross breach of trust by the accused and utter vulnerability of the deceased constitutes serious aggravating factors in this case. However, there is an important feature in this case involving the victims of the offence being the minor children of both the accused and the deceased. There is need to have regard in the exercise of discretion in light of this whether a custodial sentence would have far reaching negative implications likely to infringe or threaten the welfare and best interest of the named children in these sentencing proceedings. What stands out clearly is that there exist compelling and extenuating circumstances within the rubric of welfare and best interest of his children to adjust judicial sentencing discretion for the offence of manslaughter facing the accused person to attract a lesser sentence of non-custodial to give an opportunity to provide parental support to the children.
14. As a consequence, I impose a probation sentence of three (3) years under the supervision of Uasin Gishu County Probation Office with the following conditions attached:
  - a. That the convict shall undergo psycho social therapy from a professional counselor under the guidance of the County Director of Probation
  - b. That the psycho social therapy to incorporate the needs of the convict geared towards rebuilding and restoration of relationships between a father and his children given the trauma they may have suffered from heinous crime suffered by their mother in the hands of the convict.
  - c. That the psychologist of counselor debunks and confronts trust vs mistrust between the children and their father now a convict in this case which stemmed from the circumstances of this case.
  - d. That the probation officer under whose supervision this sentence is being executed accords the Deputy Registrar of the High Court a half yearly reports on the progress made towards rehabilitation of the convict and strengthening of relationships between both parties.
  - e. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF NOVEMBER 2024**

In the Presence of:

Mr. Okara & Co. Advocates

Mugun for the state

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**R. NYAKUNDI**

**JUDGE**

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