



Director of Public Prosecution v Lukuba & another (Criminal Case 55 of 2013) [2024] KEHC 15272 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 55 OF 2013
S MBUNGI, J
DECEMBER 3, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

FRANCIS LUKUBA 1ST ACCUSED

MARTIN NGAIRA 2ND ACCUSED

RULING

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence was that on the 2nd day of October, 2013 at Inyenyi Village, Museno sub-location at Khayega location in Kakamega County, the accused persons jointly, with others not before this court assaulted Alexander Shiangalia to death.
2. The matter proceeded to full trial and the prosecution called and relied on the evidence of three witnesses to prove their case.
3. The court ruled that a prima facie case had been established against the accused persons and they were put on their defence.
4. In their defence, the accused persons gave sworn statements without calling other witnesses to support their case. The 1st accused told the court that both the deceased and the 2nd accused person are his sons who were mentally ill. He stated that the two were caught up in a fight attracting members of public who took sides and assaulted the deceased after he kicked him.
5. The 2nd accused stated that the deceased came to his house carrying the tree he had cut, complaining that he had cut his trees and chased him to his father's homestead. When the 1st accused came out of his house, he reported to him that the deceased wanted to beat him. He also told the court that they had a history of mental illness in their family and that their mother and sister had also died of the



same. He also stated that they would occasionally quarrel with the deceased but he would run to avoid confrontation out of respect since the deceased was his eldest brother,

6. Judgment was entered thereafter where this court presided by Hon. Justice P.J.O Otieno found the accused persons guilty of the offence of murder as charged and convicted them accordingly.

7. The Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

8. In *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015*; [2015] eKLR, the High Court held that the objectives of sentencing include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

9. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

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.”
10. I was not the trial judge, but I have perused the proceedings and all the materials placed before me. I am properly sized of the facts in the matter. From outset, this is a unique case for it involves a father and his two sons and all possess unique characteristics. The father is octogenarian, and the two sons suffer from mental illness.
11. Under section 203 of the Penal Code, murder is punishable by a maximum of death sentence. The state and defence counsel have stated that the accused persons are first-time offenders. I have also read the pre-sentencing report which recommends a non-custodial sentence. I therefore rule out the death sentence.
12. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses' demeanor. The discretion must however be exercised judiciously. In the Nigerian case of *African Continents Bank vs Nuamani* [1991] NWLI (part86)486, it was observed that,
- “The exercise of court's discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”
11. The 1st accused is 76 years old. According to projections by the United Nations on life expectancy in Kenya from 1950 to 2024, The life expectancy in Kenya in 2024 is estimated to be 70.4 years for the total population, 68.6 years for males, and 72.2 years for females. However, life expectancy in Kenya is still lower than the global average of 72.8 years.
12. Biblically God allows a human being to live up to 80 years. In Psalms 90:10 New Living Translation (NLT) states that seventy years are given to us! Some even live to eighty. But even the best years are filled with pain and trouble; soon they disappear, and we fly away.
13. According to medical records from G.K Prisons dispensary Kakamega dated 20.11.2024 which I quote:
- “RE: Francis Lukuba Ngaira 76 Years Male
- The above named person has been on management of various chronic illnesses including arthritis, diabetes which is under non pharmacological monitoring and known htn on nifedipine and hctz. He has been gradually developing urine incontinence with incomplete voiding. His blood pressure is not well controlled despite our intervention with various medications. In light of the above conditions, he should be reviewed by consultant urologist and rheumatologist for further intervention and management. He would highly benefit from close monitoring and assistance from the company of close relatives. Your assistance and positive response will be highly appreciated.”
11. During the pre-sentencing hearing the prosecutor submitted that he knew the convicts were remorseful and they had reached out to the rest of the family and the family has forgiven them. Secondly, he acknowledged that the 1st accused was an old man who was suffering from a number of illnesses and the 2nd accused has mental illness thus he was not pushing for maximum sentence.



12. *The Constitution* of Kenya in Chapter 4 (Bill of Rights) obliges any state organ or public officer dealing with vulnerable persons in society such an elderly person to take into consideration the special needs of that person before making a decision.
13. *The Constitution* of Kenya's Practice Directions for 2022 state that the interests of vulnerable litigants, including the elderly, must be safeguarded in all court proceedings.
14. From the facts of the case, it is clear that the incident arose as a result of domestic differences where the deceased allegedly was unhappy that the 2nd accused had allegedly cut his trees in the compound without his permission and as a result it is said the deceased chased the 2nd accused with a rode. The 1st accused was attracted by the noises and came out of the house. The 2nd accused told him that the deceased wanted to beat him then thereafter allegedly members of public came and beat up the deceased after he kicked the father. (1st accused).
15. I have considered the circumstances surrounding the commission of the offence, the mitigation, pre-sentencing reports and the submissions made by the prosecution and defence counsel and more importantly the applicable law and guidelines to be considered when a court is passing a sentence as analyzed elsewhere in this ruling.
16. The circumstances of the incident were well captured in page 3 of the pre-sentencing report which states:

“...The offense took place in a chaotic incident of mob justice. The situation began when the victim chased the offender with a machete, prompting the offender to call for help. Hearing the commotion, villagers intervened, apprehending the victim. In a misguided attempt to enforce justice, the crowd resorted to violence, which tragically led to the victim's fatal injuries. The offender's involvement seems to have been circumstantial rather than deliberate, as he was caught up in the collective response of the community. This incident underscores a broader societal issue with mob justice rather than pointing to an individual propensity for violence...”

11. Given the age of the 1st accused, the contents of the pre-sentence report and the relevant sections of the law that I have quoted herein above, and more importantly the family wants a closure and both the family and community is ready to have the old man back to spend his remaining years of life with them I find this a proper case to exercise my discretion in a way which will foster family and community cohesion and at the same time afford the 1st accused a chance to be rehabilitated while out of confinement, and further I note given his age and the health complications he has he will be a liability to the government if given a custodial sentence.
12. I therefore sentence the 1st accused to serve 3 years' probation under the supervision and counselling of the Probation Officer and further within that period the 1st accused should not engage in any criminal activity. If he does, this court will vacate the non-custodial orders and impose a custodial sentence.
13. The 2nd accused is said to be suffering from mental illness According to medical report from G.K Prisons dispensary Kakamega dated 20.11.2024 which I quote:

“RE: MARTIN LUKUBA NGAIRA 38 YEARS MALE

The above named person is a psychiatric patient with bizarre behavior and has been on follow up. Currently on artane and largactil once a day. His condition and mental status is not stable to withstand long term confinement. He will therefore benefit highly on monthly



mental check up in a psychiatric clinic. Daily monitoring and care from close relatives will be of great value and highly recommended. Your assistance and positive response will be highly appreciated.”

11. There are also medical treatment notes and reports from Mathare Mental Hospital regarding the 2nd accused’s mental health status from which the court proceedings show he was committed between the year 2015 and 2016.
12. Now there is medical report from G.K Prisons dispensary Kakamega dated 20.11.2024 saying that the 2nd accused is not stable mentally and needs daily monitoring and care from close relatives. Just like the law does not allow a person of unsound mind to undergo a trial, a sentence cannot be passed against a person who is not mentally sound unless the court has found such a person guilty but insane, it is when one can be held in prison at the pleasure of the president. In our case, there are no records to show that the 2nd accused had mental problem at the time he took plea. According to the court record, the mental problem started after he took plea he was treated and was declared fit to stand trial. So at the time of conviction, he was of sound mind.
13. As a result of his mental instability, I think the best thing to do is to defer the sentencing until a time when the said accused will be declared of sound mind.
14. The prison authorities recommend that the 2nd accused needs close family care on his journey to recovery.
15. In order for the accused to access proper medical care I will release him to his family (either the father, or mother or sister or brother) who will take him to hospital and when declared fit mentally he will be brought to court for sentencing. To ensure that this is done, I note the said accused was on bond during the trial of Kshs. 1,000,000/- plus one surety. I will release him on similar bond terms.
16. The 2nd accused to be produced in court by the surety and the person released to on 04.03.2025 to assess his progress and take further directions on sentencing.
17. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 3RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Accused persons – present

Mr. Getanda Advocate for the accused persons present

Court Prosecutor – Mbonzo

Court Assistant – Elizabeth Angong’a

