



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 24 OF 2018

EDDLIED MANDI JILANI.....1ST APPLICANT

MAKONDE RUWA BUNI.....2ND APPLICANT

NGIRA KARISA CHARO.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The 3rd Accused herein **Ngira Karisa Charo** was charged together with the 1st accused and 2nd accused, with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the charge are that the 3rd accused in the company of the 1st and 2nd accused and others not before the court murdered **Isaack Kassim Jiraw a.k.a. Sokorow**. The 3rd accused pleaded not guilty to the charge. However, in the course of the proceedings and pursuant to a Plea Agreement dated and filed herein on 17th January, 2019 made pursuant to Section 137 A-O of the Criminal Procedure Code, Cap 75 Laws of Kenya, the 3rd accused entered into a plea bargain with the Director of Public Prosecutions and agrees *inter alia* as follows:

2. The accused person pleads guilty freely and voluntarily without promise or benefit of any kind, other than as contained in the plea agreement and without threats, force, intimidation, or coercion of any kind. The accused person knowingly, voluntarily, and truthfully admits the facts contained in the said plea agreement. The accused person agrees to plead guilty to the Offense of Murder Contrary to Section 203 as read with section 204 of the Penal Code. The accused person admits that he is guilty of jointly with others not before court and others before court with malice aforethought and through unlawful action causing the death of **Isaack kassim Jiraw** and that the maximum penalty under the law is a sentence of death. If the court accepts the plea agreement and the accused person fulfills each of the terms and conditions of this Plea Agreement, the state agrees as follows:

a) That it will tender mitigating circumstances and tender a victim impact views which are favorable to the accused in guiding the court to arrive at a just and fair sentence.

b) It will further make a specific recommendation for the accused to serve custodial sentence of (ten) 10 years

3. The Accused person also understands that this Plea Agreement affects only the criminal charge in this case and shall not be construed, in whole or in any part, as a waiver, settlement, or compromise of any civil or administrative remedies available to the Central government, or any agency, or authority, or County government. The Accused person agrees that if the Court rejects his or her plea of guilty subject to this plea agreement, the Plea Agreement shall be rendered null and void and no party shall be bound by it.

Advice on rights

4. According to the said plea agreement the accused person has been advised of his constitutional rights, including his right to a trial, his right to examine and cross-examine witnesses against him, and he has knowingly and voluntarily waived these rights and privileges and agreed to enter the plea of guilty as set forth in the Plea Agreement. The Accused person agreed to provide entirely truthful, complete and accurate information, and to cooperate fully with the State. This cooperation includes testifying before court against his accomplices as a prosecution witness. The accused person agreed that he shall at all times give complete, truthful and accurate information and testimony, and he agreed not to commit, or attempt, any act in furtherance of offence(s) the subject matter of the plea agreement. The Accused person understands that the said Plea Agreement does not protect him from prosecution for perjury, should he testify untruthfully at any proceeding, or for making false statement. Should the accused person fail to comply with the terms and conditions set forth in this Plea Agreement, the State may fully prosecute the accused person on all criminal charges that can be brought against him.

Factual basis of offences charged

5. The deceased **Mr. Isaack Kassim Jiraw** died by human action and the cause of death is cervical spinal fracture secondary to strangulation as per the expert opinion in the post term conducted by Dr .Eddy. The deceased was last seen alive by people known to him on the 8th of March, 2018. His body was discovered on 10th of March 2018 in Lango Baya thicket in Magharini, Malindi Sub-county. His naked body had been deeply scarred with chloride acid. The weapon used to strangle the deceased was found still tied to his neck and it was a brown strap from a bag. Three empty chloride oxide battery acid-branded bottles were found at the site contained some liquid now established to be chloride acid. A bottle of the same brand was recovered at the house of the 2nd accused. In the course of investigations the accused cooperated and led the police to Gede approximately 50 meters from his homestead where he had dug up from the ground a hidden mobile phone techno. Investigations established that he used this cell phone as an instrument to communicate with his accomplices in furtherance the commission of the crime. The said phone had two sim card numbers registered in his name. Forensic Analysis established active communication between his numbers **0702223057 and 0754706188** and cellphone number **0719867555** that has forensically been linked to the 1st accused person and cellphone number 0790165347 that is also forensically linked to the 2nd accused. The 3rd accused (Ngira) has by the location and movement of his phone been placed together with the 2nd accused and the deceased on 8th March, 2018 at 1442hrs at Nakumatt Nyali along Mombasa Malindi road. The cellphone geo-location of the deceased number **0722647944** and the number used to lure him and which is forensically linked to the 2nd accused **0702928209** were at the same spot just before it was switched completely. The handset that had been inserted with the same line forensically linked to the 2nd accused **0702928209** was on 3rd May 2018 activated with number **0792059628**, a number associated with a relative of one Katana Karisa Charo on whom the said handset was recovered. Further evidence is expected to establish that 1st accused was also in active communication with the brother to the 3rd accused who has to date evaded arrest and therefore his actions amount to guilty conduct. Communications between the 3rd accused and his accomplice had a peculiar pattern of intensity around the time the accused disappeared but ceased all at once which again is guilty conduct. The accused admitted his guilt and recorded a statement dated 10th May, 2018.

6. The 3rd accused, having entered a plea of guilty subject to the said plea agreement, the aforesaid factual basis only remains relevant for the ongoing case against his co-accused, and the court will not go into their details at this stage as the same may prejudice the ongoing case.

7. The issue for the determination by this Court is the kind of sentence to be met in the circumstance.

Submissions on Sentencing

8. **Mr. Jami** for the DPP submitted that notwithstanding that the plea agreement makes a specific recommendation that the accused be made to serve a jail sentence of ten (10) years, this Court is at liberty to meet out any sentence, including serving a non-custodial sentence if the Court is satisfied that the same meets justice.

9. **Ms. Oyier** for the accused person submitted that a four (4) year sentence would suffice since the accused person has cooperated with the State and is willing to testify to all that he knows in the murder.

10. **Mr. Salim** holding brief for the family of the deceased submitted that the family has accepted the reality that the deceased is gone, and that the accused has cooperated to ensure justice for the deceased and so they would be satisfied with any decision the Court may make on sentence. The family, vide their advocate's letter dated 16th January, 2019 addressed to the DPP, had already fully forgiven the accused for the murder of the deceased.

11. On 17th January, 2019 this Court directed the Probation Department to file a Social Inquiry Report to assist the Court in arriving at a decision. That Report was filed on 18th February, 2019.

Social Inquiry (Probation) Report

12. According to the said Social Inquiry Report the accused's parents are dead. He has six siblings who do casual work. The family hails from Malindi Sub-County. Despite being aware of the accused being remanded, they have never visited him and have stayed away from him all along.

13. The accused is a second born in the family of seven. He enrolled in Bugale primary but dropped only in class one and he is therefore illiterate. For the better part of his life, he says to have been a freelance casual worker doing palm wine tapping. He shifted from his home area to Watamu and prior to his arrest he was residing at an area known as Jimba village.

14. The accused is separated from his wife, **Zawadi Kenga Karisa** and alleges to have one child, **Oscar Ngira** who lives with the separated wife in Vibao Viwili area of Malindi. The wife could not be reached during the social inquiry.

15. The accused seems to be healthy mentally and physically. He indicates no major health concerns.

Offender's Attitude towards the Offence

16. According to the said Social Inquiry Report, the offender was interviewed at length. He is not easy to open up and share information especially on issues touching on his person and family. He did not show seriousness of the information he gave out. Though he admits the offence and asks for leniency, he did not portray signs of being real and genuine but he only seems to be seeking mercy and leniency. The Report states that some of the information he gave turned out to be false and incorrect and could not be fully relied upon. He kept at bay his family members and their contacts and it was hectic to reach them for more information. In other words he was not forthcoming with information.

Previous Convictions/Trials

17. The offender isn't a stranger in the court of law nor in the prison facilities, especially in Malindi Chief Magistrate's Court and Malindi High Court. He was tried and convicted vide Criminal Case Number **1720/09** before the Chief Magistrate Court Number One in Malindi. He was convicted and sentenced to serve an imprisonment term of seven years which he served between 5th July 2011 to 12th November 2014. Upon a successful appeal to the High Court at Malindi, vide criminal appeal number **76/2011**, the sentence was reviewed from seven years to five years. As a result of this imprisonment, he served in Malindi GK prison, serial number **MAL/643/2011/LS**. The offence was grievous harm. The victim is alleged to have been his neighbour.

The Victim's Family

18. The deceased was a youthful man who had established himself as a businessman. Though he resided in Nairobi, he had his businesses operations across the country. The murder left behind a big gap and agony in the family both at nuclear and extended levels. The deceased left behind dependants including wife and children, who are of tender years. Their murdered father was the only source of livelihood, hope and mentorship. The widow is traumatized and helpless. The extended family is also left suffering.

19. The family is still in agony following the murder. Though the family indicated they have healed, there are still signs of trauma when they remember the incident. The family is however ready to forgive the offender on a condition that he will give evidence during the trial. They are however not positive towards him being on a non-custodial sentence.

20. The Social Inquiry Report stated that the offender is a high risk and can easily breach court orders especially if considered for a non-custodial order.

Sentencing

21. Under the circumstances, what kind of sentencing should this Court meet out?

22. To guide the Court in this matter the following are the guidelines that I believe the Court should adopt.

(i) What is the role of plea bargaining in the criminal justice system?

(ii) What made the accused to participate in the offence?

(iii) What is the attitude of the accused towards the offence and the victim?

(iv) How would the accused be received back in the community?

(v) Is accused a perennial offender?

(vi) Is accused likely to commit other similar offences in future?

(vii) What does sentencing aim to achieve under plea bargain doctrine?

23. All above factors taken together, the Court must consider that plea bargain is a new phenomenon aimed at securing speedy justice for the victim and the accused while at the same time saving the precious judicial time. The doctrine of plea bargain is therefore central to the emerging criminal justice system, alongside the concept of diversion and prudence on the prosecuting authority. It is the duty of this Court to promote and strengthen these doctrines, especially the one under reference herein - plea bargain - so that the public is aware of the benefits to be gained by employing the doctrine. An accused person should not be made to feel that his victory was a pyrrhic one as soon as he pleads guilty. He should see the benefit of the plea bargain in the sentence meted out by the Court. Plea bargain doctrine, when adopted by the Court, therefore necessarily implies a reduction of the sentence, and this reduction must clearly come out so that both the accused person, the victim's family and the public internalize the benefits of the doctrine.

24. Having said the above, this Court must still weigh the gravity of the offence. Rarely do accused persons confess to an offence, and when they do not, a Court has to wade through mountains of evidence to find an accused guilty as charged. Even then, courts, being manned by human beings, may not be 100% correct. There is always an element of possible error, but a Court would be justified jailing an accused person whose guilt is proved beyond reasonable doubt. However, "beyond reasonable doubt" is not 100% correct. There is never a perfect trial.

25. The only perfect trial is like the one before the Court where an accused person has confessed to committing an offence and has pleaded guilty. That confession makes the decision easier for the Court. The irony, however, is this, that when the Court has before it a perfect trial, and has found - like in this case - the murderer - the Court is being asked to be lenient. Rarely do Courts have a chance to see a murderer, even when they convict them, there is always an element of doubt. But before me today, is a confessed murderer, and this Court knows for certain that here is the murderer. Yet because he has entered a plea bargain with the prosecution I am asked to meet out a lesser sentence.

26. I am persuaded by the noble objectives of plea bargain. In the said plea bargain agreement parties have agreed that a minimum of ten (10) years should be meted out, but the discretion is left to the Court. The offence of murder can attract more than fifty years in jail. However, because the accused must derive some benefit from the said plea bargain, and because of the factors already stated about him being remorseful and the benefits of plea bargain to the criminal justice system, I am persuaded that eight (8) years in jail would serve as adequate punishment for the offence committed by the accused person.

Order

26. The 3rd accused person herein, **Ngira Karisa Charo**, is hereby sentenced to serve eight (8) years in prison.

Dated, Signed and Delivered in Mombasa this 8th day of April, 2019.

E. OGOLA

JUDGE

In the presence of:

Mr. Magolo for 1st Accused

Mr. Wamotsa for 2nd Accused

Ms. Oyier for 3rd Accused

Mr. Isaboke for DPP

Mr. Salim for Family of the victims

Mr. Kaunda Court Assistant