



**Republic v Kirimi (Criminal Case 66 of 2013)
[2024] KEHC 459 (KLR) (25 January 2024) (Sentence)**

Neutral citation: [2024] KEHC 459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 66 OF 2013
EM MURIITHI, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH MAINGI KIRIMI ACCUSED

SENTENCE

1. The Accused was on 15/7/2023 initially charged with murder contrary to section 203 as read with 204 of the Penal Code. The accused was certified not fit to plead and was hospitalised at the Mathari Mental Hospital for treatment by a committal order and warrant dated 12/8/2013.
2. In a report by Officer in charge of Meru Main Prison, the history of the accused’s remand is given as follows:

“Ref. No. Merlpris/8/6aNol.iv 159 Date: 13-02-2020

The Office of the Director of Public Prosecutions,
Meru County,
Po Box 2377-60200,
Meru.

Re: Joseph Maingi Kirimi Murder Cr No. 66/2013 Meru:

We write in respect of the above remand prisoner.

He was admitted to this facility on 5th August, 2013 charged with the offence of murder c/ sec 203, read with sec 204 of the Penal Code. On 12th August, 2013, an order was made that he is admitted at Mathari Mental Hospital for mental treatment. He was at Mathari Hospital until 2017 when he was discharged and remanded at Nairobi Remand And Allocation.



He was brought here in December 2019. We have been trying to liaise with the honorable to issue a production order so that we can have him produced in court but the same has not been forthcoming.

Kindly assist.

Thank you.

Gerald Gichunge R. (SSP)

For: Officer in Charge,

Meru Main Prison.

Cc

The Deputy Registrar

High Court Meru

Po Box 118

Meru”

3. As the accused was in hospital for the treatment of his mental illness from 2013 -2017, the Court accepts the period of his pre-trial detention to begin on 1/1/2017 as the date of discharge from mental hospital and remand at Nairobi Remand and Allocation centre is not disclosed.
4. The accused was certified fit to plead by certificates dated 16/3/2021 and 6/10/2022. He denied the charge and the Prosecution called its seven (7) witnesses to prove the charge. The Court found that there was established a prima facie case against the accused and he was put on his defence.
5. Before the defence hearing, the accused requested for plea bargain that would change his charge to one of manslaughter. The Plea Bargain Agreement dated was subsequently entered into between the DPP and the Accused.

Postmortem

6. The history on the postmortem examination report dated 12/7/2013 indicated the circumstances of death as follows:-

“The deceased was left sleeping by her mother at their home when she went to fetch fire at a nearby sister’s house. When she returned back after five minutes and found the deceased lying in a pool of blood having her throat slit. Where she tried to take her to hospital but she died on the way.” (sic)
7. On examination, it was revealed “severed cervical vertebrae 4 (C4) [and] severed cervical spinal cord”, and the cause of death was in the opinion of the pathologist shown as “severe haemorrhage due to deep cut to the neck.”
8. The facts of the case accepted by the accused upon the plea bargain were set out in the Plea Bargain Agreement dated 7/11/2023 as follows:

“ Facts

 9. On the 7th day of July 2013 at around 0630hrs Joyce Ntinyari woke up in her parents home at Kilechune sub-location where she had gone to visit them.



Joyce Ntinyari then headed to one of her sisters' house to collect firewood and she left behind her only child aged 8 months VW the deceased sleeping in the bed and she locked the door before heading to her sister's place. After 5 minutes Joyce Ntinyari was headed back to her home when she saw the accused person running from the house where she had left the deceased and he was headed the opposite direction but did not know why the accused person was running.

10. Joyce Ntinyari then opened the door and entered the room where she decided to soak the deceased clothes before preparing breakfast. When Joyce Ntinyari removed the basin which had the deceased's clothes but became frightened when she saw blood drops at the door to the bedroom. Joyce Ntinyari then decided to follow the drops of blood which led her into the bedroom where she found the deceased her daughter who was covered all over her body as well as her face. Joyce Ntinyari then uncovered the deceased face and that is when she saw that the deceased was sleeping in a pool of blood and she immediately picked the deceased up and that is when she found out that the deceased's throat had been slit and she was bleeding profusely. Immediately Joyce Ntinyari screamed for help. Neighbours and family members responded to Joyce Ntinyari's responded to the cried for help 11. Moses Kaberia brother to Joyce Ntinyari rushed out of his house and went towards where his sister was and that is when he found her carrying the deceased who he saw was bleeding profusely from the neck. Moses Kaberia also cried out for help and as he turned his head while crying for help he saw the accused person running away. Moses Kaberia then started running after the accused person who had in his hands a panga which had water. However when the accused person noticed Moses Kaberia running after him he charged towards him with panga he had in his possession. Moses Kaberia then retreated in fear of his life and returned back to the compound. Moses Kaberia together with Joyce Ntinyari then took the deceased person to hospital.
12. Jacob Murithi was also among persons who heard cries of help from Joyce Ntinyari, when he was running towards the said direction he met with the accused person who was running while in possession of a panga which had blood. the accused person then ran past Jacob Murithi while heading towards the river. When Jacob Murithi got to where the cries were coming from he found J oyce Ntinyari and other persons at the scene. Jacob Murithi then informed persons who had gathered at the scene that he had seen the accused person running towards a river. Jacob Murithi together with other villagers then decided to pursue the accused person. The accused person was later on spotted at karama market whereby he was arrested by the villagers after which he was escorted t Karama market where he was handed over to the area assistant chief of Antuanduru sub location Adrian Kinyua Muyuri along with the panga he had in his possession.
13. The area assistant chief who called Administration Police officers and they escorted the accused person to Muthara Police Station. During the time of arrest the assistant chief was handed the panga which the accused person had in his possession and the same was recovered as an exhibit. Upon conducting a search on the accused person police found a key and the same was identified



by Moses Kaberia as a key which had got lost and the same could also open the house which Joyce Ntinyari was staying in.

14. Post mortem was conducted at Meru Level 5 Hospital whereby the cause of death was found to be severe haemorrhage due to deep cut to the neck.”

9. The Pre-sentence report by the Probation Officer dated 28/112023 recommended a custodial sentence as follows:

“Recommendation

Your Lordship, the offender is said to have gone to the house where the innocent eight months kid was sleeping on the fateful morning. He mercilessly slit the throat of the infant killing her instantly then covered her with the bedding. The offender has had a tendency of violent and life-threatening attacks to his cousin, own mother and a brother. He has been suspected to have been abusing drugs. He has also been on mental treatment at Mathari Mental Hospital for some time. His family has a history of mental sickness with his mother and a brother being mentally sick.

The offender is a threat to his family and community security. His wife is said to have separated from him due to violent behavior. The secondary victim who is the mother of the deceased and also the younger sister of the offender is still in pain, bitterness and fear when she recounts on the incident of the grisly murder of her innocent infant ten years down the line. She says that if the child was allowed to live, she could have been a big girl often years.

It is our opinion and recommendation that the offender is Not fit for non-custodial sentence.

Report compiled by:

For, Faith Owiyo

Probation Officer,

Tigania.

Date: 28.11.2023.”

10. During the sentencing proceedings, the Court took the Victim Impact statement of the deceased’s mother who testified as follows:

“PW8 Adult female Christian sworn and states in Kimeru with interpretation:

I am Joyce Ntinyari. I live at Karama. I work as grocery Keeper. The accused is my brother. He is older than me. The accused is the 1st born. I am 6th child.

VW the deceased was my child. She was 8 months old. She was born on 2012.

The death of my child affected me. I got blood pressure. The family I was married at, I left upto now. I do not trust anybody. I am emotionally disturbed until now and I do not have peace. [Weeps].

I left the family in Nyandarua County in Kinangop, I left because Kirimi had killed my child and they did not accept me unless I returned their child. The deceased was their child because I give birth to her with their son.



After the incident of killing, I did not talk to my brother the accused because I fainted and went to hospital. For the 10 years, he has been in custody. I have not spoken to the accused. I have not spoken to him even today. When I see him, I get so angry. I am so angry. I pray that the court gives me justice for me and my deceased child.

If he is released I cannot stay at home because I only live with fear of the accused. I would not know how to live with him, feed with him or even leave a child at home.

Before the accused did the killing he used to stay at home. He stayed alone and he had chased away his family. His two children have finished fourth form at their mother. He was staying alone as he had chased away his family.

Today I stay at a rented house at Karama Market to be able to go to my work place at Karama market.

Because of my child, I cant leave child at home, that is why I rented the house at Karama. I cannot have the child at home as I remember what Kirimi did and I fear my children are aged 8 years and 2 years respectively.

I cannot forgive the accused. He had called me seeking forgiveness but my heart does not feel comfortable to forgive.

Edward M. Muriithi J

20/12/2023

Cross-examination by Mr. Wamache

Accused is my eldest brother since we were children we had problems with accused. I am 28 years. The accused is 1972 born (51). I recall when I was in form 2 is when we had issues with him. This was 2012 January. The incident happened in 2013.

I had no parents in 2012. My father died and left my mother who was sick in 2012. It was my brother who paid my school fees. It was my Moses Kaberia and my deceased sister Eunice Mwanjaru who paid my school fees. Kirimi did not pay for fees. It is in 2012 January that I dropped out of school because Kirimi was trying to rape me. In 2012, I was 17 years. The child was born in 2012 November. I had not attained 18 years.

Do you have anything to show that you went to the Chief and Police?

I do not anything but the Chief is aware.

I cannot forgive my brother because he gave me a wound that will never heal. I am a Christian.

I cannot forgive him.

Edward M. Muriithi J

20/12/2023

Re-examination

Nil.

11. In Mitigation, the Accused Counsel said:

“Mr. Wamache in Mitigation



In mitigation, as I am the one who dealt with his matter since testifying. The accused is established to be mentally stable.

Section 11 of *Penal Code* on presumption of sound mind.

At that time of plea. Accused was determined that his mental status did not allow him to take plea.

Is he criminally responsible for this action?

Since 2013 upto now the accused has been in and out of hospital and when he became aware of his actions. We approached DPP for alternative charge.

The witness (mother of deceased) has indicated that the accused had approached her for forgiveness and reconciliation.

It is over 10 years since the charge. He has always been in custody. All through the years were reports indicating his mental status was not okay, that is why it has taken this long.

I refer to Probation Officer's Report at P.3 of opinion of Chief of the area that accused had no history of criminality.

The report is only based on the family of the deceased which understandably are aggrieved.

Accused is remorseful and as approached the family for forgiveness. He has children. It has not been shown that he was threatened them.

I rely on sections 11 and 12 of *Penal Code* that presumption of security. At the time, the action of the accused, the court may not have been responsible for his action at time of incident.

The accused approached DPP for plea bargain during his lucid moments when he was out of hospital

Accused is first offender and he pleads for leniency.

The court should consider a non-custodial sentence. I believe he is still under medication.”

12. The Accused himself said -

“I pray that the court considers 820 (?) and 240 (?) laws of Kenya.

I did not wish to act. The deceased's mother attacked me and cut me on the shoulder demanding that I should give her land as elder. I took the panga and cut the child with the knife. My father is John Maingi. My mother is Marha Nguu and my grandfather is Kenyatta Jomo Kenyatta.”

13. The DPP urged the Court to pass a custodial sentence as follows:

Mr. Masila

I rely on the prosecution report dated 28/11/2023. It is comprehensive and it recommended that he is not fit for non-custodial sentence. No parent should bury their own child it should be the other way round.

The deceased was 9 months old. The rights of every child is procured under Article 53 should not be subjected in any form of violence.



Weapon used was a *panga* which is classified as a dangerous weapon. This is a matter which the prosecution closed its case.

Prima facie case was established and plea bargain was agreed after defence was called to present its case.

Accused arranged on 15/7/2013. He did not take plea due to his mental condition at the time. He took plea in July 2021 after treatment. All the time he was undergoing treatment in Nairobi on his mental condition. Now he is stable. An offence of manslaughter is life imprisonment. The period in custody is currently considered in factoring into sentence. He has been in custody for 10 years, but a majority of more than half he was in hospital undergoing treatment with mental condition. The court ought to consider the period. However, he was not under prison authorities undergoing repair, education anger management. It is now when upon conviction and sentence he will undergo proper rehabilitation. It will be conducted by prison authorities.

The innocent 9 months old child deserved to get justice in this matter. The deceased was related to the accused as family. He ought to have protected and nurtured and guided the deceased as his own child.

He butchered the child mercilessly. I urge the court to consider custodial sentence to act as deliverance to like-minded people, help accused to re-integrate back into the society and fell wanted by his siblings and community at large, and for him to undergo rehabilitation into a responsible person.

14. In reply to the submission by the Defence Counsel, Mr. Masila for DPP said:

“On sections 11 and 12 of *Penal Code*. That can only be established on the evidence by the prosecution we establish a prima facie case. The defence has not given its side of the story as to what happened.

The entire case has to be expunged for court to determine whether along the commission of offence accused is insane. The court may render a verdict of guilty but insane.

The circumstances for this case is different. Plea bargain was entered based on the facts at paragraph 9 of the Plea Bargain Agreement signed on 7/11/2023.

The facts do not indicate that the accused was insane when he committed the offence. I pray that the court disregard the submission on section 11 and 12 of *Penal Code*.”

Plea of Mental Insanity

15. The accused’s counsel’s attempt to invoke the defence of insanity is not successful. Section 11 of presumption of sanity provides as follows:

“11. Presumption of sanity

Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”



16. If it sought to rely on the defence of insanity, Section 12 of the *Penal Code* requires an accused to show that he was of unsound mind at the time of the offence as provided in section 12 of the *Penal Code* follows:

“ 12. Insanity

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

17. The accused in this case did not show insanity within the meaning of section 12 of the *Penal Code*. The presumption of sanity in terms of section 11 of the *Penal Code* was not dislodged on the evidence by the Prosecution. The Defence did not adduce any evidence because they opted to plead guilty to the lesser charge of manslaughter after the accused was found to have a case to answer on the murder charge. There is evidence of committal to mental hospital upon finding of unfitness to plead by reason of a finding that

“He has a mental illness and he requires treatment at a maximum security hospital (Mathare Hospital). He is not fit to stand trial.”

This was only evidence of fitness to stand trial not of his state of mind at the time of commission of the offence, which is the relevant factor in a finding on insanity under section 12 of the *Penal Code*.

18. The Psychiatrist report of 29/7/2013 on the basis of which the accused was committed to Mathari Hospital only generally diagnosed him to suffer a mental illness which was undisclosed and only significant abnormality particularised in the mental status assessment was delusions as shown in the said report set out in full below:

“The High Court

Court at Meru

Re: Joseph Maingi Kirimiom

Assessed on 29th July 2013

Mental Status Assessment

Appearance - Good Physical condition

Attitude- Cooperative

Speech- Pressure of speech

Mood- Normal

Thought processes- loose associations

Thought content- Delusions

Perception- Normal

Alertness- Fully aware of Surrounding Environment



Orientation-Oriented in time, place and person

Concentration- Poor

Memory- Normal

Abstraction- Poor abstraction

Insight- Lacks insight

Intelligence- Normal

Conclusion

He has a mental illness and he requires treatment at a maximum security hospital (Mathare Hospital). He is not mentally fit to stand trial.

Dr. Thuo J. N.

Consultant Psychiatrist

For. Medical Superintendent

Embu Provincial General Hospital”

19. Even if his statement in court may indicate delusions of his parentage, there was no attempt to present his case as one of insanity defence, and the court has no evidential basis to find at the time of doing the act of killing the child in this case, that the accused suffered from a disease affecting his mind making him “incapable of understanding what he was doing, or of knowing that he ought not to do the act” in terms of section 12 of the *Penal Code*.
20. The accused has, while certified fit to plead, pleaded guilty to manslaughter after the court found that the prosecution had established a prima facie case in ruling on a case to answer.
21. In his statement before the court in the sentencing proceedings it is clear that the accused knew exactly what he was doing and he did it in retaliation of assault he claimed the child’s mother had committed on him as follows:

“I did not wish to act. The deceased’s mother attacked me and cut me on the shoulder demanding that I should give her land as elder. I took the panga and cut the child with the knife.”

Consequently, the court does not find merit in the accused counsel’s argument on insanity and it is rejected.

Appropriate Sentence

22. The Court has considered the circumstances of this case, the accused’s mitigation and the victim impact statement together with the submissions of the Counsel for the Accused and the DPP. The Court notes the heinousness of the killing of the defenceless 8-month old baby while its mother was away by none other than the mother’s brother, the accused herein, who ought to be one of the persons expected to act as the deceased’s caregiver and protector in the baby’s world in view of their familial relationship. The violation of trust manifested by the cold-blooded killing is appalling! It must be suitably punished for deterrence.
23. There is no evidence that the accused was anything but sane at the time of the commission of the offence. The accused presents as a person in need of reformation. The Probation Officer’s report and



the sister's statement before the court indicate a need for discipline, counselling and instruction in Prison towards the reform of the accused for anger management and social relations in family and extra family settings. The Community reported accused abuse of drugs, the rehabilitation from which is usually conducted in confinement.

24. No amount of disagreement with the parent(s) of a child can excuse the killing or indeed any assault on their child. The sentence of the court must underline this position.
25. The Court considers that an imprisonment term of fifteen years meets the objectives of rehabilitation and deterrence in this case for the accused and others similarly motivated. The sentence of imprisonment shall take into account the period of pre-trial detention in terms of section 333(2) of the [Criminal Procedure Code](#).

Order

26. Accordingly, for the reasons set out above, the Court having convicted the accused of the offence of manslaughter contrary to section 202 as read with 205 of the [Penal Code](#), sentences the accused to imprisonment for fifteen (15) years.
27. The sentence of imprisonment for fifteen (15) years shall commence on the 1/1/2017 the date that the court presumes the accused was placed in remand following his treatment at Mathari Mental Hospital and when, therefore, the Court considers he has been in pre-trial detention within the meaning of section 333 (2) of the [Criminal Procedure Code](#).

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Wamache, Advocate for the Accused.

Mr. Masila, Principal Prosecution Counsel for the DPP.

