



**Republic v Kebwaro & 5 others (Criminal Case E042 of 2022)
[2024] KEHC 4163 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E042 OF 2022**

HM NYAGA, J

APRIL 25, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

EVANS MICHORI KEBWARO 1ST ACCUSED

KEVIN OMONDI OTIENO 2ND ACCUSED

JOSPHAT SIMIYU JUMA 3RD ACCUSED

JULIUS OMONDI OTIENO 4TH ACCUSED

DENNIS ALUSIOLA MMBOLO 5TH ACCUSED

ISAAC KINYANJUI NG'ANG'A 6TH ACCUSED

RULING

1. The Accused Persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Particulars are that on 21st June, 2022 at Ngomongo Village, Rurii Sub-Location, Nakuru North Sub-County, Nakuru County, within the Republic of Kenya they murdered Susan Wambui Ngige.
3. The charge was read to the Accused Persons on 3rd August, 2022 and each accused person pleaded not guilty.
4. The 1st Accused Person sought to engage in a plea bargaining agreement, to which the prosecution consented.
5. The parties entered into a plea bargaining agreement pursuant to the provisions of Section 137 of the Criminal Procedure Code signed 14th March, 2024, respectively.



6. In the Plea Bargaining Agreement, the agreed facts were as follows: -

“During the month of June 2022, the accused person met Kinyanjui, Deno, Kevo, Simiyu and Julius while working at a construction site. Kevo told the group that he could introduce them to other jobs that would bring them quick money. On 20th June, 2022 the accused person and his five accomplices met at Kingdom Seekers field at around 5. 00p.m where Kevo informed them that there was some work to be done and they agreed to meet at Makaburini Area the following day. On 21st June, 2022 at around 8. 00a.m, the accused person and his five accomplices met in the morning and boarded their motor bikes to Mawanga Area. Kevo showed them a home and one Deno went to find out who was in the shop which is under one roof with the main house. Deno came back and informed them there was a woman in the house. The others advised Deno to go and distract the woman who is the deceased Susan Wambui Ngige by pretending that he was buying something and the rest of the team gained access to the house by jumping through the iron sheet wall at the back. The TV was on and the deceased’s three years old child was sleeping on the Sofa. Simiyu was leading the team and he entered the shop where the deceased was. He was armed with a maasai sword and the deceased got scared. Kevo entered the shop from the front and closed the door. He asked the deceased to give her money and she said she would look for money. Julius entered the shop and took some money. They then entered the living room where they found a 32-inch TV and a TV box. Kevo dragged the deceased into her room inside the house. He called Julius in the room and he then left. Julius came out of the room shortly and Kevo asked him whether the deceased was dead and he confirmed the same. The accused person, Julius and Deno entered the bedroom and saw the deceased lying dead on the floor. The accused person, Deno and Kinyanjui lifted the deceased and put her on the bed. They then came out of the bedroom. Kevo went into the bedroom with petrol which was inside a bottle. He poured the petrol inside the bedroom where the deceased was and in the sitting room where the deceased’s child was sleeping. Kevo told the accused person to kill the deceased child but he did not do so. Kevo then lit match boxes and set the house on fire. The accused person and his accomplices left the compound by jumping over the fence. They then took their motorbikes and drove towards town. Kevo and Julius left with the deceased’s television and money that they got from the deceased’s shop.

At around 2. 00p.m, one Judy saw the deceased’s house on fire and she alerted her neighbours who included Monicah Nderitu. The neighbours rushed to the deceased’s compound and found the door locked from the inside using a padlock. The neighbours broke the window pane and called the Child’s name. The Child responded and stood crying at the window. He was rescued and removed from the house. He was unhurt. The fire was put off by the neighbours who later found the deceased lying unconscious on her bed in the master bedroom. Blood was oozing from her mouth as well as her nose. The deceased was rushed to Mediheal hospital for treatment but she succumbed to her injuries. He body was taken to PNN Funeral Services to await a Post Mortem. Post Mortem was conducted on 24th June,2022 and the doctor opined the cause of death was asphyxia due to strangulation occasioned by neck pressure. He also collected samples including finger nails, vaginal swab and blood from the left ventricle for further analysis by the government chemist analyst.

The accused person was later to be arrested at Kisii where he had fled. The police were able to trace the accused person after he inserted his SIM card in a phone belonging to a deceased person who they had also robbed and killed.



Upon his arrest and after interrogation, the accused person disclosed to the investigating officers who his accomplices were and proceeded to identify the five others. He took the police where each resided and the police conducted a thorough search in each of their residences where some items were recovered. The accused person then recorded a detailed confession statement in which he detailed the role that he played. The same was recorded by Chief Inspector Philip Bii on 20th July,2022. On 2nd August,2022, the accused person was charged with the offence of murder which the state now substitutes with that of manslaughter.”

7. In the plea agreement the 1st accused agreed to entirely cooperate with the state by providing true and accurate information and to inter alia testify as a prosecution witness in this matter.
8. When the Advocates for the other accused persons were given a chance to comment on the plea bargain agreement, the Advocates for the 3rd accused person, told court that the plea agreement contains factual information against the 3rd accused and if admitted may be prejudicial to him as they will not be able to cross examine the 1st Accused. He contended that the plea agreement is actually a confession by the 1st accused fashioned as facts. He urged this court to expunge the offending paragraphs against the 3rd accused.
9. The 2nd accused associated himself with the sentiments of the 3rd Accused.
10. The advocates for the other accused persons were absent in court despite full knowledge of the hearing date.
11. The counsel for the 1st accused submitted that the plea agreement is between the state and the 1st accused person and it was made on conditions inter alia that the 1st accused will testify as a state witness. He however agreed that the offending sections be expunged and the plea agreement be adopted by the Court.
12. The Prosecutor on her part contended that the plea agreement is proper and it is clear that the 1st accused has agreed to be a state witness, and that no prejudice will be occasioned to other accused persons. She prayed that the plea agreement be adopted.

Analysis and Determination

13. The sole issue for determination is whether the plea agreement should be adopted as it is by this Honourable Court.
14. ODPP Plea Bargaining Fact Sheet defines plea agreement as follows: -

“A plea bargain is a negotiated agreement between a criminal accused and a prosecutor, where the accused agrees to voluntarily plead “guilty” or “no contest” for a concession from a prosecutor in exchange for a plea. e.g. murder may be reduced to manslaughter.”
15. The *Criminal Procedure Code* anticipates that plea agreements involve both the prosecution and the accused person. Section 2 defines a plea agreement as;

‘an agreement entered into between the prosecution and an accused person in a criminal trial in accordance with Part IV.’



16. According to [Plea Bargaining Guidelines 2019](#), the aim and purpose of the plea agreement are as follows: -

“The aim of plea bargain or plea negotiations is for the accused to enter into an agreement or plead guilty in exchange for some concessions by the prosecution. This may take the form of an offer of a plea by the accused to some but not all the charges, a different offence or less serious charge or to one of multiple charges or agreement to testify against some or other of the accused person.

1B- The purpose of plea bargaining is to narrow down the issues in a case with a view to reaching a just outcome within the shortest possible time, including the possibility of reaching an agreement about acceptable plea[s] of guilty and recommendations on sentencing.”

17. Plea Bargaining is guided by Section 137 A - O of the [Criminal Procedure Code](#) and the [Criminal Procedure \(Plea Bargaining\) Rules 2018](#).

18. The Plea agreement is between the state and the 1st accused person. In my opinion the plea agreement as drawn contains factual averments that directly incriminate the other accused persons. The plea agreement ought to have restricted itself to facts referring to the 1st accused only, and avoided specifics to the other accused person.

19. There is intimation by the state that after the plea agreement 1st accused person has agreed to testify as a state witness against his co-accused. At this stage, the 1st accused has not been called upon to testify. If he does so eventually then his evidence against his co-accused will be subjected to the rigours set out in *Waringa v Republic* [1984] KLR 617 where the Court of Appeal laid down the principles in considering accomplice evidence. At that stage, the other accused persons will have a chance to cross examine him.

20. I am of the view that the plea agreement, and in particular the facts set out, in so far as it gives details of what the other accused persons allegedly did, may seem to amount to admission of evidence against them before they are given a chance to test that evidence.

21. I therefore concur with the advocates for the other accused persons that they will be highly prejudiced should this court accept the plea bargaining agreement as drawn, in this same file.

22. For the foregoing reasons, I find the plea agreement as drawn cannot be allowed to be on this court record. The prosecution ought to proceed to separately charge the 1st Accused so that such incriminating averments do no form part of the court record herein.

23. Once the plea agreement to the reduced offence is admitted by the court, the 1st Accused will be dealt with on his own, without prejudicing the other accused persons.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF APRIL, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Kipsugut



1st accused present (Naivasha)

2nd, 3rd, 4th, 5th and 6th accused present

Mr. Opondo for 1st accused

Mrs. Morande for 5th accused and holding brief for Mr. Ooga for 3rd accused

Ms Githae for 6th accused

