State v Kabena (Criminal Case E003 of 2022) [2024] KEHC 7512 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 7512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL CASE E003 OF 2022

DO CHEPKWONY, J

MAY 31, 2024

BETWEEN

STATE ..... PROSECUTION

AND

BRIAN WAWERU KABENA ..... ACCUSED

RULING

1. The accused, Brian Waweru Kabena was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 Laws of Kenya.

   The particulars of the offence are that:-

   > " On the 31st day of December, 2021 and 1st day of January, 2022 at Kwa Munyinyi area in Ndenderu in Kiambaa Sub County the accused murdered Everlyne Wanjiru Waweru".

2. The accused was arraigned before court on 24th January, 2022 and on 26th January, 2022, the accused pleaded 'Not Guilty' to the offence of Murder. Later, the accused sought for and was granted a plea bargain wherein the agreement was executed as between the parties on 31st January, 2024. The charge of murder was then substituted with a lesser charge of Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. On 23rd April 2024, the accused pleaded 'Guilty' to the offence of Manslaughter.

3. The facts of the case were that on 4th January, 2022 at about 4.30pm one Nelly Nyamathure Kimachia who is an aunt to the accused person went to report at Rweno police station, that she had gone to the accused's house in Ndenderu along Limuru road to give him money and food which had been sent by his biological mother who resides in USA. She stated that she found the door closed but since she had the spare keys of the house, she opened it as she would always do and entered inside. She then found the body of Everlyn Wanjiru Waweru, the deceased lying on the floor. On seeing this, Nelly went and reported to the police station. The police visited the scene and commenced investigations. The police

moved the deceased's body to Kihara Mortuary where a post mortem examination was conducted on by Dr. Eunice Mugweru who prepared a post mortem report. The prosecution produced the post mortem report as PExhibit – 1, a Government Analyst Report dated 9th March, 2023, and Memo Form dated 12th January, 2023 as PExhibits 2(a) and (b) and the knife with a blood stain as PExhibit 3.

4. The Accused person was thereafter arrested from Jowac Sports Club, a bar within the shopping centre at Ndenderu and he led the police officers to his house where he showed them the knife - PExhibit 3, which was the murder weapon.

5. The Accused was then charged with the offence of murder which has now been substituted with a lesser charge of Manslaughter after a Plea Bargain Agreement was executed between him and the prosecution.

6. The Accused pleaded guilty to the offence and on being explained to the facts of the case, the accused confirmed that they were true. The court proceeded to enter a 'Plea of Guilt' for the accused.

7. For determination by the court at this stage is what would be the appropriate sentence for the accused. The prosecution told court that they did not have previous records on the accused but requested for a social inquiry to be conducted on him by the Probation Officer. The court then called for a social inquiry to be conducted on the accused by the Probation and Aftercare Services Department and for a pre-sentence report to be filed.

8. The pre-sentence report was filed on 13th May, 2024 and I have read through it and noted that in compiling the said report, the Probation Officer as indicated therein in conducting a social inquiry on the accused's family background, the personal history, circumstances of the offence, community's attitude towards the offence, view of the victim's family , attitude of the community towards the offender and the circumstances under which the offence was committed so as to come up with recommendations. Having conducted the said inquiry, the Probation Officer concluded that the Accused person is aged 27 years old and was raised by a single mother. She reported that he is remorseful and pleads for a community based sentence. She also pointed out that the Deceased had been the girlfriend of the accused for many years and they were living as husband and wife and were working in a salon together. It is further reported that the Accused had been battling with alcoholism for a long period and was once committed at Lifetime Wellness Centre for rehabilitation but he relapsed after being released from there.

9. From interviewing the accused, the Probation Officer reported that the accused has since realised the negative effects of drugs and substance abuse and has made a decision to quit. She states that the accused suffers from bipolar which is a mental illness, liver problem and asthma and is currently under medication. She also reports that the accused seeks the forgiveness of his family, the victim's family and the community at large as he has undergone counselling sessions in prison and now talks to young people who have been affected by drugs and substance abuse. It is also reported that the accused has undertaken bible courses which have been nourishing him spiritually. He enjoys a strong support system and that his aunt is ready to host him in Ruiru to ensure he gets all the support he needs.

10. On the part of the victim's family, the Probation Officer reported that the loss of the deceased had left an enduring pain in their hearts and they pray for justice so that they can get a closure. And from the community and local administration, it is their position is that the accused does not have a criminal history and have urged the court to deal with the matter in a fair way.

11. In her recommendations, the Probation Officer has stated that the Accused is highly remorseful for the offence and prays for a second chance. She states that he has a supportive family which is ready to support him in rehabilitation. She however, points out that the victim's family is still bitter and want justice to prevail. Her recommendation is that the Accused is suitable for a noncustodial sentence,

which if granted, her office is ready to work closely with the accused and his family by offering him guidance and counselling.

12. The Accused filed an Affidavit in support of his Mitigation which was sworn on 17th May, 2024. He also addressed the court in further mitigation on 23rd May, 2024. According to the accused, he was the only child of Fredrick Kabena who had passed on when he was three years old and Minneh Kimacia who works out of the country doing casual jobs. He told court that he was left under the care of his relatives at a young age and they neglected and discriminated him, a result of which he started abusing drugs so as to cope with the challenges he was facing. That consequently, he was admitted at Lifetime Wellness Centre for three months and he was also diagnosed with bipolar disorder in 2020 and liver cirrhosis on 5th October, 2021.

13. It is the accused person's contention that at the time of commission of the offence, he was not taking his bipolar medication and this aggravated the fight between him and the deceased, which he really regrets. He also contends that he is a first time offender, has been in custody for two years and six months, he is deeply remorseful and seeks forgiveness from his family, family of deceased and the court.

14. The accused confirms the findings of the Probation Officer that while in custody, he has attended various bible classes, counselling programs and has become a peer counsellor so he can help other inmates in dealing with drug addiction problems. He also confirms that he has a supportive family which will help him in re-integrating back to society.

15. He holds that Section 35 of *Penal Code* bestows the court discretion to discharge accused person unconditionally or on condition that he does not commit any offence within a period of twelve (12) months. He then urged the court to adopt the principle set out in the case of *Republic v Patrick Macharia Wambui* [2019]eKLR. He also urged the court to take cognisance of his mitigating circumstances and grant him a non- custodial sentence or a lenient sentence.

16. The court has considered the circumstances under which the offence was committed, the information in the Plea Bargain Agreement dated 31st January, 2024 alongside the information and recommendation in the pre-sentence report filed on 13th May, 2024 and the sentiments in the mitigation of the Accused person.

17. The sentence for a charge of Manslaughter is provided for under Section 205 of the *Penal Code* as follows:-

> " Any person who commits the felony of manslaughter is liable imprisonment for life.

18. In view of all that, the court has also taken into account the amended guidelines in the Muruatetu Case which include a consideration of age of the accused, him being a first offender, his plea of guilt, character and record. Although the law has prescribed the punishment for Manslaughter under Section 205 of the Penal Code to be life imprisonment, the court takes note that the accused has pleaded guilty to the lesser charge of manslaughter.

19. In order to balance the rights of the accused person and that of the victim's family who lost their loved one through the hands of the deceased they too deserve to see justice as having been served . For that reason, the court does not agree with the Probation Officer that the accused will benefit more from a non-custodial sentence but should also serve a custodial sentence to serve as a warning especially against the rising incidents of femicide.

20. In that regard the court shall give the following orders:-

a. The Accused shall serve five (5) years imprisonment, which sentence should run from the date of his arrest.

b. In addition, of the five years' imprisonment, the accused shall serve probation for a period of three years (3) from the date he completes his imprisonment period.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 31ST DAY OF MAY 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ndeda counsel for State

Mr. Mumma counsel for accused

Mr. Kungu watching brief for victim's family

Accused - present

Court Assistant - Martin

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