

**Republic v Mwa & 5 others (Criminal Case 7 of 2020)
[2024] KEHC 4237 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU**

CRIMINAL CASE 7 OF 2020

CM KARIUKI, J

APRIL 29, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

HARRISON MWA 1ST ACCUSED

JOHN KIMWELI MUSAU 2ND ACCUSED

LINUS KIPNGETICH TORER 3RD ACCUSED

JOSEPH MUREITHI 4TH ACCUSED

DAVID KIPKEMOI 5TH ACCUSED

MAGDALENE NAPHAPAI 6TH ACCUSED

RULING

1. The accused persons (1st, 2nd, 3rd, and 4th) were charged along with the accused 5th and 6th, who were acquitted on the offense of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya.
2. Accused (1-4) were found to have a case to answer, but they opted to remain silent. They did not advance their fashion of what transpired on the date of the incident. They relied on the court analysis of what was tendered by the prosecution from the eyewitness's perspective; thus, the Court had no benefit to getting the perspective of the accused (1-4) fashion of the unfolding of events leading to the death of the victim.
3. Thus, the Court was convinced beyond any reasonable doubt that the evidence tendered by the prosecution met the threshold of proof beyond reasonable doubt in establishing the ingredients of murder as charged.
4. The Court upon-conviction order post-conviction report (PCR) is prepared and filed for each accused (1-4).



5. The same order was complied with. After that, the defense tendered mitigations of the accused (4 of them) after the prosecution told the Court that each accused (1-4) had no previous records and could be treated as first offenders.

6. The counsels submitted as follows:

“The deceased was attacked while at her home and was harmless. She has left orphans with no support. The four accused are people in authority and are supposed to protect the public, including the victims.

Instead, they inflicted injuries on a harmless and vulnerable. The Court should award a maximum sentence to deter other public officers from the same acts. That is all.”

7. Defense submissions by Chege

“The accused persons are first-time offenders without any previous records. They are GSU officers employed by the Government of Kenya.

Accused persons were invited to arrest the victim who was committing criminal offence of brewing illicit liquor.

The arrest was within their mandate under the Police Act. There was no evidence that the accused knew the victim before the encounter. The presented reports affirm that they had the mission of drawing water for domestic use in Laikipia County and were invited by the 5th and sixth accused persons to assist them in arresting the victim.

There was no pre-meditation to commit the offense. They empathize with the families of the victims for loss and appreciate the magnitude of the offense.

The probation officer report is positive regarding offenders' attitudes towards offenses and the community.

The only thing in the report is the recommendation on custodial sentences due to their attitude.

Their employers are positive towards them and are capable of rehabilitation. They seek lenience and are remorseful. They rely on PCR, which narrates;

The 1st accused is 40 years of age. He is married to one wife and has three children who are going to school and rely on him for support. He is a Christian and a church elder. He suffers from rheumatic heart disease and is due to undergo heart surgery. A report dated 4/3/2024 confirms that he is to undergo the surgery. He suffers from hypertension and has a follow-up with a cardiologist. He is on medication, and custodial imprisonment will worsen his medical conditions. See PCR report.

The 2nd accused is 56 years old and has a few years in service before retirement. He is bound to lose his benefits if imprisoned at his current age. He is married to one wife and has six children, one of whom is a student at Kabarak Technical Institute. He cares for all his children, including his daughter, whom her husband separates. He has diabetes, and his medical conditions are bound to deteriorate if he is put on a custodial sentence. The 3rd accused is 37 years old, married to one wife, and blessed with three children who are in Primary school, the eldest in grade 7, the second born in grade 5, and the last born at. His family entirely depends on him. He is only 37 years old.



The 4th accused is 34, married to one wife with one child in PP1. He has another child who was at Mount Kenya University, and he relies on him. He would suffer if placed in custody sentence. He has poor eyesight.

The deceased's family is very bitter about the accused persons for the loss of a loved one, having the option of filing a civil suit against the accused persons seeking compensation. However, we appreciate that not

a quantum of money can restore life. All is not lost for the family of the deceased.

It has the discretion to make a sentence less than the maximum prescribed in the case of *Muruatetu & Others – Versus – Republic* Supreme court decision reported [2021] eKLR where Supreme court held that Maximum sentence can. See the authority.

The accused have been in the conduct of justice since 15/6/2020. They have faithfully attended Court. They have suffered psychological effects and financial loss, and their family has also suffered immensely as a result of this case.

They have been under interdiction and thus on ½ salary and thus mitigate for their condition and circumstances.

They undertake any other duties that would show their concern. I urge the Court to be lenient."

Probation Reports

8. ...
9. for IP Harrison Mwa are as follows;

Conclusion:

10. The offender before this Honourable Court is 40 years old. He is a GSU officer; his last posting was at the GSU headquarters in Nairobi. He is married and has three children, all in school. He had been the primary breadwinner of his family. He suffered from rheumatic heart disease with mild mitral aortic valve stenosis and was recommended for repair.
11. Furthermore, he suffers from hypertension. He does not drink, and never has he been into drugs. He is in denial but respects the Court's verdict. He is remorseful and pleads for leniency in sentence.
12. His nuclear family, through his wife, described him as a responsible husband and father who catered to all its needs. The children described their dad as a loving father who was responsible, supportive, and very good to them. The family prays that he be granted a noncustodial sentence. His more prominent family talks highly of him and describes him as responsible, saying that his elderly parents mainly depended on him. He also supported the children of his late sister and those of the sister who is a widow. He has leadership qualities and was the cord that tied the family together.
13. The secondary victims, who are the children of the victim, have suffered immensely. They have been affected both psychologically and financially. They live in abject poverty and mainly depend on relatives and well-wishers. They are still hurt and unforgiving. They want justice served. The rest of the family members of the victim had to shoulder the burden of bringing up the children and being poor means they feel overwhelmed. They are bitter and want justice served.
14. The chief from where the offender comes from stated that he has a good reputation that has earned him recognition in the community. He has supported several poor school-going children and provided



food to the community members whenever famine strikes. The offender has very strong ties and has bonded well with the community. The area chief observed that the offender is one of her most obedient and trusted subjects. Other members of the community shared the same views with the area chief. The assistant chief from where the victim hails stated that the community was unhappy with the occurrence but has come to terms with it over time. The sentiments were affirmed by village elders and a neighbor who added that the children of the victim had suffered a lot and that they had been living at the mercy of the relatives and community members.

15. A GSU chaplain at the GSU headquarters at Ruaraka described him as a good family man and a man of the people who had friends in every corner of the country where he worked. He is very religious and is a church elder.

Recommendation

17. Based on the above findings, the victim's children have suffered a lot after as an aftermath of losing their mother, who was the sole breadwinner, and are unwilling to forgive him. I find the offender not suitable for a noncustodial sentence. However, due to his obligations to his family being the sole breadwinner, the positive reputation from the community where he comes from, and his health conditions, he may benefit from a lenient sentence of court discretion notwithstanding.
18. For Corporal John Kimweli Musau, as follows:

Conclusion:

19. ...
20. The offender is 56 years old and hails from Kolooso village, Kiasave Sublocation, Matungulu, in Machakos county. He was a GSU officer based at the GSU headquarters in Nairobi. He lived in the Athi River with his family. He is married and is a father to six children. One of the children is in college, while one is waiting to join college. His nuclear family, through his wife, talked well of him, describing him as their primary breadwinner and a very responsible father. She asserts that his arrest has occasioned financial strains and emotional turmoil, and the wife's health has been dramatically affected. They strongly plead with the Court to be lenient in sentencing. He has diabetes. He had been under interdiction since the case began. He was out on bond during trial and has never failed to appear in Court. Despite being in denial, he respects the Court's ruling. He is remorseful and acknowledges the effects of the offense. He pleads for leniency in sentencing.
21. His more prominent family described him as a very responsible person whom the elderly and ailing parents largely depended on. The family is very cohesive and very supportive of each other. The family is very much willing to support him and be fully involved in his rehabilitation.
22. The secondary victims, who are the children of the victim, have suffered immensely. They have been affected both psychologically and financially. They live in abject poverty and mainly depend on relatives and well-wishers. They are still hurt and unforgiving. They want justice served. The rest of the family members of the victim had to shoulder the burden of bringing up the children and being poor means they feel overwhelmed. They are bitter and want justice served.
23. He has solid community ties, according to his home area chief. The area chief further clarified that the offender has no criminal records in the area and is well-referred in the society. The assistant chief from where the victim hails stated that the community was unhappy with the occurrence but has come to terms with it over time. The sentiments were affirmed by village elders and a neighbor who added that



the children of the victim had suffered a lot and that they had been living at the mercy of the relatives and community members.

Recommendation:

24. Based on the above findings, the victim's children have suffered a lot after as an aftermath of losing their mother, who was the sole breadwinner, and are unwilling to forgive him. I find the offender not suitable for a noncustodial sentence. However, due to his obligations to his family as the primary breadwinner, the positive reputation of his community, and his health conditions, he may benefit from a lenient sentence, court discretion notwithstanding.
25. For Linus Kipngetich, as follows:

Conclusion:

26.
27. The offender before the Honourable Court is 37 years old. He originates from Kaboson, Sigol Sub-County in Bomet County. He was working as a GSU officer based at the GSU headquarters in Nairobi. He is married and has three children, all in school. He confesses to having been using alcohol, though occasionally. He has no previous criminal history on record. He had been on interdiction since the matter commenced. He is in denial regarding the offense but respects the Court's ruling. He is remorseful and acknowledges the magnitude of the offense. He pleads for leniency in sentencing. He has been out on bond and has never failed to appear in Court when required.
28. His immediate family asserted that they highly depended on him, especially for the school-going children. They vouch for a lenient sentence for the offender, indicating that the children became traumatized after learning of their father's conviction. The family pledges to offer total support to him. The family assured him he would not likely re-offend based on his past conduct.
29. The secondary victims, who are the children of the victim, have suffered immensely. They have been affected both psychologically and financially. They live in abject poverty and mainly depend on relatives and well-wishers. They are still hurt and unforgiving. They want justice served. The rest of the family members of the victim had to shoulder the burden of bringing up the children and being poor means they feel overwhelmed. They are bitter and want justice served.
30. The chief from where the offender comes from stated that he has been responsible and law-abiding. He has no records of his bad conduct or criminal history. The community leaders describe him as a reliable person who hoped for forgiveness and reconciliation between the two parties. The assistant chief from where the victim hails stated that the community was unhappy with the occurrence but has come to terms with it over time. The sentiments were affirmed by village elders and a neighbor who added that the children of the victim had suffered a lot and that they had been living at the mercy of the relatives and community members.

Recommendation

31. ..
32. Based on the above findings, the victim's children have suffered a lot after as an aftermath of losing their mother, who was the sole breadwinner, and are unwilling to forgive him. I find the offender unsuitable for a noncustodial sentence, but due to his being a provider to his family. With the positive reputation from the community, he may benefit from a lenient sentence, court discretion notwithstanding.
33. For Joseph Muriithi, as follows



Conclusion:

34. The offender before the Honorable Court is 44 years old. He currently lives at Nanyuki Railways staff houses, where he worked as a railway police officer. He originates from Kwa Ex-Willies village in Mweiga, Nyeri County. The offender is married and is a father to one child with his current wife. He had previously been married to another woman, but they later separated.
35. Nevertheless, he was left with one child, a first-year student at Mount Kenyatta University, whom he supports. His nuclear family largely depends on him. He once suffered from depression and was admitted to Mathari Hospital in Nairobi for treatment. He also suffers from poor eyesight and uses glasses. He is in denial but respects the Court's verdict. He is remorseful and pleads for leniency in sentencing. He had been out on bond and never failed to appear in Court during the trial dates.
36. He relates well with the other family members and relatives he used to support while working. The family described him as a reliable person they depended on. They feel lost in that he has been convicted. They are ready to assist in his rehabilitation. They plead with the Court to grant him a lenient sentence.
37. The secondary victims, who are the children of the victim, have suffered immensely. They have been affected both psychologically and financially. They live in abject poverty and mainly depend on relatives and well-wishers. They are still hurt and unforgiving. They want justice served. The rest of the family members of the victim had to shoulder the burden of bringing up the children and being poor means they feel overwhelmed. They are bitter and want justice served.
38. The assistant chief from his home area stated that he has no criminal history of the offender. He noted that the offender maintained close ties with his relatives. The assistant chief from where the victim hails stated that the community was unhappy with the occurrence but has come to terms with it over time. The sentiments were affirmed by village elders and a neighbor who added that the children of the victim had suffered a lot and that they had been living at the mercy of the relatives and community members.

Recommendation:

39. ...
40. Based on the above findings, the victim's children have suffered a lot after as an aftermath of losing their mother, who was the sole breadwinner, and are unwilling to forgive him. I find the offender not suitable for a noncustodial sentence. However, due to his obligations to his family being the sole breadwinner, the positive reputation of his community, and his health conditions, he may benefit from a lenient sentence, court discretion notwithstanding.
41. Under Petitions 15 and 16 of 2015 *Muruatetu & another versus Republic, [Muruatetu & another v Republic; Katiba Institute & 4 others \(Amicus Curiae\) \(Petition 15 & 16 of 2015\)](#)* [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court of Kenya held that the mandatory aspect of the death penalty under provisions of Section 203, as read with Section 204 of the Penal Code, is unconstitutional. However, that did not abolish the death penalty but retained it as a maximum sentence.
42. This widened the High Court sentencing latitude to make appropriate sentencing depending on the case's circumstance.
43. The Court gave guidelines on factors to be considered in sentencing in the murder matters. These were essentially policies fashioned by the judiciary.
 - i. Age of the offender;



- ii. Being a first offender,
 - iii. Whether the offender pleaded guilty;
 - iv. Character and record of the offender;
 - v. Commission of the offense in response to gender-based violence;
 - vi. How the offense was committed on the victim;
 - vii. The physical and psychological effect of the offense on the victim's family;
 - viii. Remorsefulness of the offender;
 - ix. The possibility of reform and social re-adaptation of the offender and;
 - x. Any other factor that the Court considered relevant.
44. - Being first offender- No previous Whether they pleaded guilty – None The character of offenders is described as usual and positive. Offense based on gender-based violence – No. Manner of the offense committed to the victim – brutal by beating her with runkus/thick sticks. Physical and psychological effects – effects on victim's family victims' children gravely affected dropped school. Two got children, live in abject poverty, still very emotional and unforgiving. Remorseful of offenders – Nil, still in denial Possibility of reform and social re-adaptation of offenders – No report on that by any expert. Any other factors – Accused one is said to have a heart condition and need for repair of mitral/aortic valve stenosis, which is said to be mild vide report of 4/3/2024. The doctor was not called to explain that, and the possible implication was suggested in case the accused is imprisoned for a custodial sentence. There is no indication that medical services will not be available in the prisons.
45. The attendance and payment for medical services via the attached copies are from 2022 years. One wonders whether that is the only period accused I had issues while the instant matter was in Court.
46. This is a 2020 case, and the accused had been arrested after the charge, and the issue was not raised; then, accused two (2) is said to be 56 years old, and PCR says it on page 3, paragraph 5.
47. He has diabetes; no medical document was furnished to the Court, nor was a medical officer called. It is not established that he is suffering from the same disease.
48. Thus, considering the above facts, there was a suggestion for a noncustodial sentence only cares alluded to were:
- Republic - versus- FOO (a minor) (2022) eKLR, where a minor four (4) years had killed an infant aged two (2) months old. The Probation report recommended a noncustodial sentence, and he was to return to school and imposed strict terms of not returning home for three (3) years.
49. Probation officer's supervision. The term sentence of three (3) years probation, the provisions of the Children's Act, was factored in as the accused was a minor.
50. The second case was Republic – versus versus-Oloo & 2 others (2022) KEHC 10093 (KLR), where the accused was aged 82 years, was living with disability, and could only walk with support; they were rescuing the 3rd accused, who was acquitted from a fierce man and who was administering incessant domestic violence to her as husband. They used excessive force to save her and faced excessive violence and cruelty; thus, they assaulted him (deceased), and he died.
51. She was very expectant, and she could have died from assault when they rescued her (according to the evidence).



52. Thus, the sentence for the disabled and other accused was probation for three (3) years. None in our instant case is in such a situation, nor has any of the accused justified such a measure.
53. The act of beating the victim with extreme cruelty led to her death the same day. If the mission were just to arrest the victim, the 4th GSU officers and chief and Assistant Chief would not have been overwhelmed by the victim, a female gender. None indicated that the victim ought to have been beaten to facilitate arrest. Thus, the Court finds that the noncustodial sentence is unavailable as the (PCR) reports recommended.
54. The Court has considered each accused person's circumstances and mitigation and thus will award sentences to accused persons accordingly. The Court agrees that the maximum sentence (death penalty) is not suitable in the circumstances of the case. Thus, the sentence will be dictated by the factors directed by the Supreme Court of Kenya in the Muruatetu supra case. Thus, the Court makes the orders;
- I. Harrison Mwa,^{1st} Accused; John Kimweli Musau,^{2nd} Accused; Linus Kipngetich Torer,^{3rd} Accused; and Joseph Mureithi,^{4th} Accused, are each sentenced to serve fifteen (15) Years imprisonment.
 - II. The right of appeal is explained.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 29TH DAY OF APRIL 2024.

CHARLES KARIUKI

JUDGE

