



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Oteko (Criminal Case 15 of 2019)
[2022] KEHC 543 (KLR) (24 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 15 OF 2019
SN MUTUKU, J
FEBRUARY 24, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

EUNICE ASUMWA OTEKO ACCUSED

JUDGMENT

1. Eunice Asumwa Oteko, the accused, was found guilty and was convicted on her own plea of guilty for the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. She had initially been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The Information in respect of the offence of manslaughter read as follows:

STATEMENT OF OFFENCE

Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* (cap. 63) Laws of Kenya.

PARTICULARS OF OFFENCE

Eunice Asumwa Oteko: On the 9th Day of August, 2019 at Magadi Soda Township within Kajiado County murdered Jakes Kweh Kuru.

2. The particulars of the substituted charge ought to have stated that she “unlawfully killed Jakes Kweh Kuru” instead of murdered since the offence she was pleading guilty to had changed to manslaughter. However, I find this did not occasion miscarriage of justice on the part of the accused. I have used Section 382 of the Criminal Procedure Code to cure the defects in the charge sheet.
3. The accused had pleaded “Not Guilty” to the original charge of murder. In the course of these proceedings, the defence indicated that the accused was willing to enter into a Plea Bargain Agreement



- with the state for the lesser charge of manslaughter. On 24th November 2021, the Plea Bargain Agreement was executed. The charge of manslaughter was presented to the accused who pleaded guilty.
4. The presentation of facts by the Prosecution Counsel shows that the accused was employed by Mr. and Mrs. Onduru on 17th March 2019 to mind JKK, the minor aged six months. On 27th June 2019, NA K, mother to the minor returned home and picked the baby who started crying as if in pain. She asked the accused what had happened to the baby but the accused denied any wrong doing. The baby was taken to Magadi Hospital the following day where physical examination elicited no significant injury. However, the baby continued experiencing pain.
 5. On 9th August 2019, the minor convulsed leading to a referral to Nairobi Hospital where examination revealed that he had minor fracture of the skull at the occiput, swelling and bleeding in the brain. An X-ray to the chest revealed three broken but healing ribs aged about one month and bleeding on the trachea. The baby was admitted at the hospital but succumbed to the injuries on 14th August 2019.
 6. The post mortem conducted on the body of the baby revealed cause of death was due to head injury due to blunt trauma. The comments of the pathologist are that the findings of healing rib fractures are in keeping with a child who has undergone previous trauma and is common in cases of child abuse. The post mortem report and other medical documents were produced as exhibits.
 7. The accused was arrested and charged with murder now reduced to manslaughter.
 8. The accused admitted that the facts as presented were correct. This court found her guilty of manslaughter.
 9. During mitigation, the Prosecution Counsel informed the court that there were no previous records of the accused. She asked the court to treat the accused as a first offender.
 10. In mitigation, Mr. Nzaku, learned counsel for the accused told the court that the accused was remorseful for the loss of baby J; that the child fell down hitting his head on the floor; that the accused tried administering first aid and sought neighbours' help in rushing the boy to the hospital as well as alerting the mother of the child as the situation demanded. He mitigated that the accused did not run away from the place of work but continued working there until she was arrested; that this showed that she did not have any ill motive towards the child.
 11. It was his mitigation that the accused saved the court's time by pleading guilty; that she is a mother of two children aged 13 years and 5 years respectively; that the 13 year old is now in Form One (1) but has dropped out of school due to lack of school fees; that the accused has been the sole breadwinner to her sickly mother who has been in hospital with swollen legs and that the accused was remorseful and has asked for forgiveness from the victim's family. Mr. Nzaku urged that this court considers a lenient sentence.
 12. The court called for a Pre-Sentencing Report from the Probation Officer. The report was filed on 21st January, 2022. I have read the report and acquainted myself with its contents. I have noted that the accused has shown remorse as captured in the pre-sentence report. The report shows no bad blood between the accused and the mother of the child. In fact, Annette stated that the baby had bonded well with the accused and liked her more that he liked the mother.
 13. From the explanations by the accused as captured in the pre-sentence report and the mitigation in court, the accused is deeply remorseful for the death of the baby.
 14. I have considered the circumstances of this offence. It is clear to me that the accused, though careless in leaving the baby unattended, harbored no ill motive in the circumstances that led to the death of



the baby. She had no intention to harm or to kill him. It was unfortunate that she was a bit careless and negligence in her actions.

15. Penalty for manslaughter is life imprisonment. Section 205 of the Penal Code is worded thus:
 205. Punishment of manslaughter Any person who commits the felony of manslaughter is liable to imprisonment for life.
16. The use of the word “liable” merely gives a likely maximum sentence and not mandatory. This was the view taken by the Court of Appeal in *Caroline Auma Majabu v Republic* [2014] eKLR where that Court had this to say:

“..... the use of the word “liable” in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.
17. To my mind therefore, the use of the word “liable” under Section 205 of the Penal Code gives this court latitude to exercise my discretion in passing the sentence where an accused person has been found guilty of manslaughter.
18. In view of this and having taken into account the circumstances of this case, it is my considered view that the accused acted recklessly but had no intention of hurting the baby. I therefore sentence her to serve four (4) years imprisonment and thereafter to be placed under the care and supervision of a Probation Officer for an additional one year. The computation of the time of serving the jail term shall take into account the time the accused spent in custody from 24th September 2019 when she appeared in court and was placed in custody.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 24TH FEBRUARY 2022.

S. N. MUTUKU

JUDGE

