



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 23 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

MARY NAPUNYI.....ACCUSED

RULING ON SENTENCE

1. The accused person herein was charged in 2018, with the murder of Jactone Moche, on 8th May 2018. She was never formally tried of the offence. On 6th June 2018, a report was placed on record, to effect that she was not fit to stand trial, and an order was made for her referral to Mathare Mental Hospital. She was admitted at Mathare Mental Hospital, and her condition ostensibly improved, whereupon plea was taken on 21st May 2019, and she pleaded not guilty to the offence charged.

2. On 5th May 2021, the State indicated to the court that it was pursuing a plea bargain with the defence. The parties subsequently entered into a plea bargain agreement, dated 4th October 2021. Whereupon the court directed that manslaughter charges be drawn up for the accused to plead to. That was done, and plea was taken on 6th October 2021, to which the accused pleaded guilty, based on the plea agreement. On the same date, an order was made for the Probation Service to assess the accused person for the purposes of a pre-sentence report.

3. The assessment was done by the County Probation office, and a report was prepared and filed herein, dated 26th November 2021. A sentencing hearing was conducted on 31st January 2022. Ms. Ashitsa, Advocate, for the accused, mitigated on her behalf. She submitted that the victim of the crime was a child of the accused, and the accused was remorseful for what had happened. She stated that the accused was a mental patient, who had four children to take care of. She urged the court to take into account the probation officer's report and the circumstances of the accused person, and consider giving her a non-custodial sentence. She submitted that a non-custodial sentence would enable her to continue attending mental clinics.

4. I was due to pronounce sentence on 4th February 2022, but when I settled to prepare the ruling on sentence, and perused the file of papers before me, and the relevant authorities, I noted that the accused is a person battling mental challenges. She did not take plea initially because of that, and the plea bargain agreement reduced the charge to manslaughter for the same reasons. I decided to defer consideration of sentence to enable me consider the matter in view of recent jurisprudence on treatment of accused persons facing mental challenges.

5. In *Isaac Ndegwa Kimaru & 17 others vs. the Attorney General & 2 others* Nairobi HC Petition No. 226 of 2020 (Mrima J), it was held that an accused person, who is found to be unfit to stand or to continue to participate in a criminal trial, due to mental challenges, or who is tried and a special finding of not guilty but insane is made, is a person suffering from disability, and ought to be accorded the necessary protection and assistance required under the Constitution and the law.

6. The court in, *Hassan Hussein Yusuf vs. Republic* [2016] eKLR (Kiarie J), stated that mental instability is a form of sickness, and asserted that the place for a sick person was at a hospital and not in prison. The case, of course turned on section 167 of the Criminal Procedure Code, Cap 75, Laws of Kenya, on how accused persons found guilty but insane are to be handled, which is not necessarily the case here, but the principle is the same, how to treat a persons said to have committed an offence when he or she was suffering from mental illness. The handling of such a person should be geared at treating the mental condition of the person, rather than to expose the person to punishment for an act done by them when they were under disability, for their actions would be deemed to have been influenced, not by a free mind, but one whose thought process and reasoning had been distorted by the illness afflicting it. To subject a person to punishment for acts done when they had no or had little control over their minds would be to subject such persons to unfair and unjust treatment.

7. The challenge with the matter before me is that the accused person was not subjected to a full trial, but her conviction is founded on a plea bargain, ostensibly entered into to circumvent the question of her soundness of mind as at the time of commission of the offence, which was bound to arise, if a full trial were to be conducted. There is a psychiatric report on her mental state at about the time the alleged crime was committed. According to the charge sheet, the offence was committed on 8th May 2018, and there is a report by a psychiatrist, Dr. Amunga,

dated, 11th May 2018, prepared just three days thereafter, stating that she was unfit to stand trial. The probationer's report is clear that unsoundness of mind runs in her family, and, therefore, there is a real risk that the criminal justice system could be considering to punish the accused, who is clearly under disability, instead of treating her as a person with disability, who is in need of care and protection, rather than one who needs to be made to pay for her crime.

8. She is said to have been in an abusive marriage. When she escaped from it, her biological mother, who appears to have been her pillar, given that she understood her condition, died, forcing her back to the abusive marriage, where a second wife had been introduced in the matrix, on top of the continuing abuse. Given her rather unstable mental state generally, she snapped, and committed the act which is the basis for the instant charges. What should be addressed urgently is her disability, and not the crime she allegedly committed, for as long as her mental condition remains constant, there is a possibility that she could commit similar acts in future, when subjected to conditions similar to those that she was subjected to in 2018, when the offence herein was committed. Her disability is, ostensibly, as no full trial was conducted, the underlying cause of the commission of the alleged crime. The best way to treat her is to address that disability first, to obviate similar conduct repeating itself in future.

9. As a consequence of what I have stated above, I am persuaded, and, therefore, I find, and hold, that the accused person herein is under disability, and she should not be subjected to any form of punishment. I believe she should not even be considered for probation, for probation is designed for offenders, and it addresses social challenges as opposed to mental challenges. I will consider it only for the reason that mental challenges, by themselves, also present or engender psycho-social problems of the kind that social workers address, and the accused person herein does need such help and support, even as she heads out to seek for help with respect to care and treatment regarding her mental problems. I am persuaded that the County Director of Probation would arrange for or facilitate a proper system for her to access medication and proper mental care and treatment, as intimated in the report on record, dated 26th November 2021.

10. Consequently, I hereby order that the accused person herein shall serve probation for two years, under the Kakamega County Director of Probation, not as a form of punishment, or a means to direct her mind away from crime, but so that the probation office can facilitate her access to proper mental care and protection. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF FEBRUARY, 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the State.

Ms. Ashitsa, Advocate, for accused.