



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 19 OF 2017

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

VERSUS

TITITI OLE POTOT.....1ST ACCUSED

LEKISHON MOUWO.....2ND ACCUSED

SENTENCE

Fatal Skirmishes over Pasture

1. This is a case arising from fatal skirmishes among factions in or clans within maasai community in Narok County, for grazing pasture. The fight broke out on day of 2017 at ole Nkansasi area, which separates the Emorogi from Morijo people. During the skirmishes, a man died. There is evidence that the area has more grass than the neighbouring area since the area is on a hill. Be that as it may, there is no justification for taking the law into own hands; fight over pasture and *inter alia*, cause death of humans in the process. Consequently, the accused persons were charged with the murder of the deceased contrary to section 203 as read with section 204 of the Penal Code. They were, however, found guilty of, and convicted for the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.

2. According to Section 205 of the Penal Code, a person convicted of manslaughter is liable to be sentenced to life imprisonment.

3. I have been called upon to consider the mitigating and aggravating circumstances of this case and pass appropriate sentence on the accused persons. I must therefore hear the parties.

Prosecution: mete out deterrent sentence

4. The prosecution counsel, Ms. Torosi, submitted on relevant factors which the court should consider in sentencing the accused in this case to be: -

- a) That the accused is a first offender.
- b) That the offence committed is a serious one since life was lost and cannot be recovered;
- c) That the accused persons are part of an organized group that planned the attack;
- d) That the court should consider the weapons used were dangerous weapons, to wit, maasai sword and clubs that caused the fatal injuries.

4. She continued to state that, other aggravating factors include: -

- i) That there were repeat attacks even after the deceased fell down.
- ii) That the injuries were in the head which were indicative that they intended to inflict maximum harm.

iii) She did not think the accused persons were remorseful, for at page two of the pre-sentence report, the 1st and 2nd accused continues to deny the charge.

iv) She emphasized that the deceased was the bread winner of his family. He left a widow and 6 children- their life is now very difficult. The family is also psychologically tortured by his death. Thus, it is not true that the family has come to terms with the death of their kin. They are still bitter. She urged the court to consider the family's sentiments- the victim's view for justice to prevail. Reconciliations failed since the accused persons do not admit commission of the offence.

v) She prayed for a deterrent custodial sentence since the ground is still hostile.

Defence: grant non-custodial sentence

5. The defence counsel, Mr. Ole Kamwaro urged the court to consider the filed mitigation. In his highlight thereof, he stated that the accused were convicted of a lesser offence of manslaughter. He urged the court to consider *muruatetu* decision that before passing sentence, the court should receive evidence of mitigating factors, consider evidence given at trial, nature of the offence, and circumstances of the case in order to mete out appropriate sentence.

6. According to him, the crime was committed when two factions of clans fought over grazing field. The offence was committed not for gain or revenge. These were skirmishes between clans. The accused persons have no intentions of repeating the crime in future; that possibility is remote. The accused are not psychopaths.

7. He argued that the pre-sentence report does not indicate any hostilities towards the accused person if placed on a non-custodial sentence. The families are willing to reconcile. The Local administration has given good reports on them. The security for the accused is guaranteed. The two were out on bail and no incident was reported between the families. The present report should aid the probation because of the evidence adduced. There is no grudge between the accused and the victims. They did not go for the deceased for retaliation or anything. Skirmishes began elsewhere.

8. According to the defence, the weapons allegedly used to inflict injury were not produced and do not conform to postmortem report. The deceased died of a blunt object. No cut was established by post mortem examination. The 1st accused was initially charged with attacking pw3 and then later charged with murder of the deceased. He urged the court to re-look the evidence for appropriate sentence.

9. He prayed for non-custodial sentence so that clans can get an opportunity to come to terms with the death. The report states that they regret the offence. This amount to remorse. He stated that he had seen the letter by the victims and therefore urged the court to consider that lack of mitigation does not deny them equal opportunity in law. The families are still pursuing reconciliation.

10. He impressed the need for non- custodial sentence due to their age and circumstances of the case. The accused are family people with children. The court should consider interest of the children allow rehabilitation of the offenders the case as served as a warning to the clans.

Analysis and sentence

6. The court will now gather all the threads- mitigating as well as aggravating factors- and, weigh them on the scale of law, the principles and objectives of sentence. The court will also consider the Pre-Sentence Report from the Probation Department and victims' statement filed in accordance with section 1371 of the CPC.

Objective of sentencing

The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary, require that the sentence imposed must meet the following objectives in totality;

a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

e) Community protection: To protect the community by incapacitating the offender.

f) Denunciation: To communicates the community's condemnation of the criminal conduct.

Relevant factors

The law- statutory and case law- and, here I am content to cite Supreme Court in the **Francis Karioko Muruatetu decision (supra) provides for some of the relevant considerations in** sentencing. to wit:

“[71]. ...the following guidelines with regard to mitigating factors are applicable.....:

- (a) age of the offender;**
- (b) being a first offender;**
- (c) whether the offender pleaded guilty;**
- (d) character and record of the offender;**
- (e) commission of the offence in response to gender-based violence;**
- (f) remorsefulness of the offender;**
- (g) the possibility of reform and social re-adaptation of the offender;**
- (h) any other factor that the Court considers relevant.**

8. The list of what constitutes mitigating and aggravating factors is not exhaustive and each case is to be considered on its own circumstances. Some of the factors which the Courts take into consideration include the age of the convict both at the time of committing the offence as well as at the time of sentencing, whether the convict is a first offender, the time already served in prison by the convict; the personal and individual circumstances of the offender at the time of committing the offence and at the time of sentencing (e.g. their mental state; health; hardships, etc.) as well as the possibility of reform and social re-adaptation of the convict; the manner in which the offence was committed (i.e. whether an offensive weapon was used or not and whether he was intoxicated at the time of committing the offence) among other factors.

Circumstances of case

9. The facts of the case reveal that the deceased died in skirmishes between factions within maasai clans over pastures. The fighting was at ole Nkansasi area, which separates the Emorogi from Moriyo people. There is evidence that the area has more grass than the neighbouring area since the area is on a hill. Be that as it may, there is no justification for taking the law into own hands and fight over pasture.

10. Important evidence. Pw3 arrived at the scene and found the deceased standing at the gate of ole Letuat. The 2nd accused then hit the deceased on the head with a maasai sword. As a result, the deceased fell down. As he was lying down the 1st accused hit the deceased on the head with a rungu. Dr. Kamau and Prof. Rogena prepared a post mortem report **Pexh 2** which indicated that there was a commuted fracture of the right parietal bone extending to the left temporal bone and there was also swelling of the head. The cause of death was due to head injury due to a blunt force trauma with a fractured skull. Contrary to the submissions by the defence counsel, the weapon used was blunt object which was consistent with a rungu.

11. I do note that the convict pleaded self-defense. But, it was dislodged by the evidence adduced by the state. Notably, the offence committed is serious, for a person's precious life was lost; life is jealously protected in Article 26 of the Constitution of Kenya, 2010. The death was caused by the unlawful actions of assault of the deceased by the accused with dangerous weapons; a rungu and maasai sword. The death occurred during clan skirmishes for pasture. These incidents are prevalent in Narok County and should be discouraged.

12. However, the Court should consider mitigating factors as presented in the accused's account.

13. The pre-sentence report states, *inter alia* that the convicts are first offenders, they are 37 and 35 years old respectively. These are young persons with a whole life ahead of them except, the thoughtless commission of the crime herein, in now a huge impediment to enjoyment of life by the accused persons. They must be held accountable for their actions through punishment.

14. In light of the foregoing circumstances: On the one hand; there is the necessity; (a) to punish the accused for the offence; (b) express society's disapproval of such offensive criminal conduct; and (c) deter the accused persons and any other person from engaging in future thoughtless and unnecessary clan skirmishes for pasture. And on the other hand; there is the need to give the accused an opportunity to reform and re-integrate in society as productive citizens. A subtle balancing act is necessary here.

15. Having taken into account the victim impact assessment report, the presentence report, the submissions, the aggravating and mitigating factors in and the circumstances of, this case is not fit for non-custodial sentence. Deterrence is necessary in the circumstances of this case and this would only be achieved through custodial sentence. Except, however, the sentence should be one that affords the accused persons an opportunity for reformation and re-integration into society as productive citizens.

16. The maximum penalty for manslaughter is life imprisonment. See section 205 of the Penal Code that: -

205. Any person who commits the felony of manslaughter is liable to imprisonment for life

17. What is appropriate sentence? The accused persons pleaded for leniency, and are said to be first offenders. They are in their mid-thirties. However, there is no expression of remorse. This offence is however prevalent in Narok County and deterrence of future such thoughtless and unnecessary criminal conduct is absolutely necessary. Accordingly, I sentence the convicts to 15 years' imprisonment each. As the

convicts were released on bond not long after being charged in court, the proviso to Section 333(2) of the Criminal Procedure Code may not yield much. However, they have been in custody since conviction. Accordingly, the sentence will commence from the date of conviction. Right of appeal within fourteen (14) days.

Dated and delivered at NAROK through Microsoft Teams Online Application this 19th day of April, 2021

F. GIKONYO

JUDGE

In the presence of Court Assistant Mr. Kasaso, Ms. Torosi for the state and Mr. Kamwaro for the accused persons.

F. GIKONYO

JUDGE