



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 11 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SULEIMAN BAYA MAKALI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the State

Ms. Aoko for the Accused person

SENTENCE

Murder and Manslaughter are related but legally distinct categories of killing and this difference should continue to be recognized even in sentencing verdict.

From the record the convict herein Suleiman Baya Makali was initially charged of murder Contrary to Section 203 as read with Section 204 of the penal code. In the course of pretrial hearing, the convict filed a request with the state for a plea-bargaining agreement. The said application requires that negotiations be carried out with a view to consider a lesser charge of manslaughter of the offence by the state against the accused. On consideration of the matter consent was granted by this court for both parties to negotiate the terms towards the plea-bargaining agreement. This culminated into a plea agreement dated 9.2.2021. While addressing the court, the senior prosecution counsel informed the court that on review of the evidence and facts of the case, its acceptable for the accused to plead to a lesser charge of manslaughter. In this regard the new charge was read to the accused who pleaded guilty to manslaughter charge Contrary to section 202 as read with 205 of the Penal Code.

As far as the record is able to reveal both parties were to file submissions for a sentencing hearing for a final verdict on sentence. In this regard from the Memorandum submitted by **Ms. Aoko** for the convict, the court should take into account the following factors:

(a) The offence was committed without malice aforethought.

(b) He is a first offender with no previous conviction related to the present offence.

(c) The convict is a youthful offender with high chances to reform or rehabilitation.

(d) He is remorseful and regrets the offence. Counsel in her submissions to support a more lenient sentence cited and placed reliance on the following cases Kabatera Steven Criminal Appeal No 123 of 2001, Bernard Kimani Gacheru v R (2002) EKLR, R v Elizabeth Mugiywa (2018) Eklr, R V Philip Kathiwa(2015)eKLR, Sebastian Okwero v R (2014) eKLR, Joseph Mumo v R (2014) eKLR.

In Counsel addressing various arguments in favour of the convict she proposed a sentence of three (3) years imprisonment.

In response, the state was required to file a memoranda on aggravating factors but despite sentence adjournments, nothing was forthcoming to that effect. Whereas the court received submissions from the defence counsel without the input of the state prosecutor, I consider it not prejudicial to proceed and render the court's verdict on this matter.

This background to the plea agreement relate to involuntary manslaughter and as such the maximum sentence prescribed by Law is that of

Life imprisonment. Nonetheless, the defence Counsel submits and believes that it is necessary to impose a lesser sentence based on the mitigation factors offered in the memoranda.

Apart from the above which ever angle ones look at the offence. There can be nothing so offensive than that of taking another human being life even at the lowest end of the scale. It is so abhorrent and offensive to society that merits a proportionate sentence to reflect the seriousness of the offence.

Admittedly, the record on the facts admitted shows, the nature and location of the injury to the head, cheek, stomach inflicted by the convict against the deceased. It's acknowledged that the convict was armed with a knife which he used inflict the fatal injuries.

There is therefore a degree of aggravation to this manslaughter charge. A mercy killing of a human being is of a different moral order from that of a sadist and brutal offender which satisfies the intention element to cause death or serious bodily harm. I am sure the public will have confidence in the criminal justice system if convicted offenders for the offence of murder or manslaughter are given terms of imprisonment commensurate with their criminality. Submissions received from Counsel for the convict in a sense and on the events that transpired may not beg a persuasive nature to attract a minimum period of 3 years imprisonment. In this case, the governing factors and by virtue of the aggravating elements and the probable consequences of the convict conduct. In sentencing the convict, I take into account the aggravating and mitigation factors and further seek guidance from the Supreme court decision in **Francis K. Muruatetu v R (2017) eKLR**.

In addition, I reconsider the sentencing policy guidelines (2016) and principles elucidated in the cases cited by the defence counsel **Ms Aoko**. Although, the Convict is a first offender and of medium age, the aggravated factors outweigh the mitigation to influence the court to exercise discretion to impose a just sentence.

In my view relying on the scale of those two definitive factors and the fact that the convict has been in remand custody since 25.6.2019, I hereby set the sentence at 10 years imprisonment from the date of his arrest. and arraignment in court to stand trial for the offence of murder. For avoidance of doubt the committal warrant to begin the period of imprisonment shall factor the commencement date to be with effect from 25.6.2019.

Right of Appeal 14 days explained.

In the presence of:

Ms. Aoko for the Convict

Mr. Mwangi for the state

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF MAY, 2021

.....

R. NYAKUNDI

JUDGE

[\(aoko.otieno@gmail.com\)](mailto:aoko.otieno@gmail.com)