



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 17 OF 2019[MURDER PLEA BARGAINED TO MANSLAUGHTER]

REPUBLIC.....PROSECUTOR

VERSUS

NMO.....ACCUSED

JUDGMENT ON PLEA BARGAIN

1. The accused person herein NMO was charged with the offence of murder contrary to section 203 as read with section 205 of the Penal Code. He pleaded not guilty to the charge and the trial commenced. As the hearing progressed, the accused person sought to plea bargain with the state for a lesser charge of manslaughter which the prosecution acceded to. A plea bargaining agreement was signed between the parties and a fresh charge of manslaughter was filed, substituting the Information for murder dated 4th December, 2019. In the Information for Manslaughter dated 27th April 2021 signed by Mr. Edward Kakoi Principal Prosecution Counsel, the accused is charged with Manslaughter contrary to section 202 as read with section 205 of the Penal Code. Particulars of the offence are that on the 16th and 17th day of November, 2019, at around 0030hours in Gem Sub County within Siaya County, the accused person unlawfully killed one JAO.

2. The accused person who was duly represented by an advocate, Mr. Okello, and having signed the plea bargaining agreement together with his advocate, pleaded guilty to the Information and a plea of guilty was entered against him. The facts of the case were read out to him in Dholuo language which he understood and he admitted the said facts as being true. This court then proceeded to convict him accordingly, for the offence of manslaughter.

3. The prosecution indicated that they had no previous records on the accused hence he could be treated as a first offender. In mitigation by his counsel, the accused sought for lenient sentence. The accused person was also given the liberty to mitigate personally. The court then reserved the matter for sentencing to receive a presentencing report which report was filed in this court on 25th June 2021 signed by Euphemia Kidwoli, probation Officer.

4. I find it important to outline the facts as read out by the prosecution on 27th April, 2021 and which the accused person admitted as being true before he was convicted for manslaughter.

FACTS OF THE CASE

5. The deceased was the estranged wife of the accused. On the night of 16th November 2019 at about 9 pm, the accused called the deceased to meet him in K'ogalo Bar in Akala Trading Centre. She went there and he booked a room (lodging) and they got in together. In the course of that night, the accused killed the deceased and left the room in the morning and called HOM the deceased's brother, directing him to go and check in Room No. 1 at the lodging to see what had happened. H went to the Bar and asked the management on whether they knew what had happened at Room 1 which they denied and ongoing to check, they found the deceased lying dead. A few minutes later, the accused called H telling him that he (accused) had killed the deceased. The report was made to the police who went to the scene and took over investigations.

6. On 17/11/2019 at 2 pm, the accused surrendered to Awendo Police Station in Migori and reported that he had killed a person in Akala. He was arrested and escorted to Akala Police Stations.

7. A post mortem was carried out on the deceased's body and the cause of death was found to be hypoxic brain injury secondary to asphyxiation. The post mortem report was produced as PEx1. Statements of witnesses were recorded and the accused was charged with Murder of the deceased which was reduced to Manslaughter through Plea bargain.

8. The accused was mentally assessed and was found to be mentally fit to stand trial. The Mental Assessment report which was filed in court is dated 3/12/2019 done by Dr. Edwin Nyaura Consultant Psychiatrist.

9. The accused admitted the above facts to be true and was convicted accordingly. The prosecution stated that he was a first offender.

10. In mitigation, Mr. Okello advocate stated that the accused is a first offender. He is a young man with a family and the breadwinner of his family. He prayed that the court gives him a light sentence.

11. In his own words, the accused had the following to tell the court, verbatim:

“J was my wife from 2009 until her death. We have 5 children together. I now are left alone with the five children. I pray for leniency. I assist other children which she brought with her. My younger child has sickle cell anaemia and tuberculosis. I did not plan to kill my wife for me to suffer and to let my children suffer. On 20/8/2019, I am a DJ and when I returned at night, I knocked the door and my wife refused to open the door. I had left a motorcycle at the petrol station so I came on foot. I learnt that there was a man sleeping with her in the house as the two were talking. I asked her whom she was talking to and a person emerged from the house and held me and we struggled. He was armed with a knife and he injured me on my neck and forehead and nose. (shows the court scars - healed).

J came out of the house covered in a bedsheet, returned inside and locked the door and remained in the house. A neighbor heard what was going on and came and opened the door and the said man who had returned to the house escaped. I was taken to hospital, treated and discharged. J left my house with children and a neighbour's 5 sewing machine heads. She used to ask my neighbours on how seriously injured I was. I could not go to work because of injuries. I used to tell her that it was unnecessary to fight. She was a tailor. After she left, her customers were coming back to me asking for their clothes. I went to the Chief and he issued me with a letter to go to J's parents to request her to release the customer's items – clothes and machines.

I went to J's home and I was welcomed at her uncle's homestead because her parents lived in Nairobi. I did not find J. I spent a night at her uncle's home and I was taken to Asembo at one of her uncle's house where I stayed upto 11 pm and tried contacting J but her phone and that of her Aunt were off.

I found my children there in Asembo. J is said to have gone to a gold mine and by midnight she had not returned. I took a motorcycle and went back to Gem. J was contacted on phone but she kept asking the callers if I was still there. She was reached on phone and told to come so that we resolve any outstanding issues but she said that her parents died and her uncles were not her parents so she was not ready to listen to them.

I was given the sick child to go with to Migori. I was told by her Aunt that if I was found I would be killed by motorcyclists. I then started calling J asking her to return with the children and I went to the Chief who spoke to her and she said she would return in October which she did and found when I was in Hospital at Kokeyo with the sick child. She stayed for three days and she told me she would go to bring the children. We went to the Chief's area and agreed to make peace.

When I was in hospital, I send her to bring me money and NHIF card to clear the child's hospital bill but she picked the card and money and took off.

On 16/11/2019, a Saturday, J called me in the morning saying she wanted to meet me so that we talk and make peace. She declined fare. I was happy so I came from Migori and met her at Akala at 6 pm. I asked her where we would talk from and whether we could visit her home and talk to her guardians but she said she had no good relations with her relatives. Her Aunt had called me saying that the character of J was not good. J asked me to get for her a rental room so she went to Ogallo Bar and called me to go and she said we could stay in the lodging and talk. We took guinness - 2 bottles each. She then told me that she looked for me to tell me that it was over between me and her. She told me that she had found another husband whom she could live with. I told her that if that was the case, she should bring me the children but she said the children had found a father.

She had a Samsung Phone which she called someone a man asking what she could go and pick for the children. I was angry because I had come all the way from Migori to be told that I was not a worthy husband. She even showed me the photograph she had taken with the other man. I slapped her and I pushed her and she hit her head on a bed. She never woke up so I got scared and I called her relatives and found her brother then I boarded a vehicle to Migori. J was buried at my home. The children were taken by J's family.

I regret and feel bad about the death of the deceased as I am left with suffering children. I did not anticipate the death. I signed Plea Bargain Agreement today.”

12. It was in of the above lengthy mitigation that this court ordered for Presentence Report to be filed by the Probation Officer and the Victim Impact Statements. I then set the mention for 28/6/2021 for sentencing as I was proceeding on leave.

13. In the probation Officer's report and victim impact statement, it is stated that the deceased was an orphan and all her siblings live in Nairobi doing casual jobs. Her rural home is deserted. Only one of her brothers who testified in this case and her step mother were traced and that they claimed that they did not want to be involved in this case. The deceased had five children three of whom were fathered by the accused. The children went to live with their maternal aunt in Nairobi but that she was suspected of having killed someone so she escaped leaving the children on their own and nobody knows their whereabouts.

14. The accused person's parents are alive and have been trying to locate the children of the accused to no avail. The accused is said to be humble and hardworking. He was the sole breadwinner of his family comprising the deceased and five children. He was fostering three of her children born of different fathers. She previous was married to the accused person's uncle. The accused was warned against marrying the deceased due to her wayward character and that despite being married to him, she was a sex worker. All his children are minors except the deceased's first child who is over twenty years old. He married the deceased when he was only 17 years old after dropping out of school in Class seven in 2009.

15. The victim was buried in the accused person's home despite the offence because he had paid her dowry and so, the accused person's parents and relatives met the funeral expenses. The children of the deceased and accused now need the accused more than anyone else because he is the sole surviving parent and his parents are separated. Their aunt who was caring for the said children is said to have abandoned them after she committed the offence and escaped. The last born child has sickle cell anaemia and requires constant medication and care. The offender is remorseful for the offence and would like to pursue and trace his children. He regrets the offence.

16. The probation officer recommends probation service to counsel the offender.

17. Having considered all the above circumstances under which the offence of manslaughter was committed, taking into account the fact that the accused was a first offender, his mitigations, victim impact statement and report by the probation officer especially the accused person's remorse and responsibility to third parties who are minor children who have now been left on their own as their caregiver, a maternal aunt has vanished leaving them on their own and one of the children having serious health issues, and as the victim had loose family ties, and taking into account the objects of sentencing as set out in the Judiciary Sentencing Guidelines and those set out in the **Francis Muruatetu & another v Republic [2017]e KLR** case, ***I hereby exercise discretion and sentence the accused person Nelson Mandela Ochola to Five Years Imprisonment. Of the Five years imposed, the accused shall serve three years on probation upon completion of two years in prison, to be calculated from the date of his arrest, as contemplated in section 333(2) of the Criminal Procedure Code, taking into account the period that he has been in prison custody as he was not on bond.***

18. ***Right of appeal guaranteed, 14 days of today,***

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF JUNE, 2021

R.E.ABURILI

JUDGE

In the presence of:

Mr. Kakoi Principal Prosecution Counsel for the State

Mr. Okello for the accused person-virtually

Accused person NMO in Court

CA: Modestar and Mboya