



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. E001 OF 2021

CORAM: HON. R.E. ABURILL J

STATE.....PROSECUTION

VERSUS

STEPHEN OTIENO OGADA.....ACCUSED

JUDGMENT

1. The accused person/convict herein Stephen Otieno Ogada was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. This was vide information dated 18th January 2021 filed on the same date and signed by Mr. Edward Kakoi, Senior Principal Prosecution Counsel Siaya on behalf of Director of Public Prosecutions.
2. On the same 18/1/2021, the accused person was arraigned and a Plea was taken before me, after the court satisfying itself that the accused had been mentally examined vide a mental assessment report dated 12/1/2021 by Dr. Edwin Nyaura, Consultant Psychiatrist at Jaramogi Oginga Odinga Teaching and Referral Hospital, Kisumu.
3. The accused person was ably represented by Mr. Victor Were Advocate.
4. The accused pleaded Not Guilty to the charge of Murder and the court fixed the matter for hearing on 29/3/2021. The court also granted the accused person bond.
5. On 22/2/2021, when the matter came up form routine mention, the accused informed the court (personally) and in the absence of his advocate that he wished to Plea bargain.
6. Ms. Nambisia Prosecution counsel informed the court that she would contact counsel for the accused person, Mr. Were to confirm the position of his client. She requested for another mention date which the court acceded to and mentioned the matter on 2/3/2021 while retaining the hearing date earlier fixed.
7. On 3/3/2021, Mr. Were Advocate did not attend court to represent his client hence this court discharged him and directed the Deputy Registrar to appoint another advocate.
8. The matter was then slated for mention on 16/3/2021.
9. On the latter date, Ms. Akinyi Florence Advocate appeared for the accused and requested for more time to Plea bargain. She also prayed for an alternative hearing date. The court fixed the hearing for 13/7/2021 with a mention on 27/4/2021 to confirm progress on proposed Plea bargaining.
10. The position on Plea bargaining was confirmed on 27/4/2021 and parties agreed to mention the matter on 6/7/2021 when on application by the prosecution, the charge of Murder was substituted with Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and a fresh plea taken.
11. The accused Stephen Otieno Ogada therefore stands charged with the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
12. Particulars of the offence are that on the 31st day of December 2020 at around 5.30 hours at Malanga sub location in Gem Sub County

within Siaya County, he unlawfully killed one Bernard Odera Siyenji.

13. Upon the substituted charge being read to the accused person with all its elements explained to him in the Dholuo language through interpretation by Court Assistant Mr. Mboya, the accused person pleaded guilty to the charge.

14. The Plea was taken after this court was satisfied that the accused and his advocates had signed a Plea bargaining agreement dated 6th July 2021 prepared by the ODPP and that all the matters contained in the Plea Bargaining agreement had been explained to him.

15. Upon the accused person pleading guilty to the charge of Manslaughter, the Prosecution read out to court the facts of the case being that on 31st December 2020 at around 5 am, Simon Sigala Siyenji went to the deceased's houses and found the house empty. At a distance, he heard someone calling out his name so he moved in that direction and found the accused herein assaulting the deceased using a rungu-Club while the deceased was pleading with the accused not to kill him.

16. The deceased was saying in Kiswahili, ***“ulinitoa kwa nyumba uende kuninunulia pombe kumbe unataka kuniua”*** translated - ***“You removed me from my house to go and buy me alcohol only for you to kill me.”***

17. The mother of the accused was at the scene and was also pleading with the accused, her son, to stop assaulting the deceased. Simon then tried to snatch the rungu from the accused but the latter was too strong for him so, Simon screamed for help and left the scene going to get more help. When Simon returned within one Kennedy Owino, the accused saw them with a crowd and so he ran to his house and retrieved a panga which the crown snatched from him.

18. At that time, the deceased who was badly assaulted was groaning from the ground in pain. He was escorted to Yala Level 4 Hospital but at 11 am he died. Postmortem was carried out by Dr. Mbeki who established the cause of the deceased's demise to be due to severe haemorrhage due to splenic rupture and severe head injury secondary to trauma to the head. The Prosecution produced the postmortem report dated 5/1/2021 as PEx1.

19. Investigations were carried out and the witness' statements were recorded and the accused was arrested and charged and arraigned for Murder which had now been reduced to Manslaughter through Plea bargain.

20. On being asked in Dholuo language of the facts read out to court and interpreted to him in Dholuo whether the facts as read out were corrected or not, the accused person stated in Dholuo, “the facts are true.”

21. Upon admission of the facts as true, this court convicted the accused person for the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

22. The Prosecution stated that they had no previous records hence the accused should be treated as a first offender.

23. Mitigating on behalf of the accused person, Ms. Akinyi advocate stated that the accused is a first offender, had been in prison remand for seven months and regretted the offence as he did not intend to kill the deceased who was his cousin.

24. That he had made peace with family of the deceased and asked them for forgiveness and that they had since forgiven him.

25. The court allowed the accused person to mitigate personally, in addition to what his counsel had submitted on and he stated that he did not intend to kill the deceased. He prayed for lenient sentence because he had shortened the trial period by Plea bargaining. He stated that he killed the deceased when he found the latter breaking into his (accused person's house.)

26. Upon hearing the mitigation by the accused and his counsel, I ordered for a presentence report to be filed by the probation officer. I also ordered for the victim's family impact statement to be filed before sentencing the accused person.

27. The Probation officer Mr. Odumba did note this file on 6/7/2021. I have considered the mitigations by the accused person and his advocate. I have also considered the circumstances under which the offence was committed which circumstances are not clear in other words, it is not clear why the accused killed the deceased who was his cousin, using a rungu (club), despite interventions by one Simon and the accused person's own mother. The accused however, claims that he found the deceased breaking into his house so he killed while defending himself.

28. However, the accused admitted as true the facts read out to him that he was found assaulting the deceased outside the deceased's house. There is no evidence that the deceased was armed or that he posed any threat to the life and limb of the accused.

29. The accused and deceased were cousins. The accused's mother pleaded with the accused not to assault the deceased. Simon also tried to intervene in vain. The deceased pleaded not to be killed by the accused but the latter could hear none of the pleas until the deceased sustained fatal injuries and died within seven hours of the assault.

30. The deceased was aged 31 years old, according to the postmortem report. He sustained serious trauma on the head and severe haemorrhage - bleeding due to rupture of the spleen. The deceased must have suffered a lot of pain before he died the same day at about 11 a.m.

31. The accused person is 28 years old. He did not tell the court whether he was married and or whether he was with a family that depended on him. Furthermore, the Presentence report dated 15/9/2021 is silent.

32. He is a young man, from my observation. He is expected to know how to resolve disputes if any with other people and especially his own cousin. He did not have to butcher his blood cousin. The postmortem report shows that the deceased sustained the following injuries as a result of the assault – a cut wound 7 cm on the parietal region with cyanosis of the skin around it - simple fracture on both left and right lower limbs on the upper 3rd of the limbs affecting both tibia and fibula. A fracture of the left humerus at the lower third aspect. Those injuries were very severe.

33. No person has any right to take away the life of another person other than as may be authorized by the constitution or by a written law.

34. The accused claims that he found the deceased breaking into his house. If that be the case, the accused who appeared the strong one did not have to butcher his cousin. He should have arrested him and called for help.

35. The bone fractures and rupture of the skin spleen and trauma on the head of the deceased is evidence of serious assault with the intention to kill or cause grievous harm not to immobilize a suspected burglar or a thief. The Presentence report describes the accused as violent and a social misfit.

36. The accused is lucky that the offence, through his Plea bargain, was reduced to Manslaughter by the prosecution. It is true that he has saved this court trial time and money in that witnesses did not have to come and testify. Nonetheless, the offence of Manslaughter upon conviction, carries up to life imprisonment, being the maximum sentence.

37. Having considered all the above circumstances, mitigation and the Presentence Report and objectives and Judiciary on Guidelines on sentencing, I hereby exercise discretion and sentence the accused person Stephen Otieno Ogada to serve fifteen (15) years imprisonment. In accordance with the provisions of Article 50(2)(p) of the Constitution, as read with Section 333(2) of the Criminal Procedure Code, and to ensure the accused is given a less severe sentence under the law, the fifteen (15) years imprisonment herein imposed shall be calculated from the date of his arrest to be supplied by the Protection records.

38. Right of Appeal is 14 days of today.

39. File closed.

40. Orders accordingly.

Dated, signed and Delivered at Siaya this 27th Day of September 2021

R.E. ABURILI

JUDGE