



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE NUMBER 22 OF 2018**

**REPUBLIC.....ODPP**

**VERSUS**

**DENNIS BARASA WANYONYI .....ACCUSED**

**S E N T E N C E ( A F T E R P L E A A G R E E M E N T )**

1. The accused person Dennis Barasa Wanyonyi was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 26<sup>th</sup> April 2018 at Manyani Estate Nakuru Town, Nakuru East Sub County within Nakuru County murdered Juma Abdi.
2. Accused took plea on 10<sup>th</sup> May 2018. He pleaded not guilty. He was represented by Ms. Chemng'etich.
3. Despite numerous hearing dates being fixed, the matter never took off and on 28<sup>th</sup> October 2020 the court was informed that parties were pursuing a Plea Agreement negotiation as provided for under Section 137 of the Criminal Procedure Code.
4. The plea negotiation was concluded on 10<sup>th</sup> November 2021 when the court was informed that the accused person and the ODPP had agreed to a charge of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code. It states:

***“202. Manslaughter***

***(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.***

***(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.***

***205. Punishment of manslaughter***

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

5. The prosecution lay the substituted charge before the court. The accused pleaded guilty to the charge in affirmation of the plea agreement.
6. The facts of the case were that the accused and the deceased are cousins. On 22<sup>nd</sup> April, 2014 one Kennedy Wafula gave the accused his mobile phone when he came later to ask for it the accused refused to give it to him. Kennedy reported to his mother, and later at Bondeni Police Station. He did not get the assistance he expected to retrieve his phone. On 26<sup>th</sup> April, 2018 in the company of Juma Abdi he went to demand for his phone. In the process a fight ensued among the three (3) of them. The accused person's mother came and separated them. The accused then rushed into the house, but Juma Abdi followed him, pushed him. He fell to the ground. There happened to be a knife on the floor which he picked and stabbed Juma. Accused ran away. Juma Abdi was taken to hospital and report made to Bondeni Police Station. Unfortunately he died. The accused took himself to the Police Station. After the post mortem he was charged with this offence. The post mortem confirmed that the deceased died from that single stab wound.
7. Accused person accepted these facts as being true, and I convicted him accordingly and I sought a Probation Officer's Report. Both the prosecution and defence addressed the court pursuant to Section 137I of the Criminal Procedure Code.
8. The state proposes a sentence of ten (10) years imprisonment. The defence seeks three (3) years non-custodial sentence. The basis for the latter is that the accused and the deceased were cousins. The two (2) families have reconciled, hence the secondary victims of the offence; the parent and siblings of the deceased have accepted what happened and are ready and willing to accept the accused back into the family and

the community. This is evidenced by the proceedings of the family meeting held on 13<sup>th</sup> February 2021. This is confirmed by the Probation Officer's Report filed on 15<sup>th</sup> November 2021.

9. The issue then is whether this is a case suitable for a term of imprisonment or non-custodial sentence.

10. The accused has been in custody since 27<sup>th</sup> April, 2018 when he was first arraigned in court. This is a period of over three (3) years. This ought to be taken into consideration pursuant to Section 332 of the Criminal Procedure Code.

11. In addition Article 159 (2) (c) of the Constitution, courts are obligated to encourage other forms of dispute resolution. Ours is a pluralist legal system where both the formal criminal justice system, must of necessity be read together, so to speak with what is referred to as alternative forms of dispute resolution. It is clearly evident that the plea agreement envisioned by Section 137 recognises that there is a place for reconciliation, as it states at Section 137 I, that the court in passing sentence shall take into account

*“2 (d) The nature and amount of any restitution or compensation agreed to be made by the accused person.”*

12. Restitution is not necessarily the giving of something, it can be by way of doing something. In this case both families had done something, come together and demonstrated that they had exchanged good will, through the traditional system, and there is restoration of the sense of family in spite of the incident that deprived them of one of their own. This is something the formal justice system must acknowledge because it results in a peaceful coexistence and avoidance of further conflict unlike where in these similar circumstances the offender is simply imprisoned, and the tension between the two families remains alive, even sometimes remaining so, culminating into rekindle conflict at the point he completes his sentence and has to return to the community.

13. In the circumstances of this case there is no evidence that this agreement to 'kusameheana', reconcile is repugnant to any morality or justice as it is mutual and has brought the two families together. Hence, it is my considered view that the custodial sentence proposed by the ODPP may not serve the purpose of sentencing.

14. The accused has been in custody for over three years, the deceased is his cousin, he acted at the spur, he regrets what happened, and the families have reconciled. An additional non-custodial sentence will take cognizance of the period he has been in custody while demonstrating to him that what he did has consequences, while at the same time providing the space to continue to restore relationships.

15. I find that the three (3) years in custody serve as the custodial period, already served.

16. In addition, the accused person be and is hereby placed on probation supervision for three (3) years under the Probation of Offenders Act cap 64 Laws of Kenya. During this period the accused person is to abide by the Probation Order. Should he fail to do so or commit any other offence, the Probation Order may be set aside and substituted with a term of imprisonment.

17. Orders accordingly.

**DATED, DELIVERED AND SIGNED VIRTUALLY THIS 19TH DAY OF NOVEMBER, 2021.**

**MUMBUA T. MATHEKA**

**Judge**

**In the presence of:**

**JUDITH: COURT ASSISTANT**

**FOR ACCUSED: MS. CHEMNG'ETICH**

**FOR STATE: MS. MURUNGA**

**ACCUSED: PRESENT**