



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL CASE NO 19 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

DENNIS KIPYEGON CHERUIYOT.....ACCUSED

JUDGMENT AND SENTENCE UPON PLEA AGREEMENT

1. The Accused Dennis Kipyegon Cheruiyot was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. He was alleged to have murdered his brother one Julius Kipngetich Cheruiyot on 27th September 2018 at Kimuchul location within Bomet County.
2. The Accused denied the charge and the trial proceeded before Muya J. who heard 7 witnesses. Subsequently parties took directions before me to proceed with the case from where it had reached before Muya J.
3. When the case came up for mention for directions on 15th April 2021, defence counsel told the court that they wished to plea bargain with the prosecution. Parties subsequently filed a plea agreement on 25th November 2021.
4. The court accepted the plea agreement after satisfying itself that the Accused understood his rights and the process and had executed the agreement voluntarily. The prosecution was therefore allowed to present the substituted charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and to which the Accused pleaded guilty.
5. The facts of the case as read by the prosecutor were recorded verbatim as follows:-

“The facts surrounding this case is that on the 27th September 2018 at around 2030 hours the Accused in this case went to his sister’s house D-1 where he found the deceased in company of D-1 and D-2 in the house taking supper. E-1 entered the house and after greeting D-1, D-2 and the deceased he immediately left and stood outside the house.

After finishing taking supper the deceased excused himself and left but upon reaching the door he was confronted by E-1 where a quarrel ensued attracting D-1 and D-2 to intervene but in the course of intervention E-1 drew a sharp pointed panga from his waist and stabbed the deceased on the right side of the chest where he fell down inside the house and died instantly.

D-1 and D-2 who were in the house raised alarm attracting D-3 and D-4 among other villagers and neighbours who responded swiftly to the scene as E-1 escaped from the scene.

D-3 and D-4 and other neighbours upon arrival at the scene were informed by D-1 and D-2 on what had happened. D-4 in the company of other neighbours traced E-1 and managed to arrest him while still armed with a murder weapon (a sharp pointed panga) and escorted him back to the house of D-1 where the deceased was lying dead.

D-4 further informed D-5 the area Chief who in turn informed the police officers from Longisa Patrol Base about the incident. Police officers from Longisa and DCI officers visited the scene, E-1 got re-arrested from members of the public, the murder weapon, a blood stained sharp pointed panga was recovered and the deceased body was escorted to Longisa Hospital Mortuary awaiting postmortem.

On the 2nd October 2018, at around 1430 hours at Longisa Hospital Mortuary, postmortem was conducted by D-8 the doctor, in the presence of D-9 a Police officer after the deceased’s body was identified by both D-6 and D-7 relatives to the deceased. D-8’s opinion to the cause of death is as indicated in exhibit marked C-1 (Postmortem form).

Later, D-9 the Investigating Officer prepared exhibits marked C-2 (Exhibit Memo) and forwarded the deceased's blood sample, a blood stained sharp pointed panga and a blood stained long trouser jeans both recovered from E-1 during arrest for DNA analysis at Kisumu Government Chemist."

6. The Accused accepted the facts as true and was convicted for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

7. At the sentence hearing on 25th November 2021, defence counsel Ms. Chemutai submitted that the Accused was remorseful for causing the death of his brother. That he was now reformed and wished to start a family. That he was now a born again Christian and prayed for leniency. Counsel asked the court to consider the pre-sentence Probation Officer's report which she submitted was favourable to the Accused.

8. On its part, the State through Prosecution Counsel Mr. Murithi submitted that it had no criminal records of the Accused and that he may be treated as a first offender.

9. The pre-sentence probation report dated 24th November 2021 states that the Accused and the deceased were siblings. That the Accused was prior to the incident a law abiding citizen who related well with the rest of the family and community members. Respecting the circumstances of the case, the report states that the family members did not really comprehend the unfortunate attack which led to the death of the deceased. Nonetheless, the report states that the parents and family of the Accused who were also victims of this offence have forgiven him.

10. The report singles out the deceased's wife as having forgiven the Accused, who by his reckless action turned her into a widow with responsibility over their 5 children. The report states that the family and the community were ready and willing to reintegrate him if granted a non-custodial sentence. They state that they would undertake traditional cleansing rituals upon the release of the Accused from custody.

11. I have considered the mitigation and the pre-sentence probation report. I have also considered the victim impact statement as contained in the probation report.

12. The purposes of sentencing as captured in the Judiciary Sentencing Policy Guidelines (2014) are:-

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

2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

4. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

5. Community protection: to protect the community by incapacitating the offender.

6. Denunciation: to communicate the community's condemnation of the criminal conduct.

13. It is trite and as restated in the Policy that the purposes listed above are not exclusive in themselves and their application is dependent on the unique circumstances of each case. I draw further guidance from the court of appeal decision in ***Thomas Mwambu Wenyi Vs Republic (2017) eKLR*** which cited the decision of the Supreme Court of India in ***Alister Anthony Pereira Vs State of Maharashtra*** at paragraph 70-71 where the court aptly summarized and explained the objectives and principles of sentencing in the following words:-

"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

14. In this case it is clear that the Accused senselessly killed his brother. No explanation or motivation was given for this heinous action. His action therefore is deserving of the most serious penal sanction. However, the court has also considered the position of the family that they had come to terms with the loss of the deceased and had forgiven the Accused. The victims separately filed a document which is titled "Agreement between the family of Mr. and Mrs. Isaac Kilele." In this document, which is essentially minutes of a family meeting, they stated that the family had agreed to forgive the Accused and request the court to release him so that they engage in traditional cleansing. They also stated that the family previously had 3 sons being the deceased, the Accused (now in prison) and a third son who recently passed on leaving the aged parents without any support.

15. In ***R. V. Priscillah Cheronno Chebet & 2 Others Nairobi High Court Criminal Case No. 65 of 2011***, this court stated as follows:-

“It is my considered view that reconciliation ought to be given visible and viable space in the criminal justice system as envisaged by Article 159 of the Constitution. For both the offender and victims, genuine reconciliation brings closure to the loss however heinous the crime committed may have been. Reconciliation is even more critical where both the offenders and the victims are family, relatives, neighbours or friends. It therefore behoves the courts where the circumstances of a case permit, to promote reconciliation alongside penal sanctions. In my view, reconciliation speaks to the humanity of the offender and of the victim(s) while penal sanctions speak to society’s condemnation of the offender and the offence and the two ought to work in tandem.”

16. In this case therefore, I consider the request of the victims merited. They have sanctioned the Accused, they have forgiven him and they desire his release so that he can take care of his aged parents.

17. The Accused has been in pre-trial custody since being charged on 1st October 2018 a period of 3 years. Paragraph 7.10 of the Judiciary Sentencing Policy Guidelines states as follows:-

“The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.”

18. Having taken all factors into consideration including but not limited to the victim’s plea, the period spent in custody as well as the mitigation offered by the Accused, I am persuaded that the Accused is deserving of a non-custodial sentence. He is released to serve a 3 year probationary sentence. He shall as a probation condition, support the education of his deceased brother’s children.

19. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 21ST DAY OF DECEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Accused, Mr. Koske holding brief for Ms. Chemutai Defence Counsel for the Accused, Mr. Murithi for the DPP, and Kiprotich (Court Assistant).