



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL CASE NO 13 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL KIRUL.....ACCUSED

JUDGMENT AND SENTENCE UPON PLEA AGREEMENT

1. The Accused Samuel Kirui was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was alleged to have murdered his brother one Richard Kirui on 7th July 2018 at their home in Kinyorir village Bomet East, Longisa Division within Bomet County.
2. The Accused took plea on 23rd July 2018 and denied the charge. When the case came up for directions before Muya J. on 22nd October 2018, learned defence Counsel Ms. Rotich informed the court that the defence had made a plea offer to the prosecution. The case was subsequently mentioned from time to time. On the 8th July 2021 when the case came up before me Ms. Chemutai who had taken over the defence informed the court that the parties had filed a plea agreement.
3. The court considered the plea agreement. It also satisfied itself that the Accused understood his trial rights and process and had executed the agreement voluntarily. The court therefore found the plea agreement acceptable.
4. On 22nd July 2021 the Accused then took plea on the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and pleaded guilty.
5. The facts of the case as read by Mr. Wawire, the learned Prosecution Counsel were recorded verbatim as follows:-

“On 7th July 2018, the Accused went home at Kinyorik village and picked a quarrel with his mother, sister and brother. The Accused claimed he had been neglected and threatened to demolish his mother’s house. He armed himself with a stick to attack his mother. The deceased tried to separate them. The Accused over powered the deceased took the wooden stick and hit him several times on the head. Members of the public responded and restrained the Accused. They rushed the deceased to hospital but was pronounced dead on arrival. Accused was arrested, witness statements taken and the murder weapon was recovered. A post mortem was conducted by Dr. Byegon of Longisa hospital. The cause of death was acute sub dural hematoma secondary to blunt force trauma to the head.”

6. The Accused accepted the facts as true and was convicted on his own guilty plea for the lesser offence of manslaughter contrary Section 202 as read with Section 205 of the Penal Code.
7. During the sentence hearing Ms. Chemutai learned defence counsel submitted that the Accused was deeply remorseful and prayed for leniency from the court. She stated that the wife and sister of the Accused were present in court and that his parents were both deceased. Counsel further submitted that the family including his mother (now deceased) had forgiven him. Counsel presented to the court a document written and signed by family members which in part reads:-

“We the family of Mr. and Mrs. Raelly Tuimissing having deliberated on the case of the above named person agreed for him to be released on the following grounds:-

- (i) Our late mother had wished for his release despite the fact that she succumbed to cancer before she realized the same.***
- (ii) The Accused had a very young family which needs close attention as he was the sole breadwinner.***

(iii) Both parents of the Accused are deceased.”

8. The court directed the filing of a pre-sentence report and a victim impact statement. In the report filed on 28th September 2021, the Probation Officer stated that the victim’s family members were deeply affected by the demise of their son in the hands of their other son. That they had agonized over the death of one and the arrest and incarceration of the other and in search for answers, had attributed the unfortunate events to a curse since they had suffered other mysterious deaths in the family. That they desired to undertake traditional cleansing rituals to stem more calamities from befalling the family.

9. On his part, leaned Prosecution Counsel Mr. Waweru told the court that the Accused had no previous criminal record. He urged the court to consider that the Accused had plea bargained and saved the court precious time and was evidently remorseful.

10. I have considered the mitigation, the victim’s views and the Probation report. In considering an appropriate sentence, I am guided by the purposes of sentencing enumerated in the Judiciary Policy Sentencing Guidelines (2014) as:-

“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.”

11. What then is the appropriate sentence in this case? No doubt crime must be punished and punishment ought to be one that promotes deterrence. On the other hand however, rehabilitation is key and each case therefore must be treated on its own peculiar circumstances.

12. In this case, the Accused killed his brother. As stated above, the family which is also the victim of the offence has made an impassioned appeal to the court to consider a lenient sentence. It is apparent from their address to the court that they have forgiven him and are more concerned about their mystic beliefs on what has befallen their family. I consider, without passing judgment on their beliefs and concerns that same is receivable by the court under Section 20 (i) (b) of the Victim Protection Act, 2014.

13. In **R. V. Priscillah Cheronno Chebet Nairobi Criminal Case No. 65 of 2011**, this court held with respect to applicability of reconciliation in criminal matters thus:-

“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 behooves 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.”

14. In the circumstances of this case therefore having taken into account that the Accused has already been in 3 years pre-trial custody, that he saved judicial time by plea bargaining and that he has been forgiven by the victims of the offence, that a non-custodial sentence was appropriate.

15. The Accused is sentenced to serve 3 years’ probation.

16. Orders accordingly.

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

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R. LAGAT-KORIR

JUDGE

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