



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL CASE (MURDER) NO. 9 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

JNM.....ACCUSED

JUDGMENT ON SENTENCING

1. The accused is charged with the murder of WKM on 19th March 2018 at [Particulars Withheld] Village, Kinangop. He was first arraigned in court on 26th March 2018 when the accused's mental assessment was ordered. The accused took plea on 30th May, 2018 when he pleaded not guilty.
2. On 9th July 2018 the court ordered a second mental assessment of the accused. The Consultant Psychiatrist at the Department of the Health Services Nakuru, issued a Psychiatric report on the accused dated 27th July, 2018. It concluded that the accused was suffering from, schizophrenia a mental condition rendering him unable to follow court proceedings, and was held incapable to plead.
3. By a court order of 9th July 2018 the court ordered the accused to be escorted to hospital for psychiatric treatment on 4th September 2018, the accused was removed from Prisons custody and delivered into the custody of the Chief Consultant Psychiatrist in charge at Mathari Hospital, Nairobi. On 24th October, 2018 Mathari Hospital issued a Certificate of Capability to make a Defence pursuant to Section 163 (1) of the Criminal Procedure Code in respect of the accused.
4. On 13th December, 2018 the accused took plea afresh, and this time he pleaded "Ni kweli" (it is true) thrice when the charge and particulars were read over and explained to him. The file was placed aside for the defence to counsel to converse with the accused who had surprised counsel with his response. Eventually plea taking was deferred for 20th December, 2018 when a plea of not guilty was entered. A pre-bail probation report was also ordered.
5. A pre-bail report dated 7th February, 2019 recommended that the accused was unsuitable for bond as both the community, the complainants family and the accused's own family were not in favour of his release on bond. The defence abandoned bail application.
6. On 4th April, 2019 Defence counsel and the prosecution indicated to the court that Plea Bargaining had been proposed. A Plea Bargaining Agreement was finally entered on 10th July, 2019. The Plea Bargaining Agreement was recorded in court on 15th October 2019, after the court was satisfied as to the competence of the accused and that he was acting voluntarily. The provision of **Section 137F and G** were complied with; and the parties urged the signed the Court Form for Recording a Plea Bargaining Agreement. The court therefore convicted the accused for Manslaughter contrary to **Section 202** as read with **205 Section** of the **Penal Code** and ordered a Probation Officer's Presentence Report to be availed.
7. The facts were set out in the Plea Bargaining Agreement as follows:

"THAT on 19th March, 2018 at 6.30pm one FNM arrived from school and met the accused (his brother) outside their house and noticed he was wearing his jacket, he politely requested the accused to remove the jacket but the accused responded rudely and beat him. FNM ran to a neighbour's house where he requested for a phone and run his bother WM (the deceased) to come and assist to persuade the accused to remove the jacket since he was to use the jacket on 21st March, 2018.

That around 7.30pm the deceased arrived and found the accused at the house and when the deceased told him to remove the jacket the accused removed a knife from his pocket and stabbed the deceased twice on the chest and abdomen. The deceased fell down while bleeding profusely.

The deceased's brothers, F and K rushed to where deceased was, administered first aid and called out to neighbours to help. The accused threw the knife and escaped the scene. The deceased was rushed to South Kinangop Medical Clinic where he passed on while undergoing treatment.

That the matter was reported to Haraka Police Station where officers visited the scene and later transferred deceased's body to Engineer District Hospital mortuary to await post mortem. On 23rd March, 2018 Dr. Nywigah conducted a post mortem on the deceased and concluded the cause of death as injuries to the intra vena and lung tissue leading to haemophenothorax and massive blood loss due to sharp force trauma. The post mortem report is produced as P. Exhibit 1.

The accused was later traced, arrested and charged. It was later established that the accused had mental illness prior to the offence."

8. The mitigation hearing was held on 13th November, 2019. Counsel noted that the accused was 26 years old and a first offender; that he has other relatives who, however, do not live in accused's home area; that the accused has a history of mental illness which was evidenced in the court file; that he is a person in need of psychiatric care; that he is more likely to be rehabilitated by a sentence of probation with an attendant programme as opposed to incarceration.

9. The court has taken into account the accused's mitigation. It has also duly considered the Probation Officers Report filed on 29th July 2019. It noted that the accused is the fourth born in a family of seven all of whom are grown up; that he dropped out of school in form four just one day before sitting his K.C.S.E. examinations. It was widely thought that he developed mental issues at that time.

10. The report states that the offender is single, that he had exhibited strange behaviour before the incident; that he understood the seriousness of the offence, but does not fully accept responsibility for it and did not appear remorseful but instead appeared confused. According to the report, the community has a negative attitude towards the accused who had threatened to kill some of them; that his safety within the community cannot be assured; and that the victim's family are bitter and had threatened to kill the offender.

11. The Probation report concludes and recommends as follows:-

"The family members were opposed to the offender being placed on non-custodial sentence. They expressed their fear that the offender ought be a threat to the family.....

In my view.....the offender [is] unsuitable for release on a non-custodial sentence. The offender doe s not appear to be remorseful and on the other hand, the home environment is hostile and not conducive for his return."

12. The court has considered the mitigation by counsel on behalf of accused and the Probation Officers report and recommendations. There can be no doubt that the accused has had a history of mental disturbance requiring hospitalization and medical treatment. The manner in which the accused stabbed the deceased, threw down the offensive weapon - a knife - and fled the scene for the reason that the deceased asked him to remove a jacket, suggests that the accused was under mental stress.

13. I agree with the probation officers conclusion, that the accused ought not be released on a non-custodial sentence. He may injure others or himself. Or he may be attacked by family members.

14. In the circumstances, I sentence the accused to imprisonment for five (5) years commencing from the date of his arrest and incarceration on the following conditions:-

a) The accused shall be placed under a mental and psychological rehabilitative programme, and whenever he suffers mental instability, he shall be facilitated to see a mental health doctor.

b) The Prisons Service shall maintain a detailed record of the accused's life and conduct while he is incarcerated which shall be availed to the court after his first three (3) years of incarceration, to determine whether the sentence shall be reviewed.

c) The accused shall be brought to court on completion of his third year of incarceration for review of his sentence at the court's discretion.

15. Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of January, 2020.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State

2. Mr. Wairegi holding brief for Mr. Terer for the Accused

3. Accused - JNM - present

4. Court Clerk - Quinter Ogutu