



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MANSLAUGHTER) CASE NO. 6 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MOSES MBITHI MUYAACCUSED

SENTENCE

1. **MOSES MBITHI MUYA** pleaded **GUILTY** to the offence of manslaughter and was convicted accordingly. The Accused was initially charged with murder contrary to section 203 as read with 204 of the Penal Code which was reduced to manslaughter upon a plea bargain agreement. The court convicted the accused on his own plea of guilty to the offence of manslaughter on a charge prepared following the acceptance by the court of the plea agreement pursuant to section 137H of the Criminal Procedure Code (CPC), upon being satisfied of the factual basis of the plea agreement and that the accused was at the time of the agreement competent, of sound mind and had acted voluntarily in terms of Section 137G of the CPC.

2. In terms of Section 202 as read with Section 205 of the Penal Code the accused who has pleaded guilty and has been convicted is subject to be sentenced to life imprisonment.

3. The prosecution is represented by Mr. Machogu, whereas the accused is represented by Mr. Muthama. In his submissions on sentencing, Mr. Machogu submitted that the accused is a first offender.

4. Counsel for the accused prayed for a non-custodial sentence on the grounds that the deceased was his brother and that the whole family members are ready to receive him. It was counsel’s submission that the accused is a bread winner for his aged parents and is remorseful and apologetic for the unfortunate turn of events. The accused chose not to say anything in his allocutus.

5. On record is a presentence report dated 14.11.2019 that indicated that the deceased met his death whilst attempting to calm down the accused who was then fighting with his wife. It was reported that his family had a positive attitude towards him and indicated willingness to assist him resettle. It was reported that the local administration have no problem with the accused who does not have any other previous criminal record.

6. The offence of manslaughter is punishable by the maximum penalty of life imprisonment under section 205 of the Penal Code Act. However, this represents the maximum sentence which is usually reserved for the worst of such cases. I do not consider this to be a case falling in the category of the most extreme cases of manslaughter. I have for that reason discounted life imprisonment.

7. The sentencing regime in Kenya is guided by the Constitution, statutes, policy guidelines and case law. While the Constitution lays down the general frame work on sentencing, the statutes, Practice Direction and case laws provide guidelines on sentencing. The Judiciary Sentencing policy guidelines are silent on the path to take in manslaughter cases hence the starting point in the determination of a custodial sentence for offences of manslaughter would be case law.

8. The discretion of sentencing rests with the trial judge because he or she has the opportunity to watch the case proceeding before him or her and detect the accused and witnesses’ behavior. The discretion must however be exercised judiciously. In the persuasive Nigerian case of **African Continents Bank V Nuamani [1991] NWLI (parti86)486**, it was observed that,

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

9. The convict committed manslaughter at a relatively young age. He is a first offender and a father to one child and has a spouse who fled from the home. Because sentencing is not a mechanical process but a matter of judicial discretion, perfect uniformity is hardly possible.

10. In **V M K v Republic [2015] eKLR**, 10 years imprisonment was given for manslaughter. Courts are inclined to impose life imprisonment where a deadly weapon was used in committing the offence. In this case, there is no evidence that the convict used such a weapon. I have noted that the convict pleaded guilty and where a judge takes a plea of guilty into account, it is important that he or she says he or she has done so (see **R v. Fearon [1996] 2 Cr. App. R (S) 25 CA**). In this case therefore I have taken into account the fact that the convict readily pleaded guilty, as one of the factors mitigating her sentence. Further, the English practice of a reduction of one third has been held to be an appropriate discount (see: **R v. Buffrey (1993) 14 Cr App R (S) 511** where the Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the court believed that something of the order of one-third would be an appropriate discount. In light of the convict's plea of guilty, and persuaded by the English practice, because the convict before me pleaded guilty, I propose at this point to exclude the sentence of life imprisonment and I shall consider to reduce the sentence by one third from the starting point of ten years to a period of three years' imprisonment.

11. In the case of **Republic v Daniel Okello Rapuch [2017] eKLR**, a sentence of 12 months imprisonment was meted out to a man who killed another on the allegation of being involved in an illicit love affair with his girlfriend. In **Republic v Ismail Hussein Ibrahim [2018] eKLR**, the court acquitted the accused in lieu of having him charged of a lesser offence of manslaughter as he was acting in self defence. In light of aggravating factors, I have adopted a starting point of three years' imprisonment.

12. I have considered oral submissions by learned counsels as well as the presentence report. It turns out that the accused and deceased are brothers and that the deceased was trying to intervene in a dispute between accused and his wife. Unfortunately it turned tragic. Their parents are reported to be traumatized by the turn of events and seek to have the accused reunited with the family. The accused is said to be a first offender and that the local administration do not have issues with him. The report has noted a character flaw attributed to the accused to the effect that he has unmanaged anger issues which require to be attended to. The death might not have been intended but then had the accused controlled his anger his brother could be alive today. Even though the deceased had tried to intervene in accused's domestic tiff with his wife he did not deserve to die. A life was lost and which calls for a deterrent sentence. Looking at the circumstances I note that the accused has been in custody for a period of about a year and since the presentence report is favourable for a non -custodial sentence I order the accused to serve under probation for a period of three years under the supervision of the Machakos County Probation Officer.

Orders accordingly.

Dated and delivered at **Machakos** this **28th** day of **January, 2020**.

D. K. Kemei

Judge