



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 43 OF 2014

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

PMK.....ACCUSED

SENTENCING

1. The accused herein, **PMK**, was on 26th February convicted of manslaughter contrary to section 202 as read with section 205 of the **Penal Code**. The particulars of the offence she was charged with were that on the 30th day of October, 2016 at Makadara Area Location of Athi River Sub-county within Machakos County, the accused by unlawful act caused the death of **Shadrack Kioko Muasya**.
2. When the charge, which had been, upon plea bargaining, reduced from murder to manslaughter, was read to the accused, she pleaded guilty to the charge. A plea of guilty was thereby entered and when the facts were read over to her, she similarly admitted the same as true and she was convicted on her own plea of guilty.
3. According to the statement of facts, on 30th October, 2016 at about 8.00 am the accused, then aged 16 years was in their house doing cleaning when the deceased, who was her foster father, and who was drunk at the time, entered the house, grabbed her by the hands and started pulling her towards his bedroom with an intention of defiling her.
4. The accused managed to struggle and extricate herself from the grip of the deceased and escaped to Italy International Boutique, situated in Makadara Township in Athi River, where she met her mother and their employee and she explained to the mother what had happened to her. The mother told her that they would talk about the matter with the deceased when the deceased became sober. However, about 30 minutes later, the deceased arrived at the boutique and started beating the accused. When the mother asked why he was beating the accused and why he wanted to defile, the deceased pounced upon the mother and started violently beating her as well. The screams from the mother and the daughter attracted the attention of members of the public who went to the boutique and rescued the two and removed him from the boutique escorting him towards Embakasi Area and after about 100 metres left him advising him to go home and sleep.
5. Instead of heeding the advice, the deceased returned to the boutique after about 30 minutes and continued violently assaulting the accused and her mother. Due to the beating and the anger, the accused took a knife which was on the table in the room used as a kitchen and stabbed the deceased on the left side of the chest. She then threw the knife into a corner and went to Athi River Police Station where she reported the incident. Accompanied by police officers from the said station they proceeded to the scene where she handed over the said knife to the police. When the police officers proceeded to Makadara Health Care Hospital, they found that the deceased had died while undergoing treatment upon arrival. His body was removed to Machakos Hospital Level 5 Mortuary where a post mortem was conducted. The post mortem report was exhibited.
6. In mitigation, **Miss Ndegwa**, learned counsel for the accused submitted that the accused was aged 16 years at the time of the incident and the facts reveal that there was immense provocation by the deceased and the offence was committed in self defence on the part of the accused. It was submitted that the deceased had attempted to defile the accused who escaped but was pursued by the deceased to a public place where the deceased repeatedly attacked both the accused and her mother. Even the intervention by members of the public did not deter the deceased. Accordingly, the accused acted in anger without intent to cause death to the deceased. From the post mortem report, the stab was only once in the chest.
7. It was submitted that the accused is remorseful having caused the death of another human being though with no intention of doing so and immediately reported the matter to the police. The offence was committed in anger and fear and she pleaded for leniency. At the time the offence was committed the accused was a teenager and was not able to respond otherwise. She had undergone counselling and was in form 4 and a copy of her report card was exhibited. Learned counsel urged the court to temper justice with mercy and sought for a non-custodial sentence.

8. On behalf of the prosecution, **Miss Njeru**, Snr Asst. Director of Public Prosecutions, submitted that the accused was a first offender. Based on the circumstances of the case, learned counsel also sought leniency on the part of the court since the accused was provoked and attacked by somebody she had faith in. She similarly urged the court to impose a non-custodial sentence.

9. I have considered the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic** Petition Number 15 of 2015 discussed the provisions of **section 329** of the *Criminal Procedure Code* which provides:-

“It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

10. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

11. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

12. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

13. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic**, **Petition No. 15 of 2015**, as a guide in sentencing held that:

“[71]...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

14. Although loss of life is a very serious matter, this is a rather peculiar case and it is highly unlikely that the accused will in these circumstances commit a similar offence. The accused committed the offence when she was aged 16 years. **Sotomayor J** in **J. D. B. vs. North Carolina 564 U.S. 261 (2011)** had this to say on the issue:

“Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, e.g., 1 W. Blackstone, Commentaries on the Laws of England (hereinafter Blackstone) (explaining that limits on children’s legal capacity under the common law “secure them from hurting themselves by their own improvident acts”). Like this Court’s own generalizations, the legal disqualifications placed on children as a class— e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal. Indeed, even where a “reasonable person” standard otherwise applies, the common law has reflected the reality that children are not adults. As this discussion establishes, “[o]ur history is replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. *Eddings*, 455 U. S., at 115–116. We see no justification for taking a different course

here...”

15. While adults are expected, when confronted with dangerous situations to take less harmful actions, in cases of children, a little latitude must be given to them taking into account their inability to make proper judgement in those circumstances. In this case the accused was confronted with the actions of a foster father who had attempted to defile her, pursued her up to where she had taken refuge under the care of the only protector she could think of, the mother, continued assaulting her and when the protector attempted to intervene, the deceased violently pounced on her and rained blows on her as well. In those circumstances one can imagine the anger that welled into her heart as she witnessed her protector similarly being violently assaulted. It was only natural that she would take the readily available tool in order to bring the assault to an end.

16. The deceased was her foster father and in my view, that is a much heavier sentence than this Court could ever hope to impose on her. She will forever to live with that psychological trauma that the person she referred to as her father lost his life from her own action for the rest of her life, notwithstanding the fact that she acted in self defence. The court must also take into account the fact that though the accused could have chosen to go the whole hog with the trial, she decided to plead to the charge of manslaughter. That the process of counselling has borne fruit is evidenced by the contents of the accused’s report card.

17. In my view keeping the accused in custody will only be detrimental to her welfare. I have considered the propriety of a probation order under the **Probation of Offenders Act** which I find, in light of the fact that the accused is a candidate, that placing her on probation is not appropriate as that may adversely affect her academic performance.

18. In the foregoing premises, pursuant to section 35 of the **Penal Code**, I discharged her unconditionally.

19. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 11th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Miss Ndegwa for the accused

Miss Mogoi for the State

CA Geoffrey