



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.45 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KYALO NDAKA.....ACCUSED

SENTENCE

1. **ANTHONY KYALO NDAKA** was found **GUILTY** of the offence of manslaughter under section 202 as read with section 205 of the Penal Code and convicted accordingly vide this court's judgement dated 14.10.2020. Under the above provisions, he is subject to life imprisonment.

2. The prosecution is represented by Mr. Mwangera, whereas the convict is represented by Mr. Mwihi. In his submissions on sentencing, Mwangera submitted that the court ought to take cognizance of the fact that a life was lost; that the deceased had a family of five children who depended on him; that the actions of the deceased led to the death of the deceased and as such the same ought to be taken into consideration when sentencing the convict.

3. Counsel for the convict placed reliance on the authorities as well as the pre-sentence report. It was submitted that the accused is remorseful and regrets his actions. Counsel prayed for leniency as the accused was aged 61 years and a polygamous man with two families. It was submitted that the accused is the sole bread winner of the family and sought to reunite with them. It was submitted that the deceased and the accused had been long time friends and had no grudges. It was submitted that the probation officers interviewed three categories of groups, all of whom gave positive reports about the accused. It was submitted that the community was receptive of the accused as he had demonstrated good character; that the accused had learned his lesson hence a non-custodial sentence be meted on him. It was submitted that the accused is ailing with a mild eye problem; that meetings with the two families had taken place and that the families were ready to receive back the accused. Further that there were negotiations under the Kamba customs. It was submitted that a non-custodial sentence be given as a form of reformation and restorative justice.

4. The accused chose not to say anything in his allocutus.

5. On record is a probation officer's report dated 27.10.2020 which indicated that the offence had been committed as a result of poor anger management, lack of self-control and lack of skills in dispute resolution mechanisms and drunken state of both the deceased and the accused. It was reported that the deceased's family had a positive attitude towards him and that the accused's family agreed to compensate the deceased's family according to Kamba traditions and customs as well as reimburse the costs incurred by the deceased's wife in raising her children after the death of her husband. It was reported that the deceased's family and the accused's family relate well and that they have reconciled. Further that they are not opposed to a lenient sentence being passed on the accused. It was reported that the community was shocked by the occurrence of the offence as the accused was not known as a violent person. It was also reported that the community was not hostile to the accused as he is not a threat to them. It was reported that the accused required counselling on drugs and substance abuse, on self-control, anger management and alternative dispute resolution. In respect of previous conviction, was reported that the accused had been arrested and charged for harvesting sand at Yilima river and fined Kshs 10,000/- in the year 2019.

6. The offence of manslaughter is punishable by the maximum penalty of life imprisonment under section 205 of the Penal Code. 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 for 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 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 accused committed manslaughter at a relatively advanced age, he was not a first offender and a father to 11 children and 20 grandchildren. 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 accused used such a weapon.

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 with 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 the fact that the accused is not a first offender, a relatively aged man. The previous offence is noted to be a misdemeanor for which he was fined. I also note the pre-sentence report which is comprehensive and has captured the views of both the family of the accused and the offender. There seems to be unanimity for the accused to rejoin the society so that the traditional compensation exercised can be commenced. Indeed, life was lost as a result of the accused assaulting the deceased. Had the accused restrained himself from over reacting to the insults hurled by the deceased, then the deceased could very well be alive today. The altercation was thus uncalled for. The accused was then still sober and ought to have weighed in properly in deciding to attack the deceased as a result of the insults directed at him. The accused was fully aware that the deceased was then too inebriated to sustain a fight with him as he himself was sober. I have considered the fact that the accused needs to be rehabilitated through counselling on drugs and substance abuse, on self-control, anger management and alternative dispute resolution. I find a non-custodial sentence is suitable in the circumstance. This will enable the issue of Kamba traditional compensation to be initiated and to allow the probation officers guide and supervise him under probation. Consequently, I order the accused herein **Anthony Kyalo Ndaka** to serve under probation for three (3) years under the supervision of the Machakos County Probation Officer.

It is so ordered.

Dated and delivered at Machakos this 25th day of November, 2020.

D. K. Kemei

Judge