



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL CASE NO. 16 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DKK.....SUBJECT**

**RULING ON SENTENCE**

1. The subject in this matter, DKK a minor aged 16 years, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 13<sup>th</sup> day of July 2018 within Kericho County, he murdered Samwel Ngugi Njogu.
2. The subject pleaded not guilty to the offence and the matter was scheduled for trial. However, pursuant to a plea agreement entered into between him and the state dated 20<sup>th</sup> November 2018, he pleaded and was convicted on his own plea of guilty to the lesser offence of manslaughter. The state indicated that he is a first offender.
3. The facts of the case as presented by Learned Prosecution Counsel, Ms. Keli, are that on the 13<sup>th</sup> day of January 2018 at around 10.00 p.m., the subject was in the company of his friends, one of them known as Simon, at Palace Inn Pub in Nyagacho. The deceased was also in the company of his friends, taking drinks inside the pub.
4. After a while, the subject's friend Simon stepped out of the bar to smoke a cigarette. He went back inside after 5 minutes and found the subject and the deceased quarrelling, and he managed to cool them down. The following day, the subject went back to the same pub in the company of his friend Simon. As they approached the pub, the deceased emerged together with his friends and pointed at the subject and said, "*There he is!*"
5. The deceased then grabbed the subject by the collar, slapped him twice on the face, and they got into a fight. Simon managed to separate them and pulled the subject away. The subject left in a rush as the deceased and his friends walked away. After about 5 minutes, the subject went back, rushing in the direction where the deceased and his friends were. A woman who was selling French fries nearby from the direction where the subject had rushed to was heard shouting that the subject had carried a knife. The subject, who had indeed carried a knife from a nearby grocery, caught up with the deceased and his friends and asked them "*Who wants to beat me?*" The deceased responded and punched the subject on the face, to which the subject responded by stabbing the deceased in the chest using the knife.
6. The deceased fell down, unconscious, with blood oozing from his chest. Upon realising that the deceased had fallen down helpless in a pool of blood, the subject ran away. He was however, chased and caught by an angry mob which beat him up. Two police officers arrived and rescued the subject from the mob and escorted him to Kericho District Hospital.
7. The deceased was rushed to St. Leonard's Hospital Nyagacho but was pronounced dead on arrival. His body was transported to the Kericho District Hospital where a post mortem was conducted on 16<sup>th</sup> July 2018 by Dr. Kaberia. The opinion formed by Dr. Kaberia was that the cause of death was massive haemorrhage due to penetrating anterior chest wall injury and ventricular laceration. A copy of the post mortem form was produced as exhibit 1.
8. The subject was discharged from Kericho District Hospital on 15<sup>th</sup> July 2018 and escorted to Nyagacho Police Station where he was arrested and charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
9. The prosecution indicated that the state did not have previous records in respect of the subject and he could be treated as a first offender. Ms. Keli, however, asked the court to consider the circumstances under which the offence was committed: that a young soul was lost due to the unlawful act of the subject, who intentionally armed himself with a knife to attack the deceased.
10. In a personal statement after his plea of guilty, the subject stated that he wanted to ask for forgiveness from the court and the family of the deceased.

11. In mitigation on his behalf, Learned Counsel, Ms. Wilbey, stated that the subject is a first offender and was remorseful for his actions. He regretted causing the death of the deceased and was seeking forgiveness from the family of the deceased. He was deeply disturbed by what he did and was praying for leniency. He was a minor and was actually a pupil at [Particulars Withheld] Primary School in Kipsitet Location. He had dropped out of school in second term of 2018 as his parents had separated and he needed to move to Kericho town to stay with his father. Ms. Wilbey produced a letter from the school showing that the subject was a pupil at the school where he was doing well.
12. According to Ms. Wilbey, on 14<sup>th</sup> July 2018, the subject and his friend had been drinking for almost 5 hours, from 4.30 p.m. to 9.30 p.m. His mind was therefore impaired by the time he came into contact with the deceased. He was therefore not able to comprehend the excessive force he used in defending himself. Ms. Wilbey further observed that it was the deceased who attacked the subject first by holding his collar and slapping him, leading to a fight as the subject defended himself. She urged the court to be lenient and give the subject a non-custodial sentence.
13. A social inquiry report filed on 4<sup>th</sup> February 2019 in respect of the subject notes that the subject had dropped out of school in class 6 due to lack of basic necessities and the separation of his parents due to domestic violence. The local administration and the mother of the subject plead with the court to place him in a rehabilitation institution as the community was very hostile to him. He had been battered seriously by a mob after the incident and was almost lynched. The Probation Officer recommends that the subject be placed in a Borstal institution and recommends a specific institution, the Shikusa Borstal institution.
14. I have considered the facts of this case, the mitigation offered by Counsel for the subject, and the social inquiry report by the Probation Office. I also noted the demeanour of the subject as he sought forgiveness from the court, and from the family of the deceased.
15. This case represents, in my view, the extent to which, as a society, we have failed our young people. A young man of 16 spends 5 hours in a bar, drinking. What kind of person sells liquor for 5 hours, or at all, to a 16-year-old boy? Why is such an establishment still operating? This is a young man who dropped out of school at class 6. Where is his future?
16. The subject demonstrated real remorse as he stood in the dock, pleading guilty to the killing of the deceased, another young man, barely 21. That they were both probably drunk and engaged in the kind of macho bravado that leads young men to murder or death is, however, not really an excuse for what the young man did. From the facts and the mitigation presented before the court, he had been provoked the day before by the deceased. It was the deceased again who, the following evening, picked up the quarrel where he and the deceased had left it the previous night: he had grabbed the subject by the collar and slapped him twice.
17. Unfortunately, after the two were separated, the subject did not walk away and go about his business. He rushed away, took a knife from a grocery, followed the deceased, and challenged him to a fight. He knew he had a lethal weapon, and he probably also knew that the deceased would react as he did, by punching him in the face. The subject then used the knife and stabbed the deceased in the chest, which, I believe, is what he intended from the moment he armed himself with the knife.
18. The consequences were inevitable. One sometimes is moved to scream in frustration, if only to the four winds: what does a person who uses a knife to stab another in the chest expect? Doesn't the subject, and all the other young men and women who are prone to use knives on others, know that almost invariably a knife wound will result in death?
19. I noted the subject's regret at causing the death of the deceased. He pleaded for forgiveness from the family of the deceased, and from the court. Unfortunately, however deep his regret, it will never bring the deceased back to life.
20. The subject is a child under the law. Section 191 of the Children Act provides as follows with respect to the sentencing of minors:
- (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—***
- (a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);***
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;***
- (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);***
- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;***
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;***
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;***
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;***
- (h) by placing the offender under the care of a qualified counsellor;***
- (i) by ordering him to be placed in an educational institution or a vocational training programme;***

*(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);*

*(k) by making a community service order; or*

*(l) in any other lawful manner.*

21. The Probation Officer recommends that the subject be placed in a Borstal institution and specifies Shikusa Borstal institution. I agree with this recommendation. However, I have considered various decisions of courts in this jurisdiction in which the courts have had to grapple with the question of sentencing minors who have committed serious offences.

22. In **R vs DKC [2014] eKLR**, the appellant had been convicted of the offence of murder and sentenced to life imprisonment. He was aged 20 at the time of sentencing but was 15 years old when the offence was committed.

23. In reducing the sentence of life imprisonment to 10 years, the trial court cited the decision of the Court of Appeal in **Nyeri Criminal Appeal No 118 of 2011- JKK vs R [2013] eKLR** where the Court had considered the correct punishment for a minor offender and had stated as follows:

*“The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the Children Act. The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.”*  
(Emphasis added)

24. See also the decision in **Daniel Langat Kiprotich vs State [2018] eKLR**.

25. In this case, I take note of the fact that it was the deceased, who was older than the subject, who revived the fight the day following their confrontation at the bar. I further observe that they were both drunk. I also take into account the deep remorse that the subject showed when he sought forgiveness from the family of the deceased when the plea agreement between him and the state was being recorded. Nonetheless, I do not think that a brief stint of two years in a Borstal institution where he cannot be held after he reaches the age of majority, is sufficient to allow the subject appreciate the enormity of his actions, and to understand the consequences of his rash act. I therefore commit the subject to serve two years in the Shikusa Borstal institution. Upon attaining the age of 18, he shall serve a term of 2 years imprisonment at the Kericho GK prison.

26. He has a right of appeal against sentence in 14 days.

**Dated Delivered and Signed at Kericho this 20<sup>th</sup> day of February 2019**

**MUMBI NGUGI**

**JUDGE**

**Ms. Susan Keli for the Director of Public Prosecutions**

**Ms. Dela Wilbey for the subject**