



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRC NO. 39 OF 2017

(FORMERLY ELDORET HCCRC NO. 32 OF 2016)

REPUBLIC.....PROSECUTION

=VERSUS=

ALEX KEMBOI CHESIRE ALIAS

RICHARD CHEPCHIEN CHEBET.....ACCUSED

JUDGMENT

1. Upon considering the factual basis of the plea agreement herein, offered by the DPP that the killing of the deceased was not premeditated, the court accepted the plea bargain agreement and reduced the charge of murder contrary to section 203 as read with 204 of the Penal Code to one of manslaughter contrary to section 202 as read with 205 of the Penal Code.
2. The Court noted the accused's certificate of fitness to plead dated 27/4/16 which noted alcohol abuse on the part of the accused and upon examination on oath established his plea agreement was voluntary and that he understood the full consequences of his plea and the possible sentence of life imprisonment.
3. When the charge of manslaughter was put to the accused he pleaded guilty and, subsequently, admitted the following facts of the case as related by the DPP:

"FACTS

*On the 10th of April 2016, the accused in this case arrived home at about 9.00 pm and found a panga at his gate. He was surprised because the panga was not his and he heard people murmuring in his house. He peeped through a hole next to the door and with the help of a torch light inside the house he saw a man having sex with his wife on his bed. **He took a panga and moved towards the house and coughed to alert those who were inside. The deceased came out of the house running. As he did so the accused cut him on the head. The deceased continued running and the accused ran after him for about 10 meters and caught up with him. He cut him on the neck, head and chest. The accused then ran back to the house and found his wife who he cut her twice on the legs and once on the face. She managed to run away while bleeding. The accused went and hid in the bush from where he was arrested the following day by members of public but managed to run away. Upon arrest, a mobile phone make Techno belonging to the deceased and a panga were recovered from him. On 13th April 2016, the accused surrendered himself to the AP camp at Salawa and was re-arrested. He was taken to Court and charged with murder which has now been reduced to manslaughter.***

The body of the deceased was found by the roadside, lying in a pool of blood a day after the incident. Police collected the body to Baringo County Referral Hospital. Postmortem was done on the 19th of April 2016 and the cause of death was found to be multiple injuries due to sharp force trauma. The accused wife was taken to Kabarnet the same hospital for treatment. The accused's person was thereafter presented before the doctor at Moi Teaching and Referral Hospital for mental assessment and was confirmed to be mentally fit to stand trial."

4. The Court convicted the accused on his own plea of guilty for the offence of manslaughter contrary to sections 202 and 205 of the Penal Code.
5. The probation officer's report pre-sentence was negative for non-custodial sentence citing raw-nerve situation at the deceased's family and fear of reprisal in its Conclusion and Recommendation as follows:

"Your honor, before Court is an offender with a remorseful attitude. Having pleaded guilty to the lesser charge of manslaughter, he deeply regrets the tragic incident stating that he acted out of provocation due to the deceased's outrageous conduct and his

disrespect for the institution of marriage.

The deceased's family has not come to terms with the loss and is still bitter. Threats of reprisals are high and the immediate community is not ready to welcome him at the moment.

Your lordship, considering the open animosity in the neighborhood towards the accused, supervision and rehabilitation within the community would be difficult. It is therefore our humble recommendation that this case may be dealt with otherwise.

Kiprono M.K

Probation Officer

Baringo Sub County

Date: 27/02/19”

6. Counsel for the accused, Mr. Mwaita, mitigated for the accused citing his remorse, extreme provocation, his youthful age at 42 years with 8 children whose whereabouts he did not know, 2 of whom had dropped out of school after being put into the family way and 3 younger ones living with the mother who had left home following the incident. On the presentence report, Counsel for the accused and for the DPP left the matter to the court to determine the appropriate sentence.

7. The court has noted the circumstances of the killing which qualify for extreme provocation in terms of the meaning of the word under section 208 of the Penal Code as follows:

“Provocation defined

208. 1) The term “**provocation**” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

3) A lawful act is not provocation to any person for an assault.

4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

8. In accordance with section 207 of the Penal Code, the accused who was suddenly provoked by the spectacle of the deceased having sex with the accused's wife on his bed, the accused “*is guilty of manslaughter only.*”

9. In considering the appropriate sentence the court has considered the exhibits of the post-mortem report on the weapon used and photographs of the deceased produced as exhibits 1, 3 and 5, respectively showing the gruesome killing of the deceased using a panga to inflict injuries on the head, neck and back of the deceased, the pathologist recording on the post-mortem dated 19/4/2016 that:

“As a result of my examination, I formed an opinion that the cause of death was multiple injuries [by] sharp force trauma [secondary] to assault”.

10. Even with the provocation, the infliction of the grave injuries for which the accused died call for deterrent sentence albeit for the offence of manslaughter. The landing of the panga cuts on the head thrice and once at the back across the spinal cord area would clearly result in the killing or serious injury of the victim, a fact the accused must be taken to have known or ought to have known. The deceased did not **accidentally** die from injuries.

11. I consider that the unlawful killing in the circumstances of this case is appropriately punished by a sentence of imprisonment for a term of 8 years.

12. The accused has been in custody since 25/4/16 when he was remanded awaiting his trial. In accordance with the Proviso to section 333 (2) of the Criminal Procedure Code, the sentence of 8 years imprisonment shall be reckoned from the 25/4/16.

Orders

13. For the reasons set out above, the court having convicted the accused for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, the accused is sentenced to serve imprisonment for 8 years commencing on 25/4/16 when he was remanded awaiting trial.

Order accordingly

DATED AND DELIVERED THIS 25TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mwaita & Co. Advocates for the appellant.

Ms. Macharia, Ass. DPP for the Respondent