



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 74 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

BONFACE MUTUKU MUTISYA.....ACCUSED

RULING ON SENTENCING

1. Bonface Mutuku Mutisya was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was alleged to have murdered Francis Maingi Mutiso on the 2nd day of September, 2012 at Mathare BH Starehe District within Nairobi County.
2. At the conclusion of the trial, he was convicted of the lesser offence of manslaughter on 5th December, 2018. The defence counsel sought time to prepare for mitigation. That presented a challenge as the trial court was on transfer and therefore the sentencing hearing had to be adjourned to a later date.
3. At the sentencing hearing on 28th March, 2019 Mr. Opolo learned counsel for the accused submitted that the accused was 30 years old and was the sole breadwinner of his young family as well as the benefactor of his 5 siblings who were also orphaned. Counsel submitted that the accused regretted the events of the material date which ended up in the loss of a life and was deeply remorseful.
4. Counsel submitted further that the Accused had reformed while in prison and had undertaken various skills training and religious courses. Counsel presented to the court various certificates awarded to the accused to attest to such training. He pleaded with the court to call for a pre-sentence probation officer's report. Counsel further submitted that the accused was in custody for 4 years prior to being granted bond in 2016. He prayed that the court grants him a non – custodial sentence. The Accused also addressed the court and pleaded for a non-custodial sentence.
5. Mr. Okeyo learned counsel for the prosecution submitted that the accused was a first offender. He further submitted that there were no aggravating circumstances at the commission of the offence.
6. The court called for a pre-sentence probation officer's report and a victim impact statement both of which were filed on 15th April, 2019.
7. The probation report stated that the accused was raised in a broken family of 5 children. He dropped out of school at class eight and trained as a tailor at Kyamwai Polytechnic. He married in 2017 and has two children aged 3 ½ and 8 months respectively. On the circumstances of the offence, the report quotes the accused as admitting that he got into a fight with the deceased which led to the later's death. That he was deeply remorseful.
8. The report also states that the family of the deceased and the family of the offender had reconciled way back in 2013. They had entered into negotiation on 9th September, 2013 and, perhaps in a bid to save the accused from the trial process, filed an agreement in court on 28th March, 2019.
9. A copy of the report attached to the pre-sentence report is dated 9th May, 2013 and indicates, that the Akitutu clan and the Ecombe Nthoka Katemi clans held a reconciliation meeting on 9th May, 2013 in which it was agreed that the Akitutu clan being the offender's clan compensate the Ecombe clan 14 cows in accordance with Akamba customary law. The agreement is signed by persons indicated as chairmen of the respective clans and parents of both parties.
10. The purposes of sentencing as captured in the Judiciary Sentencing Guidelines are:-

- (i) **Retribution: to punish the offender for his/her criminal conduct in a just manner.**
- (ii) **Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- (iii) **Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.**
- (iv) **Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.**
- (v) **Community protection: to protect the community by incapacitating the offender.**
- (vi) **Denunciation: to communicate to the community's condemnation of the criminal conduct.**

These purposes are not exclusive in themselves and their application is dependent on the unique circumstances of each case.

11. I have considered the mitigation offered by the accused vis-à-vis the purposes of sentencing stated above. In convicting the accused the court observed that the defence of provocation was available to him because the deceased had disconnected his power supply in an illegal enterprise of connecting and disconnecting electricity. The court observed that the accused had no intention to end the life of the deceased. One of the purposes of sentencing however is to express society's indignation and disapproval of punished for letting his anger get the better of him causing a senseless loss of life.

12. I have no doubt in my mind that the accused was remorseful. He has exhibited this remorse throughout the trial. I say so because he was keen to take responsibility for his action as early as 2013. The record shows that on 13th May, 2013, he told the court through his counsel that he had applied for plea negotiation with the ODPP. On 1st October, 2013 the prosecution counsel then on record told the court that the plea bargain had been rejected by the DPP. The matter therefore proceeded to full trial.

13. Sentencing must also take into account the circumstances and perspectives of victims of crime. The victims of crime must feel that their sense of justice has been considered. In this case it is apparent that the victim's family has come to terms with the loss of their son and moved to reconcile with the family of the accused. It is a relevant fact that the two families have reconciled and healed their emotional wounds. They have done so through a traditional justice mechanism which recognizes compensation, and; according to the report filed in court, the two families now live harmoniously. This action, in the mind of the court, has a far greater potential of bringing closure to the victims than the incarceration of the accused. It is a relevant consideration in this sentencing.

14. The accused pleaded with the court for a non-custodial sentence. His counsel drew the attention of the court to the fact that the accused had spent four years in pre-trial custody prior to being granted bond in 2016.

15. According to the record, the accused was arrested on 2nd September, 2012 and admitted to hospital the same day as he had suffered injury as a result of mob justice arising from his killing of the deceased. He took plea on 9th October, 2012 and remained in custody. He was granted bond on 14th July, 2015 but remained in custody as he could not meet the bond terms. He was finally released from custody on 6th April, 2016 after his bond terms were reviewed. By then he had been in custody for a period of 3 ½ years. He has also been in custody from December 2018 when he was convicted. This makes a total of 4 years in custody.

16. The accused attests in his mitigation that he has reformed in the period he has been in pre-trial custody. He has supplied the court with documentary evidence to that effect. I am persuaded that he is reformed.

17. Taking all the factors which I have discussed above into consideration, and the favourable pre-sentence probation officer's report I am inclined to grant the accused a non –custodial sentence.

18. The accused is sentenced to serve 2 years' probation.

Sentence dated delivered and signed at Nairobi on this 31st day of May 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

Mr. Yussuf.....Court Assistant

Accused

Mr. Opollo.....For Accused

