



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 1 OF 2014

MOSES KANYI MUCHIRI.....ACCUSED

-VERSUS-

REPUBLIC.....PROSECUTION

SENTENCE

The accused person **Moses Kanyi Muchiri** is charged with murder c/s 203 as read with s.204 of the Penal Code. It was alleged that on 25th December 2013 at Ndunyu market in Mahiga location Nyeri South Sub County within Nyeri County he murdered Samuel Muchungi Njoroge alias Kigumo.

By a judgment dated, delivered and signed at Nyeri this 17th May 2019

I substituted offence of murder with manslaughter c/s 202 as read with 205 of Penal Code and convicted the accused person accordingly.

Section 205 of the Penal Code provides for the Punishment of manslaughter; that *Any person who commits the felony of manslaughter is liable to imprisonment for life.*

In mitigation counsel for the accused person submitted that the accused was a person of good character, with a very young family, one of who was one-year-old. That the accused had relocated from the area where the offence had happened.

The pre-sentence report ref n PS/NYS/PR/VOL.II/169 was prepared by Moses Muchuku.

The accused is a first offender. He was arrested soon after the offence and remained in custody till the 22nd April 2014. He suffers from epilepsy and according to the probation officer, he does not take alcohol.

The accused is twenty-eight years old. Upon release from custody he relocated from home, got a job and is married with two children.

His mother is widow. He assists to educate his sister

Accused committed the offence under the influence of alcohol. The deceased was his friend and there was no intention to kill him.

The family of the victim declined to participate in the sentencing process by refusing to be interviewed for the Victim impact statement as provided for by Part XI A of the Criminal Procedure code as read with s. 12 of the Victim Protection Act no 17 of 2014. The person whose contacts were available were those of the father. The report indicated that he was very bitter and whatever he was being asked to do would not bring back his child. This was within his rights as provided for under section **329D. which states that Victim impact statements discretionary**

(1) The giving of a victim impact statement is not mandatory.

(2) A victim impact statement shall not be received or considered by a court if the victim or any of the victims to whom the statement relates objects to the statement being given to the court.

Relevant to this scenario is subsection 3 which states:

(3) The absence of a victim impact statement shall not give rise to any inference that an offence had little or no impact on a

victim.

It is evident from his reaction almost 5 years after the death that he has not found closure. This is the downside of the criminal justice system, that treats victims only as witnesses to secure the conviction of offenders but despite the passing of the Victim Protection Act, does absolutely nothing for them to deal with the trauma of the offences committed.

The PART V of the Act sets the VICTIM PROTECTION TRUST FUND

27. Establishment of the Fund

There is established a Fund to be known as the Victim Protection Trust Fund.

28. Sources of Funds

(1) The Fund shall consist of—

- (a) monies appropriated by the National Assembly;*
- (b) monies received by the Fund as grants, donations or gifts from nongovernmental or non-public sources;*
- (c) the victim surcharge levy;*
- (d) income generated by investments made by the Board of Trustees;*
- (e) interest accruing from the fund.*

(2) The Board of Trustees may make payments out of the Fund for-

- (a) the expenses arising out of assistance to victims of crime;*
- (b) balances that may accrue to the Fund;*
- (c) expenses arising out of administering the fund;*
- (d) such other purposes as the Board may recommend.*

Where is this fund so that it can be utilized to accord victims the welfare and social protection services that they require? Do victims know of its whereabouts? How can the courts or other stakeholders in the criminal justice system ensure that victims who appear in court or in the system benefit from it? These are questions that this court does not have answers to but which if answered would ease the burden for victims.

It is with this in mind that find that it cannot be concluded that the family of the deceased was not affected. They were and that is demonstrated by the attitude of his father. It is my view that the probation office has a duty to find them and accord them the services they need especially now they are aware of that situation.

Coming back to the accused it is my view that the report is positive in that it paints the picture of a young person who did something wrong at the spur of the moment which led to the death of his friend.

Adhering to the principle of Proportionality defined in the sentencing policy guidelines viz:

The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

Also the Sentencing guidelines set out by the the Supreme Court in the Muruatetu case, as follows

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, 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.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.

I find that this is an accused who deserves a non -custodial sentence.

I therefore order that he be placed on probation supervision for three years.

One condition is that since the court has found that the offence was not committed intentionally, that he, with the assistance of the probation office will find the family of the deceased so that he can apologize.

Orders accordingly.

Dated delivered and signed this 28th day of June 2019 at Nyeri.

Mumbua T.Matheka

Judge

In the presence of:-

Mr. Gathiga Mwangi for accused person

Mrs.Owour for the State

Accused -present

Juliet: Court Assistant

Judge