



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCR.C. NO. 91 OF 2017

REPUBLIC.....PROSECUTOR

=VERSUS=

ALFRED KIPKEMOI YATOR.....ACCUSED

JUDGMENT

1. The court accepted a plea bargain agreement on the basis offered by the DPP that the killing of the deceased by his elder brother accused was not premeditated, and the murder charge herein was, consequently, reduced to a charge of manslaughter contrary to section 202 as read with 205 of the Penal Code. The Court then examined the accused on Oath and noted his certificate of fitness to plead, to ascertain the voluntariness of the plea bargain agreement on the part of the accused before accepting the plea bargain agreement and the new charge.

2. The accused pleaded guilty and the following facts of the case which were presented by the DPP:

“FACTS

7. The deceased and the accused in this matter are brothers. On the 5th day of October, 2017 around 11.00a.m, the accused met his brother, the deceased at their mother’s house taking busaa which their mother had prepared. The accused was also served with busaa and since the deceased was already drunk, he started abusing the accused telling him that they should fight. They argued over a piece of land left behind by their late father and this escalated into a fight. Both of them were separated and each went to his house. The deceased went and armed himself with a panga while the accused armed himself with a bow and arrows. The deceased attempted to hit the accused three times with a stone and missed but the fourth time the stone hit the accused on the left hand. The deceased also threw the panga that he was holding to the accused. The accused who was armed with a bow and arrows shot the deceased on the left side of the chest and he fell down. Their mother raised alarm and their sister and one of their neighbours ran to the scene. The deceased died at the scene. Later the assistant chief and an elder came to the scene and called police officers from Kabarnet Police Station. The body of the deceased was taken to Kabarnet District Hospital Mortuary where postmortem was done. Cause of death was established to be hemothorax due to bow and arrow assault. The accused surrendered to the chief and was arrested. He was taken to Kabarnet police station and then to court where he was charged with murder which has now been reduced to manslaughter. He was there after presented before a doctor at Moi Teaching and Referral Hospital for mental assessment and was confirmed to be mentally fit to stand trial”.

Conviction

3. The accused admitted the facts set out above and the Court accepted his plea of guilty and convicted him on 8/7/2019 for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, and thereafter called for a Probation Officer’s presentence report.

Sentencing Proceedings

4. The Ass. DPP intimated to the Court that she did not have previous records of the accused.

5. Counsel for the accused, Mr. Kipkulei, made submissions in mitigation as follows:

“The deceased started confronting the accused. He began by abusing the accused. Abuses went on when accused was quiet. The deceased proceeded out armed with stones. He missed the accused on 3 stones and hit him on the fourth. Lastly, the deceased threw a panga. The deceased was ready to harm the accused. He intended to maim the accused or kill the accused. The accused was provoked extremely and out of self defence the accused decided to arm himself with arrows. He saw his life in danger when the accused hit him with a panga. He fired only one shot. He never intended to. He did not have malice aforethought. His intention

when he met his brother at his mother's home was to quench his thirst on the Busaa.

After the incident he surrendered to the Chief. He regrets the act. He never ran away. He began feeling the pain of losing his younger brother. He is remorseful. Since arrest he has never been out on bond. He has lacked communication with the outside world except from brothers and mother who continue to see him. They have been taking care of the deceased's children and the accused's 7 children. We pray for non-custodial sentence so that he can assist his family together with his brother's family. The two families have come to terms with the death. That is all."

6. The Probation Officer's Report date 22/7/2019 recommended as probation sentence for the accused as follows:

"RECOMMENDATION

The accused before the Honourable court is remorseful and regrets having committed offence. **For the period he has been in custody, he has had time to reflect on the pain of losing a brother. He asks for leniency so that he can take up his responsibility for upkeep of his children and that of his deceased brother. The family members including wife of deceased have come to terms with the loss and have no reservation over the release of the accused into the community. They are ready to receive him and facilitate further reconciliation and cleansing rituals.** Going by the foregoing information, I recommend him to be granted a Probation sentence. This is however subject to the discretion of this honourable court."

7. Attached to the Probation Officer's report were Minutes of Meeting of the deceased's family members said to have been held on the 12th July 2019 communicating he family's decision under Minutes 2 and 3 as follows:

"MIN2/5/2019 Family's decision

The family members sat and discussed on Alfred's case and decided that he be forgiven and thereafter cleansing be done as soon as he arrives his homestead.

MIN3/52019 Welfare of Children

After a length amount of discussion the members clearly noted **that Alfred has been the breadwinner of the family**, therefore, decided that he be released so as to continue to fend for his family's needs as well as those of his late brother's children."

8. In court, the deceased's wife confirmed on oath the agreement of the family members as set out above, and the DPP did not oppose the recommendation for a probation sentence in the case.

Sentence determination

9. After agonizing on the suitable punishment in the unfortunate circumstances of this case, the court is unable to accept the recommendation for probation sentence for the reasons set out below.

10. At the outset, it appears untrue that the accused is the **bread-winner** for his whole family as represented in the minutes of the family meeting of 12/7/2019. The Probation Officer's Report presents an accused who is casual worker with two brothers – a police officer and a boda boda operator as follows:

"Home Background

The accused is aged 32 years old. He has one surviving parent, his mother, namely Sote Yator, a peasant farmer. His father, Kipytor Chesire is deceased. He has six siblings as follows: Kimutai Yator who is a police officer based in Nairobi, Seith who is married in Kaplel area, Claire who is married in Eldoret, Accused, deceased, and Kibiwott, a boda boda operator in home area.

Personal History

He studied at Kimotony primary school to class eight; however he did not pass well and opted to engage in farming and sometimes casual work to earn his livelihood. He is married to one Judy Towett and blessed with two children between ages of five and eight years."

Indeed, according to counsel for the accused in mitigation, it is the accused's brothers who provide for the children of the deceased's children as well as the accused's children.

11. It is all very understandable that the family of the deceased who have lost one son at the hand of another are not willing to lose the remaining son through incarceration in prison custody, and hence the quick forgiveness for the accused to enable his return home. The deceased's wife and sister in-law to the accused also forgave the accused's killing of her husband to facilitate his return home so that in her words he can *"help his own children and my children with his brother."*

Objectives of sentencing

12. However, the assuagement of the family of the deceased and their acceptance and forgiveness of the act of killing of their kin in this case, or other act constituting the offence, is only one of the considerations in sentencing. The Kenya Judiciary handbook on sentencing, *Sentencing Policy Guidelines*, sets out the objectives of sentencing as follows:

“OBJECTIVES OF SENTENCING

Sentences are imposed to meet the following objectives:

1. **Retribution:** *To punish the offender for his/her criminal conduct in a just manner.*
 2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
 4. **Restorative justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victim’, communities’ and offenders’ needs and justice demands that these are met.
- Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. **Community protection:** To protect the community by incapacitating the offender.
 6. **Denunciation:** To communicate the community’s condemnation of the criminal conduct.

These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As such as possible, sentences imposed should be geared towards meeting the above objectives in totality.”

13. Traditional cleansing rituals are matters for the peace and comfort of the accused and his family, which the court does not compel performance or punish for default of performance. The agreement of the family members of the deceased, who are also members of the accused’s family, shown in the Minutes of Meeting of 12/7/2019 reproduced above, only serves their private interest to have the alleged breadwinner return home. In the same vein, the Probation Officer’s report set out above, with respect, only takes care of the interests of deceased’s family. Other objectives of sentencing set out above are not addressed.

Principle of proportionality of sentence

14. The offences of manslaughter and murder as a result of drink-driven disagreements is a prevalent phenomena in the area to worrying proportions and deterrent sentences are warranted. The prevalence of the offence is an appropriate consideration (see. *Thathi v. R* (1983) KLR 354) both for deterrence and denunciation of the criminal conduct. In addition, if the offender were released on Probation sentence as recommended by the Probation Officer the object of rehabilitation “to enable the offender reform from his criminal disposition and become a law abiding person” may yet not be served. For the grave act of responding by bow and arrow to a verbal argument about land inheritance matter, the offender who so kills his opponent shall have been released with, as it were, only a slap on his arrow wielding wrist. It is a wholly disproportionate sentence to the serious offence of manslaughter.

15. The Judiciary Sentencing Guidelines provide for the principle of proportionality as one of the principles underpinning the sentencing process at p. 12 as follows:

“3.1 Proportionality:

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 weighed in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.”

Sentence in like case

16. In a recent case, *R v. Samson Kalamai Lebene*, KBT HCCR Case NO 2 of 2017, this court sentenced a husband who killed his wife following a domestic quarrel to imprisonment for five (5) years and held:

“I consider that the sentence of imprisonment for five (5) years will meet the justice of the case for retribution and deterrence of the accused and assuagement of the deceased’s family....”

17. I do not see in this case any circumstances to warrant a different sentence. Although the offender herein responded to stones thrown at him by his brother following a disagreement and only shot after he had been hit with a stone on the left hand and after the deceased threw a panga at him, the accused had to his discredit armed himself with a dangerous and offensive weapon of a bow and arrow and he must pay for the consequences of the use of the said weapon in circumstances which did not call for such arms to respond to the threat posed by his stone throwing, even panga wielding, younger brother. He ought to have sought to disarm the opponent. However, having been intoxicated takes

away the premeditation required for the offence of murder but calls for a deterrent sentence to curb the menace of drink-driven social killings in the region.

Conclusion

18. In this case, the offender is similarly a young man of 32 years of age, he has lost his younger brother by his own hand and he has, consequently, allegedly a breadwinner role in his family both for his own nucleus family and now for the deceased brother's family. However, the private interests of the family of the deceased must be balanced against the public interest in the objectives of deterrence and rehabilitation, and the Community concern at combating prevalence of alcohol abuse and resultant violence and social upheaval manifested in multiple deaths and destruction of the family units. A lesson in restraint must be learnt by offenders and potential perpetrators. A custodial sentence of imprisonment for five (5) years is, in comparison with recent sentences by this court in similar offences, appropriate.

19. The accused has been in pretrial detention awaiting conclusion of his trial since arraignment on 19th October 2017.

Orders

20. Accordingly, for the reasons set out above, having convicted the accused on his own plea for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, the court sentences the offender to **imprisonment for five (5) years to be reckoned from 19th October 2017 when he was remanded awaiting his trial**, pursuant to section 333(2) Proviso of the Criminal Procedure Code. Right of Appeal under section 379 of the Criminal Procedure Code explained.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JULY 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kipkulei, Advocate for the Accused.

Ms. Macharia, Ass. DPP for the State.