



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 10 OF 2015

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

ALBANUS NYAYO KIEMA

ALIAS KITUNGUU.....ACCUSED

SENTENCING

1. The accused herein, **Albaus Nyayo Kiema** alias **Kitunguu**, was initially charged with murder contrary to section 203 as read with section 204 of the **Penal Code**. The facts were that on 29th January, 2015 at Katangi Location in Yatta Sub County, within Machakos County, the accused murdered **Teresiah Nduku Matingi**.
2. However, on 1st October, 2018, the said charge was reduced to manslaughter contrary to section 202 as read with section 205 of the **Penal Code**, to which he pleaded guilty. Accordingly, a plea of guilty was entered and he was consequently convicted of manslaughter.
3. According to the facts which the accused confirmed as true, on 29th January, 2015 at 7.30pm, the deceased was at her parents' home in her brother's hose watching Television with her daughter and two nephews when they heard a dog barking outside. The deceased then went out to check what was happening and she found the accused, her ex-husband with whom they had separated resulting in the deceased returning to her maternal home. However, the accused continued visiting the deceased. On this day, shortly after the deceased went out, she returned back to the house and informed the other people in the house that the accused had gone to ask for his properties. The deceased then took a camera, window curtains and a speaker and threw them out and returned to the house. However, the accused called her out and a disagreement ensued outside.
4. When the deceased did not return back to the house ten minutes later, the said nephews, **Josephat Mutindi** and **Abednego Munya** went out and saw the deceased on the ground bleeding from the head while the accused was standing next to her carrying a wooden plank which was bloody. Upon seeing the said deceased's nephews, the accused threw the wooden plank down and ran away. On examining the deceased, the said nephews saw a deep cut on the forehead and realised that the deceased was already dead. Their screams attracted the neighbours who confirmed that the deceased was dead. The deceased's uncle then called the police who took away the body to Machakos Level 5 Hospital Mortuary.
5. When the death of the deceased was publicised, on 30th January, 2015, the accused surrendered and identified himself to the Officer in Charge, Masii Police Station who arrested him and investigations were commenced.
6. On 3rd February, 2015 a post mortem examination was carried out on the body of the deceased by **Dr Waithera** who found dried blood on the nose with lacerations measuring 3 centimetres on the head with an irregular fractured skull 3 centimetres lacerations. On the nerves was subdural haematoma. The doctor ascertained the cause of death as due to head injuries secondary to blunt force trauma.
7. Following the accused's conviction, the court directed that a pre-sentence report be prepared by the Probation Officer which was done. According to the said report, the accused is 41 years old and had a previous conviction of assault causing actual bodily harm contrary to section 251 of the **Penal Code** in Machakos PM's Court Criminal Case no. 3358 of 2007 in which he was convicted and placed on probation for one year on 13th October, 2010 which sentence he duly served. Though the deceased and the accused had cohabited for close to 10 years from 2004 to 2014, the relationship was reported to have been rocky with several interventions by both family members and the local administration who eventually advised that the relationship be terminated 10 months before the incident. However, the accused kept on

demanding that they get together despite lack of interest from the deceased. The said relationship was blessed with one child though the deceased had two other children from a prior relationship. The previous year the accuse remarried and the wife was at the time of the investigations 8 months pregnant. It was however reported that the accused does not take care of her daughter with the deceased who is supported by the deceased's brother and maternal aunt. While the accused was reported to be a hardworking person, he has anger management issues and was reported to have abused bhang.

8. According to the report, the community has embraced the accused and has plans to compensate the deceased's family customarily. He was reported to be a committed Christian a church reader and a choir master at the local catholic churches. The children of the deceased were however still bitter with him. While an arrangement had been entered into as regards compensation, the deceased's family was unhappy with the slow speed at which the same was moving. According to the report, while the accused says that he is remorseful, his body language does not portray the same. However, as he has not committed any offence since, the community is willing to embrace him back home while the local administration also has a positive attitude towards him and reported that he has been conducting himself well since his release on bond.

9. The probation report however found that the accused is not a straight forward person as he tried to conceal his previous criminal record as well as the fact of his remarriage. It was noted that the offence did not result from provocation as the accused had separated from the deceased ten months prior to the incident.

10. A victim impact report was also compiled and filed. The same supported the findings of the probation officer as regards the accused's violent conduct to the deceased prior to the deceased's death. It was also claimed that though the family of the accused had sent overtures towards compensation they were not keen in speeding up the same. The position of the victim's family was that the accused does not deserve a non-custodial sentence.

11. On behalf of the accused, it was submitted by **Ms Gichuki** that the accused is remorseful and prays for leniency. According to learned counsel, he has a young family with aged parents who depend on him for sustenance. While not denying the fact that he in the past abused drugs such as *cannabis sativa* which he blamed for the offence, it was submitted that he had made a decision to stop drug abuse and that he is a reformed person who has decided to remarry and start a new life, having received counselling from his parish priest being a committed Christian and a choir master at his local church. The community has forgiven him for the crime and the bitterness of the victim's family is understandable. It was submitted that the two and half years the accused spent in remand before his release on bond as well as the strides made towards compensating the victim's family ought to be taken into account in meting a non-custodial sentence which it has been agreed will be cleared before 24th October, 2019. The court was urged to pass a sentence which will enable the accused to complete the said compensation which is only possible if he is not subjected to a custodial sentence. It was disclosed that the accused is ready and willing to shoulder the entire burden of paying school fees to the daughter.

12. On behalf of the state, it was submitted by **Ms Mogoi**, learned prosecution counsel that the offence with which the accused is charged is not an assault but murder in which an innocent life was lost. As a result, the deceased left behind three children. It was submitted that the offence was gender based violence offence arising from the accused's inability to accept the decision of the deceased to move on with her life. Accordingly, the court was urged not to show him mercy considering the fact that plea bargaining took a very long time a clear indication that the accused is not apologetic to the deceased's family despite the family's willingness to accommodate him. The court was urged to mete a custodial sentence to the accused as a measure of deterrence to others engaging in domestic violence.

13. I have considered the victim impact statement, the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of **section 329** of the **Criminal Procedure Code** which provides:-

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

14. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

15. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

“... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield to them, they will meet this punishment.”

16. In **R vs. Harrison (1997) 93 Crim R 314** it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective and considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who otherwise would be tempted by the prospect that only light punishment will be imposed.”

17. Similarly in S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6 Kwa Zulu Natal High Court held that:

“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley 2008 (1) SACR 223 (SCA)* at para 35:

‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’

The judgment continues:

‘. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’

18. As regards the sentence, the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015, as a guide in sentencing held that:

“[71]...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.”

19. There is no doubt that the loss of life is a very serious matter. In this case there is no doubt that the accused was the aggressor. He committed the offence in circumstances which were clearly unjustifiable under the normal circumstances. It is however clear that he was abusing drugs. However, subsequent to his release on bond, there is no evidence that he has gone back to his old ways. He is portrayed as a hard working person who has since committed himself to a religious life taking active role in religious activities. On the family front, he is newly married with an expectant wife. The facts reveal that he has to a certain extent reformed.

20. It is however clear that though the family of the victim has extended an olive branch to him, he has not taken the same very seriously. This court in meting out the sentence must therefore take into account the consequences of the same not only on the public but also on the other people who depend on him so as not to exacerbate their circumstances, an event which may not augur well towards the process of his rehabilitation and reintegration into the community.

21. As appreciated by the Supreme Court in Muruatetu Case (supra):

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“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 victims', 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."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

22. I have taken into account the foregoing factors. The family of the deceased is unhappy that despite having extended an olive branch to the accused, he has not taken that gesture seriously. Apart from that the accused has left them to shoulder the burden of taking care of the accused's issue with the deceased.

23. I have considered that fact that the accused has been in custody for two and half years. The accused has had an opportunity to endear himself to the family of the deceased but has not taken any or any serious steps towards that direction. Considering all the circumstances of this case as well as the fact that the deceased's family have not given up on reconciliatory steps, I hereby sentence the accused to 7 years in prison. Upon his release from prison he shall be on probation for a further period of 5 years.

24. He must ensure that the process of customary compensation is satisfactorily completed by 29th October, 2019 as agreed. He must take care of the daughter of the union between him and the deceased by meeting all her needs. During period the accused is on probation he will be expected to undergo guidance and counselling on anger management, conflict resolution and alcohol and substance abuse.

25. I must emphasise to the accused that the purpose of placing him on probation will be to enable him reflect on his past and reform accordingly. However, he must note that if during the probation period he commits an offence or breaches the terms of the probation or fails to adhere to the terms of this decision, he shall be liable to be brought back to court to serve the said period of probation in custody.

26. However, pursuant to section 333(2) of the *Criminal Procedure Code* the said 7 years will take into account the 2½ years he has been in custody.

27. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 30th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Gichuki for the accused

Miss Mogoi for the State

CA Geoffrey