



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

COURT CRIMINAL CASE NO. 1 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

GIDEON NDIWA KABUNJE.....ACCUSED

JUDGMENT ON SENTENCING

1. The Accused was charged with murder contrary to **Section 203 (a)** as read with **Section 204** of the **Penal Code**. When arraigned on 16th January 2019 a psychiatric evaluation was ordered, and a second detailed one was ordered on 6th February 2019. He pleaded not guilty, and a pre-bail report was ordered. On 3rd May, 2019 the defence proposed a Plea Bargain Agreement. On 3rd May, 2019 bond was granted on strict terms and conditions.

2. A Plea Bargaining Agreement was entered on 17th July 2019, which sets out the agreed facts of the case as follows:

“That on the 14th January 2019 at Site Estate in Gilgil Township the accused arrived at the rented house at around 1900hours and found his wife Esther Wambui (the deceased) watching some programs on the television.

The deceased informed the accused that there were no vegetables and milk for supper, the accused proceeded to buy the milk and vegetables and went back to the house. While the accused was watching television and deceased cooking the accused noticed that the deceased has shaped her hair in a box style which did not impress the accused who claimed that it is not fit for a married woman. An argument ensued between the accused and the deceased where the deceased became agitated and furious, the deceased open a suit case and took the accused’s sword and aimed to stab their child but the accused intervened by grabbing the child and when he aimed to open the door to escape with the child the deceased stabbed him on the left side of the back.

The deceased and accused continued to struggle where the deceased was accidentally stabbed by the accused on the chest. The accused rushed outside and called for help from other tenants on the plot. Neighbours rushed to the accused house where they found the deceased lying in a pool of blood and had already passed on.

The police officers visited the scene, arrested the accused and moved the deceased’s body to Gilgil Sub-County Mortuary to await post mortem. On 21st January 2019 Dr. Titus Ngulungu performed a post mortem and concluded the cause of death as chest organ injury with massive intrathoracic bleeding due to sharp trauma to the chest. The post mortem form produced as PEX1.”

3. A Post Mortem report signed by Dr. Titus Ngulungu on 21st January 2019 and exhibited as P. Exhibit 1 to the Plea Bargaining Agreement concludes that:

“the cause of death was chest organs injury with massive intrathoracic bleeding [due] to sharp trauma to the chest in keeping with homicide.”

4. On 11th July 2019, and in accordance with **Section 137F to G** of the **Criminal Procedure Code**, the Court Form for Recording of Plea Agreement was completed and signed by the accused, defence counsel, prosecutor and the court. The accused was then placed on oath and answered all the questions put to him positively. The court was also satisfied as to his competence and the voluntarily nature of his entry into the Plea Bargaining Agreement. Accordingly, the accused was convicted for Manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code.

5. A Probation Officer’s pre-sentence report was then ordered to enable the defence better represent the accused during mitigation at the sentencing hearing. The report was filed on 25th July 2019. The mitigation hearing was held on 18th September 2019.

6. In mitigation, the defence counsel stated that the accused was 28 years old; dropped out of school after class 6; was employed as a security guard in several places; and was also employed as a chef at a guest home. Married to the deceased, he had two children - MC aged 3 years and MC aged 1 ½ - years at the time of the incident.

7. According to the agreed facts, an argument arose between the accused and deceased leading the deceased to become so agitated she sought to stab their child with a knife. The accused intervened and grabbed the child protecting her from danger, but was himself stabbed in the back. A scuffle then broke out between the two in which the accused fatally stabbed the deceased on the chest.

8. Defence counsel stated that the stabbing was both accidental and forced by fact that, the accused's intention to protect their child, and that the accused succeeded in saving the child's life. Counsel added that the accused was remorseful and regretted his action. He pointed out that the accused's family has since disintegrated whilst he is at a young age; that he needs to reconstruct his life and family again, and particularly the children who had no role in the offence. One child lives with in-laws and the second one live in a Children's home in Gilgil. Accused seeks a non-custodial sentence, and the pre-sentence report is favourable.

9. I have considered the accused's mitigation. The Probation Officers Report has also been considered. It shows the attitude of the accused towards the offence as essentially admission and remorse. Accused seeks to be pardoned. The deceased's daughter, decided to leave the sentencing to the court but does not favour a non-custodial sentence. The accused's family spoke positively of the accused, stating that he was always law abiding and had no criminal record.

10. The conclusions and recommendations of the Probation Report show that the accused reached out to the late victim's mother and asked for forgiveness. The report concludes:

“He [accused] pleads with the court to extend its hand of forgiveness to him. The relatives of the late Victim said that they look upon the court to deliver justice on the matter. The relatives of the accused person said that they would be willing to help him to pick up his life if granted a Non-custodial sentence.

RECOMMENDATION

Your honour, in view of the above, I find the subject suitable for a Non-custodial sentence. Since he is remorseful and given his youthful age, he may be given a chance to serve on a Probation sentence.

As he serves the sentence, our office will take him through appropriate rehabilitative therapy to enable him live at peace with others in the community and at the same time give him a chance to earn his livelihood.”

11. I have carefully considered the mitigation and the circumstances of this case. The knife used to stab the deceased was initially in the hands of deceased who had an intention to use it. The accused's intervention led to a scuffle and accidental stabbing with the same knife. Thus, the recommendation of the Probation Officer finds favour with me subject to some changes.

12. I therefore convict the accused to imprisonment of seven (7) years with effect from the date of incarceration subject to the following terms and conditions:

(a) The accused will serve a custodial sentence for the first fourteen (14) months and the remaining term shall stand suspended subject to the terms hereafter.

(b) After the fourteen (14) months incarceration, the accused will serve a probationary sentence for two (2) years during which he shall participate in a rehabilitative therapy programme to be designed by the Probation Officer.

(c) Should the accused maintain good conduct and fully participate in the probation programme aforesaid, the remaining term of the sentence shall stand voided.

(d) Should the accused not successfully complete the probation programme or should the accused fall afoul of the law and be convicted for any offence other than a simple traffic offence, the suspended sentence shall attach and the accused shall serve the remaining term thereof.

13. Right of appeal fourteen (14) days

14. Orders accordingly.

Dated and Delivered at Naivasha this 31st Day of October, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State
2. Mr. Ngunjiri for Accused
3. Accused - Gideon Ndiwa Kabunje - present
4. Court Clerk – Qinter Ogutu