



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

COURT CRIMINAL CASE NO. 7 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

JGK.....ACCUSED

JUDGMENT ON SENTENCING

1. The Accused was arraigned in court on 26th February, 2019 and charged with the murder of Samuel Waweru Mwangi on 7th February, 2019 contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Initially, the accused pleaded not guilty and through his counsel Mr. Kakinga, he sought bail which was granted on 26th February, 2019.

2. On the same date the defence indicated that they would be seeking to negotiate a plea bargain agreement, an exercise that was concluded on 29th May, 2019. The particulars of the offence are set out in the Plea Bargaining Agreement in the brief facts of the case as follows:

“That on the 7th day of February 2019 at around 9.15pm the deceased SAMUEL WAWERU MWANGI went to the house of the accused person herein in fulfillment of an appointment he had made with the accused’s wife one GNN, the deceased and the accused wife had over time engaged into a loving and romantic affair without the knowledge of the accused. On the said fateful night, the deceased and accused’s wife engaged into sexual intercourse in the house of the accused person and on his matrimonial bed. The accused who had earlier in the day informed his wife that he was to travel to Nairobi for a meeting and that he would not be coming home that very night, unfortunately returned home using his motor cycle after postponing his appointments in Nairobi.

Upon arrival of the accused person at his house, a fact that took his wife unawares, he found the front gate to his house wide open. The fact shocked the accused person and made him suspicious about the security at his house. The Accused consequently entered his gate and parked the said motor cycle at the veranda. The accused upon switching off the engine of his motorcycle was alerted by suspicious movement and footstep inside his house. The accused immediately called his wife and requested her to open the door to the house which she (accused wife) opened after a series humble begging and bargaining by the accused person.

Upon entering his house the accused entered his bedroom and found that his last born son who customarily and/or usually sleeps with his wife in their matrimonial bed was not in the said bed. The accused also noticed blood patches on the bed sheets fixed on his matrimonial bed, a fact that made him undoubtedly suspicious of the dubious sexual activity that his wife was engaged into with strangers to their marriage and in his matrimonial bed.

The accused immediately proceeded to the children’s bedroom and found his last born son and his other siblings asleep. He then flashed his torch under the children bed and saw a naked man lying flat on the floor under the children bed. The accused was terrified and scared for his life thus, he immediately locked the door and armed himself with a mallet hammer to defend himself from the stranger who was hiding under the bed in the children room.

The accused then shouted and/or called out the said stranger to immediately identify himself. Consequently, the deceased upon being asked to identify himself and why he was hiding under the children bed, the deceased stated that he was Waweru alias Kamaisha. It is at this point that the accused realized that the stranger was one of his neighbours in his village.

The accused immediately ordered his children who had woken up from sleep as a result of the verbal exchange between the deceased and the accused person. The accused locked the deceased in the children bedroom and proceeded to immediately called and/or summoned his neighbours who came and interrogated the deceased. The deceased indeed confessed to have engaged into sex intercourse with the accused’s wife that very night and how he (deceased person) had been invited by the accused’s wife who informed him that the travelled to Nairobi and was not coming back home that fateful night. The deceased further admitted that upon hearing the motorcycle for the accused person outside the house, the accused’s wife told him to take cover and hide under

the children bed in the children bedroom.

The accused upon hearing the above developments lost control of his mental faculties and in the heat of passion the accused entered the bedroom where the deceased was locked and cut him twice on the neck using a panga, thereafter the accused steeped out of his house and called the Area Chief and informed him of the incident. The accused took the panga, the soiled sheets placed in a paper bag and took them to the Assistant Chief. The accused upon informing the Area Chief of the above incident immediately proceeded to Kipipiri Police Station where he reported the incident and surrendered himself to police arrest and custody.

Police Officers from Kipipiri Police Station visited the scene, i.e. accused's house where they found the deceased had passed on, and the said police officers took the deceased's body to Gilgil Sub-County Hospital Mortuary for post mortem examination. The police officers further arrested and charged the accused's wife together with the accused for murder. However the former was later released upon the prosecution dropping charges of murder at Engineer Law Court. The accused was consequently, transferred to Naivasha Court for trial.

That on 12th February, 2019 a post mortem was conducted by Dr. Titus Ngulungu who concluded the cause of death to be massive blood loss due to sharp machete trauma to the upper neck partially decapitating the head. The post mortem report is produced as P.EX1."

3. The post mortem report by Dr. Titus Ngulungu exhibited to the Plea Bargaining Agreement as P. Exhibit 1 shows the cause of death to be:

"Massive blood loss due to sharp machete trauma to the upper neck partially decapitating the head: Homicide."

4. During the hearing, and in compliance with **Section 137F to G** of the **Criminal Procedure Code**, the accused was placed in the stand and took oath. After the court was satisfied that he understood all his rights and was competent and acting voluntarily, the accused was convicted with the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The court completed the Court Form for Recording of Plea Agreement which was signed by the Accused, his counsel, the prosecutor and the court.

5. Mitigation was conducted on 29th July, 2019 and reliance was placed on the Probation Officer's Report filed on 29th May, 2019. The defence counsel stated that the accused was 43 years old; that he was a first offender - a fact confirmed by the prosecutor; that the accused had a track record in public service as a peer educator, as chairman of [particulars withheld] Primary School Board; that he worked with I.E.B.C. and was presently engaged as a boda boda operator.

6. Counsel pointed out that the accused willingly surrendered to the police after the incident; that the Probation report shows that the accused will be able to readily integrate into the society; that he was a resourceful member of the community. Counsel pointed out that the provocation that led the accused to kill the deceased when he found him committing a sexual act with his customary law wife should be taken into account as an act of pure passion.

7. The accused has two minor children BK and FN, aged seven and 10 years respectively. The accused's wife left their home and the children are living with their maternal grandmother. The defence sought a non-custodial sentence.

8. The prosecutor confirmed the facts stated by the defence.

9. The court has carefully considered the facts of the case. I note that the accused killed the deceased in circumstances that clearly show that he was enraged when he found the deceased naked under the bed having engaged in sex with his wife in their matrimonial bed. In rage, he locked the door, armed himself with a panga and cut the deceased twice on the neck. He then took the panga and the soiled sheets, put them in a bag and took them to the Assistant Chief, reported himself, then proceeded to report to Kipipiri Police Station.

10. The act of the accused is considered a crime of passion which is a defence to murder. (*See Maina Tumken v. Republic [1965] EA 496 C.A.*, which recognizes an accused killing:

"in the heat of passion without regarding his self-control."

11. The Probation Report dated 29th May, 2019 details the accused's background and personal profile, which was highlighted by defence counsel. The accused's own attitude towards the offence is that he admits his action and has pleaded for leniency, saying he regrets his actions. The Report records the attitude of the community as follows:

"The area local administration said that the offender and his family are well known in the village and there has never been any criminal history. The head teacher, [particulars withheld] Primary School confirmed that he was their board chair and they worked very well. There is no opposition to the offender being rehabilitated on a non-custodial sentence considering the circumstances under which he committed the offence. Community members however expressed reservations to him living among them saying that the offender was a neighbour to the victim's family. The investigating officer expressed concern that the offender being seen in the community would send the wrong message to such offenders."

12. The victim's family who were interviewed were his mother and brother PM. The report states:

".....the family talked about the impact of the death of the victim on their family which has had adverse effects. His wife has

already relocated to Taita Taveta with their three children as she is unemployed and she could not make ends meet as the victim was the sole bread winner. They said the children are not attending school. They also said that the victim was taking care of their elderly mother and the brother says that he has now had to take over the responsibility which has strained him as he works in Nakuru. The old mother is in a depression and the brother is confused. They had lost a niece in mysterious circumstance last year. They link this to a land case between them and the accused's family."

13. The Probation Report concludes as follows:-

"He own up to his mistake and pleads for leniency. He says he is willing to comply with court orders and cooperate in the rehabilitation process should the court consider a non-custodial sentence. From the social inquiry, no hostility was noted towards him or danger to his life. It was also noted that he was a neighbour to the victim's family. His father and siblings say if he is placed on a non-custodial sentence, they will find an alternative place for him to live as he undergoes rehabilitation. The victim's family expressed adverse effects the death of the victim has had on their family. They say they are strained financially as he was the sole bread winner for his wife and children. He was also supporting their elderly mother. A sentence plan will be drawn for the offender to ensure that the criminogenic needs are addressed to help in the rehabilitation process. There is need for intervention on conflict resolution and anger management. The reintegration process will be followed up. Your honour, in view of the above findings, I recommend that the offender be given a chance to serve a non-custodial sentence."

14. I consider that no killing of another can be justified, although it can be explained and the explanation can be deemed as a mitigating factor. This is a case in which, to me; a partially custodial and partially non-custodial sentence will be appropriate. The accused is currently in custody, and I note that the Probation Officer proposes a sentence plan that ensures the criminogenic needs of the accused are addressed to help in his rehabilitation process, in his conflict resolution and anger management. Thereafter, the re-integration process will be followed up.

15. I partially accept the Probation Officer's recommendation. I hereby mete sentence as follows: The accused is sentenced to seven (7) years imprisonment on the following terms and conditions:-

(a) The sentence commences on the date of the first incarceration of the accused.

(b) The accused shall be in custody for the first one (1) year of the sentence and the remaining term shall stand suspended on the following terms:

(i) After the lapse of the first year of the sentence, the accused shall be on probation for two (2) years and shall participate in a programme to be designed by the Probation Officer and a record thereof shall be maintained.

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

(iii) 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.

16. Right of appeal fourteen (14) days

17. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of October, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Marigi for the State
2. Mr. Kakunga for Accused
3. Accused - Joseph Gakunga Kahare - present
4. Court Clerk – Quinter Ogutu