



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL CASE NO. 4 OF 2017

[FORMERLY ELDORET HCCR NO. 60 OF 2012]

REPUBLIC.....PROSECUTION

VERSUS

JOSHUA KIBII.....ACCUSED

JUDGMENT

1. The accused was on 10/7/2019 convicted of the offence of manslaughter contrary to the section 202 as read with 205 of the Penal Code following a plea bargain reducing the initial charge of murder contrary to section 203 as read with 204 of the Penal Code, with particulars that he had “on the 7th day of August 2012 at Kokorowonin Village, Issas sub-location, Kapteberewo location in Baringo North District within Baringo County, murdered Pauline Mulwo”. He was remanded awaiting trial and he has been in custody since, that is a period of seven (7) years four (4) months.

2. The facts of the case which the accused accepted with reduction of charge were as follows:

“FACTS

*7. On the 7th day of August 2012 at about 10:00 am, the deceased, a primary school teacher was going to work then she met the accused chasing a cow. She inquired on the said cow and told the accused to have mercy on the owner of the cow and return it. She implied that the accused was stealing the cow from the owner. The accused did not take this kindly and that is when they started arguing with the deceased. The accused stopped chasing the cow, the cow, picked a stone and hit the deceased on the head making her to fall down. The accused then picked a stick and hit the deceased. After that the accused ran to a nearby forest from where he was arrested and escorted to Kipsaraman D.Os office and later to Kabarnet police station from where he was taken to Court. The accused person was thereafter presented before the doctor at Kabarnet District hospital for mental assessment on the 10th August 2012 who confirmed that at the time he was **NOT** mentally fit to stand trial. He was referred to Moi Teaching and Referral Hospital where he was treated and on the 6th June 2013, it was established that he was fit to plead. He pleaded not guilty to murder which has now been reduced to manslaughter. The scene was visited and the body of the deceased was taken to Kabarnet District hospital mortuary where the post mortem was done. The post mortem was conducted on the 13th August 2012 where it was established that the deceased’s cause of death was head injury sustained by multiple trauma to the head that was penetrating causing internal hemorrhage to the brain. A stone and stick that were used to kill the deceased were collected by the police and kept as exhibits.”*

3. The DPP then indicated that the accused was a first offender and the accused’s Counsel in mitigation urged as follows:

DPP

I have no records for the accused. I am not aware of any other killings by accused. At the time of the offence the accused was not mentally fit.

Mr. Kipnyekwei in mitigation

It is clear that the accused has had a history of mental instability and it was clear from the interview by the Court. It indicates that he was in class 7 in 2003, a period of 30 years.

The date of offence is 7/8/2012, I am instructed that he was herding his cows when the deceased accused him of stealing somebody’s cow. The accusation angered him and in the process triggered his mental illness. An altercation ensued degenerating into a fight and in the process the accused picked a stone which was just merely on hit the accused. The stick produced by the DPP was not intended to commit any felony: it is just traditional regalia and after the incident the accused did not take off. He went on herding

his cows and the police and the County confronted him and he did not resist. He was brought to Court and mental assessment report prepared only 2 days after the incident confirmed that the accused was not mentally sound and so he was not fit to stand trial.

As a result the Court ordered the accused to undergo treatment at Moi Teaching and Referral Hospital which went on for over 1 year. He has informed Court is able to stand trial and is able to recollect the incident and the issues that arose prior to the attack. The accused is remorseful. The provocation triggered a mental illness which had kept recovering. When he fell ill he lost his faculty and cannot account for his action. He in retrospect realizes that what he did was wrongful. He now apologizes to his family and the Court for the action that happened without his full knowledge. He seeks leniency. We submit that we are dealing with a patient rather than an offender. He needs more medical care. We seek that he be committed or he be committed to a non-custodial sentence to enable him proceed with treatment and rehabilitation process.

I also have instructions that accused is father of 2 minor children who had been depending on him for their livelihood and imprisoning him will punish even the children who do not know the circumstances in which their father's relative was lost.

In the circumstances of the case the accused being of unsound mind should be released or sentenced to a non-custodial sentence.

Court

Presentence Probation Officer to be availed by 25/7/19.”

4. The Probation Officer's report dated 25th July 2019 was negative for community based rehabilitation pointing to lack of reconciliation between the accused and the family of the deceased and **“non-committal attitude of his family over his re-integration, the release of the accused into the community at the moment is likely to elicit some emotions which might be detrimental to his safety”** as follows:

“CONCLUSION

Your lordship, before Court is a 38 year old offender with history of violence against his family members and immediate neighbors. **He is known to be of unsound mind and had been previously convicted of a similar offence having allegedly killed his father by hitting with a wooden plank.**

His family members comprising of his sister (Cheshire) and brother (Zephania- (0716141479) were interviewed and **seem to be skeptical over his release into the community stating that with his unpredictable mental state he is likely to cause more harm or be harmed if released at the moment.**

The deceased husband one James Kangwony (0725034285) expressed his reservations over his release stating that he is yet to heal.

The local administration equally replicated similar sentiments indicating that the accused is a person who is difficult to manage due to his schizophrenic mental disorder which is known to relapse. They indicate that the relationship between the two families is not cordial and that no reconciliatory talks have been undertaken since the incident took place a couple of years ago.

RECOMMENDATION

Given the negative sentiments expressed by the deceased husband, and the local community, the uninitiated reconciliatory talks coupled with non-committal attitude of his family over his re-integration, the release of the accused into the community at the moment is likely to elicit some emotions which might be detrimental to his safety. His case is therefore not eligible for a community-based sentence. It may be dealt with otherwise. This is however subject to the discretion of this honorable Court.

Kiprono M.K.

Probation Officer,

Baringo Sub-County.

Date: 27/07/2019.”

5. At the request of counsel for the accused the Court called for a further report and the DPP pointing out that the accused had previous assessment of not fit to plead, the Court called for a further Probation Officer's Report and directing that other family member's as urged by the accused's counsel be interviewed as follows:

“Court:

1. Probation Office to prepare an updated report after interviewing the accused's other family members as follows:

i. Sarah Chebii Kandie of Kipsaraman.

ii. Evalyne Cheruto of Kipsaraman.

2. Directions on 11/11/2019.”

6. By a further Probation Officer’s Report dated 8/11/19, the Probation Officer recommended release of the accused to his family as follows:

“PROBATION OFFICER’S REPORT

KAB/PR.1/HC/66

SUPPLEMENTARY REPORT I.R.O. HCCR 04/17-JOSHUA KIBII

Further to the filed pre-sentence report in Court file no. HCCR 04/17 in respect of above named dated 25th July, 2019, which contains his family background, circumstances surrounding the offence prevailing situation on the ground at that time, a conclusion and recommendation. The current status is as follows:

(1) After wide consultation with the family members of accused person led by his elder brother Zephania (0716-141479) they have agreed to receive the accused and facilitate his resettlement by forging for reconciliation with the deceased kin. They also intend to relocate him to his uncle’s residence in Eldama Ravine upon release and ensure that he undergoes regular medical checkup.

(2) That the sisters mentioned by the accused in Court do not exist since Evaline passed away in 2014 and Sarah is not one of his sisters.

(3) That the deceased kin is still bitter and is opposed to his release into the community.

CONCLUSION

The Court needs to take note that the accused family previously reluctance to accept the accused back home may have been informed by the fact that the accused had committed a similar offence in the past where he killed his father and with his unpredictable mental state there was some fear among the family members that he might cause further harm if released. To avert any possibility of confrontation with the deceased kin, the accused’s brother has made arrangements for him to be relocated elsewhere upon release until such a time that the reconciliatory talks have been finalized.

RECOMMENDATION

Considering the fact that the accused’s elder brother has expressed willingness to receive him and assist him to settle down by providing psycho-social support; he may thus be released to the family. This however subject to the discretion of this honorable Court.

Kiprono M.K.

Probation Officer,

Baringo County.

Date: 08/11/2019.”

7. In further submissions upon filing of the further Probation Officer’s Report, Counsel for the Accused and for the DPP urged as follows:

Mr. Kipyekwei for the Accused

1. I have seen the pre-sentence Report. There is a brother to the accused who is willing to take care of the accused....one Zephania Kibii who is based at Muchongoi away from the area where the incident occurred at Issas Kokorowonin Sublocation Baringo North. The accused is a mental case.

2. Looking at the Health status of the accused he is better off being provided for his health by his brother who agrees to take care of him. We pray for a non-custodial sentence. Under the care of the brother Zephania Kibii.

Ms. Kitilit for DPP

The person who is opposed to his release is the husband of the deceased. I refer to the Probation Officer’s Report of 25/7/19.

Determination

8. I have considered the matter and established that the question of the accused’s mental status was raised on the first day of plea and subsequently during the hearing:

18/9/2012

Counsel for the Republic informed Court that –

“The accused is not fit to take his plea. I pray that he be mentally examined at MTRH for mental assessment.”

12/11/2012

Accused takes his plea although he has not yet been presented for mental assessment; pleads not guilty.

17/12/2012

Counsel for State informs Court accused has been assessed as not fit to plead:

“12/11/2012 – before Azangalala, J. Plea taken. Mental Assessment Report shows Accused not mentally stable. Pray he goes for treatment and then psychiatric evaluation.”

6/6/2013

State Counsel indicates accused fit to plead

“I have a medical report indicating that accused is fit to plead”.

Plea is taken and plea of not guilty entered.

24/7/2018

Upon transfer of the case to Kabarnet Court, Court notes assessment of 2/7/2018 that accused not fit to plead and he is on treatment.

28/11/2018

Accused is certified fit to plead.

10/2/2018 Plea bargain process commences.

Sentence

9. This Court has in recent decision found in cases of manslaughter a sentence of imprisonment for 5 - 8 years to be appropriate depending on the circumstance of the particular case with regard to provocation, diminished responsibility by alcohol and other factors of blameworthiness of the accused, as follows:

Sentence

6. The Court has previously lamented the prevalence of unlawful killings in the area and sought to discourage them by deterrent imprisonment sentences for periods of between 5 years for cases of extreme provocation and 8 years for other cases of unintentional killing in alcohol-driven situations. In considering the prevalence of the offence to determining the appropriate sentence in a particular case, the Court is not punishing the accused for the offences of others because the sentence is tailored to meet the particular offender having regard to such factors affecting the particular case as the gravity of the offence, the moral blameworthiness of the offender, and the community and public interest concerns in the matter. I respectfully agree with Porter, Ag. J, (as he then was) in **Thathi v. R** (1983) KLR 354 that the prevalence of a type of offence may aggravate a matter and justify a severe penalty.

7. The Court of Appeal has approved the range of five to eight years as not being excessive in manslaughter cases in Note **Wanyonyi v. The Republic** [1980] KLR 116 (Madan, Law and Potter, JJA) where the appellant had been convicted on his own plea of guilty to manslaughter and sentenced to imprisonment for 8 years, the Court determining as follows:-

“The sentence for eight years imprisonment can’t be said to be wrong in principle, but we feel that the appellant may have been very much under the influence of the chang’aa he had admittedly consumed on the afternoon of the crime, to the extent of influencing his resentment against the deceased. In the circumstances and having regard to the appellants previous good character and to his long period of detention before trial (fifteen months) we feel that his sentence is indeed heavy and reduce it to one of five years imprisonment.”

8. Similarly, in **Wero v. R.** (1983) KLR 349, the Court (Madan, Kneller JJA. & Chesoni, Ag. JA.) in same scenario as here where the accused who had been “charged with murder was convicted for manslaughter and sentenced to eight year’s imprisonment after he plead guilty to the reduced charge” held that –

“The sentence of eight year’s imprisonment where the case was on the borderline between murder and manslaughter was legal, appropriate and not manifestly excessive.”

9. In **Andrew v. R (Note)**, (1980) KLR 153, another case of plea of guilty to a reduced charge of manslaughter, the Court of Appeal (Madan & Potter JJA. & Simpson, Ag. JA.) considered the period of almost one year that the appellant had been in custody and reduced a sentence of imprisonment for eleven years to five years.

10. See also **R v. Margaret Kabon Talaa & 2 Ors.**, KBT HCCRC NO. 18 of 2017 applying *Wanyonyi v. R, supra*, and **R v. Julius Tetea Kate alias Samu**, KBT HCCRC No. 60 of 2017.”

10. However, in this case, the accused’s mental health has been in question since the date of plea with several assessment reports giving different assessments over the history of the case since the 8th August 2012. I would agree with the counsel for the accused and for the DPP that his case should be dealt with as one deserving of mental treatment intervention rather than punishment by imprisonment.

11. In any event had the Court considered a case for a sentence of imprisonment, the accused who has been in custody for seven (7) years four (4) since 8th August 2012 when he was remanded awaiting trial, has served in full with remission a whole sentence of eleven (11) years.

12. The accused should be given the benefit of the doubt as to his mental illness which was chronicled by Court record. Could he have been mentally disturbed when he committed the offence? There was certainly evidence that at some point since his detention awaiting trial he was diagnosed a not mentally fit to stand trial until the final report that cleared him for trial before the plea bargain was conducted. I have noted the protest of the deceased’s brother in terms of victim impact assessment but I think that the accused will benefit by an order which allows medical attention to his condition. The Prison is not the place for a mental infirm. He should be referred to a mental infirmary. To ensure that there is follow-through with the treatment, the accused must be placed under the care, escort and guardianship of the family where they accept so to be, or under a friend or other close person who undertakes to present the accused to mental treatment.

13. The accused’s is a sad case of indifferent treatment given to persons of unsound mind in the justice system. Despite early indication that the accused was mentally challenged, no efficient and effective treatment was taken to ameliorate his condition and perhaps have his trial brought to an expedited conclusion. By his actual pre-trial remand time of 7 years 4 months he has served a full sentence of eleven years, and treatment cannot be said to have been achieved. Although he has completed prison time for a sentence of 11 years above the sentence of upto 8 years usually passed by this Court for unlawful killing cases, and should therefore be due for release on the time served in ordinary circumstances, the mental illness element of the accused dictates as responsible action in sentence to be one of facilitating his mental treatment for his own benefit and the benefit of the community he has to live in upon release from custody.

14. While considering a case of mental inability of an accused before plea in the context of a bail application in **R v. Gilbert Kiptanui Kibilioch**, KBT HCCR.C NO. 18 of 2019, this Court released a person of unsound mind to his relatives who undertook to ensure his treatment and held that:

*“9. Bail for persons of unsound mind like for persons of sound mind, should not be an avenue for avoidance of criminal prosecution of the accused. It should not be abused to grant an accused immunity from prosecution on account of his mental status, the treatment of which he actively or passively avoids so as to maintain the status of “unfit to plead” and thereby forestall any prosecution for the offence. **Bail for persons of unsound mind, therefore, must be conditioned upon the accused’s family or relatives or friends undertaking to actively pursue effective treatment of the accused so that his prosecution resumes upon recovery of his mental faculties and ability to defend himself in the trial. To demonstrate progress of treatment, periodic reports to Court are necessary.** See paragraphs 169-172 of the Kenya Judiciary Criminal Procedure Bench book, 2018 at pp.104-5.”*

15. The Court considers that the principle applies equally to a sentence after trial of a person convicted of an offence on a plea of guilty but reasonably thought to be unsound mind, or mentally unstable. Indeed, in one of the several mental assessment reports on the accused dated 21/11/2012, Dr, Edwin Nyaura, Senior Specialist Psychiatrist at Moi Teaching and Referral Hospital said:

“However, at the outset, I would like to inform the Honourable court that Mr. Joshua Kibii is a known psychiatric patient who is being managed at Kabarnet District Hospital Psychiatric Unit.”

16. Even the Probation Officer’s report of 25th July 2019 acknowledged the accused’s mental status in allegation that he -

“had been previously convicted of a similar offence having allegedly killed his father by hitting with a wooden plank.”

17. However, as counseled by the Court of Appeal in **Kyalo v. R** (2009) KLR 325, this court is not able to take wholesale the allegation of previous conviction which was not present by way of records by the Prosecution and for which there was no evidence of the previous conviction, admission by the accused and or cross-examination. See **Thathi v R**, (1983) KLR 354 on how to deal with previous convictions.

18. In performance of its legal and moral duty to pass a sentence that fits the accused and facilitates his treatment and rehabilitation into a mentally healthy and responsible member of his community, an order for probation coupled with an order for psychiatric treatment and care for the period of the Probation with periodic reports on the progress of the treatment to ensure follow-through of the accused with the treatment and rehabilitation programme is appropriate and necessary.

ORDERS

19. Accordingly, for the reasons set out above, this Court makes the following orders:

1. The accused shall be placed on **Probation for a period of three years**, noting that he has been in custody pending trial for a period of 7 years and 4 months.

2. As further condition of the sentence, in the interests of securing his mental treatment, the accused shall be released to a relative, friend or other close person who shall undertake to attend to the presentation of the accused to a mental facility for his treatment and to report on the progress thereon, by a certificate in the hand of a practicing psychiatrist in a Public Hospital filed in Court every six months, within the three-year period of Probation.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kipnyekwei, Advocate for the Accused person.

Ms. Macharia, Ass. DPP for the Respondent.