



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL CASE NO. 48 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ESTHER NDUKU MUTISO.....ACCUSED

SENTENCE

Esther Nduku Mutiso (hereinafter referred to as “the Accused”), was initially charged with the offence of murder contrary to section 203 and section 204 of the Penal Code by way of an information dated 18th August 2014 to which she pleaded not guilty on 16th September 2014. An offer was subsequently made by the Defence counsel to plead to the offence of manslaughter, which offer was accepted by the Prosecution.

The Accused was thereafter on 11th October 2017 charged with, and pleaded guilty to the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The particulars of the offence were that on the night of 7th/8th August 2014 at Mwambani village, Kikule sub location in Masinga sub county within Machakos County, she unlawfully killed Josphat Kimina (hereinafter referred to as “the Deceased”).

On 7th August 2014, the Deceased, who was the husband of the Accused woke up at 6:00 am. The Accused person prepared him breakfast which he took and left for work at Ikalakala at 8:00 am. The Accused performed her duties at home and at about 10am went to Ikalakala to attend a meeting with other women, and had lunch with the Deceased. The Accused thereafter went home at 6:30 pm, prepared supper and ate with her children, and at 8 pm the Accused and her children went to sleep.

The Deceased arrived home at 10pm. He woke up the Accused and asked her to give him food. While the Accused was warming up the food, she noticed the Deceased deleting messages from his mobile phone. The Accused took the phone from the Deceased and found that he was deleting messages from a neighbor called Mary, who was married and had been having an affair with him. The Deceased had previously promised to end the affair. The Accused then threatened to tell Mary’s husband about the affair, and the Deceased thereupon took his phone.

The Accused gave the Deceased his supper and went to sleep while he was eating. When the Deceased finished he joined the accused in the bedroom and they went to sleep. After a short while the Deceased woke up the Accused and asked her why she was angry and the Accused told him she was going to inform Mary’s husband about the affair. The Deceased got angry, slapped the Accused on the cheeks and threatened her. He then went to the sitting room, put on the radio in loud volume and picked a *panga* (a machete) and hammer and went with them to the bedroom.

At that point, the Deceased again threatened the Accused that he was going to kill her and none of her family members could ever know where she is. The Accused, on sensing that she was in danger, grabbed the Deceased around the waist, and they wrestled. At the time the Deceased had the *panga* in his left hand and hammer in his right hand. The Accused then pushed the Deceased and he fell, and she escaped.

The Accused fled to a homestead that was nearby, where she spent the night and went to the nearest police post the next morning. The Accused waited at the police post until 11.00 am when the area chief, Timothy Munywoki, arrived. The Accused explained to the chief what had transpired and requested for security to go back home as the Deceased had threatened to kill her. The said chief made a call to the chief of the area the Accused person resided, and then called the police from Maunga division who picked the Accused and took her to Matuu police station.

The body of the Deceased was discovered in the bedroom the next day by his children and a neighbor. Upon investigation a charge of murder was brought against the Accused, before the Prosecution accepted the offer of manslaughter. The Accused pleaded guilty to the offence of manslaughter and admitted the above-stated facts that were narrated to the Court by Ms. Mogoi, the learned Prosecution counsel.

Ms. Mogoi also produced the post-mortem report as the Prosecution's Exhibit 1. The post-mortem was conducted on the deceased on 13th August 2014 by Dr. Mulu Simon Kioko. Corporal Stephen Mutai, Joseph Mutua and Musinga Matheka witnessed and identified the Deceased's body. The injuries noted were during the post-mortem were a cut wound on the left side of the neck, and the cause of death was cardiopulmonary arrest due to massive haemorrhage caused by the wound.

The Accused was convicted of the offence of manslaughter on her own plea of guilty, and I am now called upon to pass sentence bearing in mind that the maximum sentence for the offence of manslaughter is life imprisonment under section 205 of the Penal Code.

Mr. Kaluu, the learned Defence counsel, sought for leniency in mitigation due to the fact that the Accused is that the accused is a first offender, in deeply remorseful, she is the mother of four children, the oldest being 15 years and the youngest 6 years who have been left without a father and their mother's incarceration has affected their education and upkeep. Further, that the Accused has been in custody for three years since 8th August 2014, and the loss of her husband and father of her children will always weigh on her conscience.

In further mitigation, the counsel stated that the facts show the Deceased was the aggressor in the events that led to her demise which nonetheless the Accused regrets. He sought a lenient sentence.

The Prosecution did not manage to file a victim impact statement in Court citing difficulties in tracing the Deceased's relatives. The Court then directed the Probation Service to file a pre-sentencing report, which report was filed in Court on 5th February 2018. It is noted from the report that the Accused was considered positively by the local administration and community, and that her parents and siblings are receptive to a non-custodial sentence, and are ready to reintegrate her to the society and reunite her with her in laws.

The Accused's in-laws are however opposed to the Accused's release stating that the Accused's parents did not initiate compensation talks. The Accused' parents however explained that compensation is not customarily possible as they had received dowry for the Accused.

I have considered the facts of the case and the circumstances in which the Deceased's death occurred, as well as the mitigation and pre-sentencing report by the Probation Service. It is evident that the Accused was provoked and threatened, and did not have the intention of killing the Deceased, as she would not have known that her act of pushing the Deceased would cause him grievous harm leading to his death. The Court also notes in this regard from the pre-sentencing report that the Accused's home environment will be suitable for her rehabilitation, as her parents are willing to assist her re-integration into the community.

I therefore find that a non-custodial sentence will be appropriate in the circumstances of this case, and also taking into account the fact that the Accused has been in custody for more than three years. I accordingly sentence the Accused to one (1) year probation sentence, **under the supervision of, and direction of the Probation Officer in Machakos County, and order that the Accused to be hence forth released from custody unless otherwise lawfully held.**

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 20TH DAY OF FEBRUARY 2018.

P. NYAMWEYA

JUDGE