



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCR NO. 41 OF 2017

[Formerly Eldoret HCCR 45 of 2016]

REPUBLIC.....PROSECUTOR

VERSUS

ISAACK KIPSANG.....ACCUSED

JUDGMENT

1. The accused pleaded guilty to a lesser charge of manslaughter contrary to section 202 as read with 205 of the Penal Code following a plea bargain agreement which the court accepted having established the lack of intention to kill as a basis of the plea bargain agreement and the voluntariness of the agreement on the part of the accused.

2. The facts of the case as accepted by the accused were as follows:-

7. On the 6th day of April 2007 at about 1400hrs the accused went to his grandmother's home (the deceased). He found she had prepared traditional liquor namely busaa and was in company of one Selinah (his mother) and one Rebecca. He was given a cup of busaa to partake. He continued drinking when his mother inquired from the deceased why she wanted to kill her children by giving them alcohol. She alleged that the deceased caused her husband's death. This led to an argument between all of them. The accused then asked the deceased why she had refused to give him cows. The said Rebecca sided with the deceased and this angered the accused person. He hit the said Rebecca on the forehead and his mother pulled Rebecca and they both ran away leaving the deceased with the accused. The accused picked up a panga which was in the deceased's house and slashed her feet and he hit her on the chest and forehead. The deceased screamed as she was being assaulted and this attracted her grandchild one Paul Kiplagat. He found the accused had already escaped and he mobilized members of the public to rush the deceased to Mercy hospital in Koibatek. However, the deceased succumbed before reaching the hospital. The Assistant chief visited the scene where he recovered the panga used by the accused. He went to report the incident at Kabarnet Police Station and handed over the panga as an exhibit. A post-mortem was conducted on 8/4/2007 and the doctor opined the cause of death as respiratory failure secondary to right sided pneumothorax with collapse of right lung. The accused was arrested and taken to court and charged with the offence of murder which has now been reduced to manslaughter. The accused person was thereafter presented before the doctor at Moi Teaching and Referral Hospital for mental assessment who confirmed he was mentally fit to stand trial.

3. Having accepted the factual basis of lack of intention to kill as to the foundation of the plea bargain and having noted the accused's certificate of fitness to plead and, on examination, cv the voluntariness of his plea bargain agreement, and thereafter his plea to the charge of manslaughter, the court convicted him for the offence and reserved sentence upon taking mitigation and pre-sentence report by the Probation Officer, and submissions thereon by the counsel for the accused and for the DPP.

4. Counsel for the accused urged the court to consider that the accused, aged 30 years, had been in remand for 10 years from April, 2007. He further urged that the court, the prosecution and the defence had a joint responsibility to ensure that an accused is transformed into a useful Kenyan citizen and lamented that the killing was as a result of drinking the illicit brew which is prevalent in the area.

5. The Probation Report, while positive for rehabilitation, cited bitterness on the part of the deceased's son as a ground for refusal of the non-custodial sentence plea by the accused.

6. In the circumstances, the DPP urged a custodial sentence to avoid a confrontation between the family of the deceased and the accused as would lead to another killing as the one presently before the court.

Determination

7. The court notes that the accused has been in custody since April, 2007, a period of close to 11 years, the matter having been subject of successful appeal to the Court of Appeal which ordered a retrial. The killing was a result of disagreement arising in a drinking spree where

the accused, his mother and grandmother drunk together with a friend.

8. Considering the diminished blameworthiness of the accused in view of his drunkenness, the court considers that the period of 11 years in prison remand is a sufficient punishment for the offence of manslaughter in the circumstances of the case.

9. The accused has also pleaded guilty to the offence and he is entitled to benefit for a lenient sentence on that account as the matter did not have to go to full trial. See *Wanjema v. Republic [1971] EA 493, 494.*

10. That the deceased's son is still bitter with the accused 11 years after the fact of the killing of the deceased should not prevent the court from doing justice in the matter by rendering a just sentence in the case, taking into account all the circumstances of the case including the community's positive attitude to prospects of community-based rehabilitation. The Probation Officer's Report dated 15/1/2018 sets out its conclusion and recommendation as follows:-

“[T] The youthful offender before court regrets committing the offence claiming to have been intoxicated with alcohol. The deceased's son is still bitter about the loss and no reconciliation and cleaning rite has been spearheaded by the accused's family.

The local administration described the accused as a person of prior good conduct but noted that there is sharp division between accused family members concerning non-custodial sentence.

His immediate neighbours expressed no reservation over community-based rehabilitation citing that accused family ought to reconcile since they are related for peaceful coexistence.

In view of the staled reconciliation, expression of bitterness by the deceased son and the safety of the accused, this case may be dealt with otherwise.

Julius K. Limo

Probation Office

Baringo.

11. Because of the long period that the accused has been in custody awaiting his conclusion of trial, I would have to disagree with the Probation Officer on the mode of sentence. I consider that the 11 years served by any of accused awaiting trial is more than sufficient punishment for the offence of manslaughter.

12. The accused may for his own interest in social cohesion pursue and complete traditional reconciliation rites but such cannot, in the circumstances of this case, disentitle the accused to an order that the sentence on the accused be such as would enable his release on account the long detention awaiting trial. For the offence of manslaughter in similar circumstances this court has passed an imprisonment term for eight (8) years.

Order

13. Accordingly, for the reasons set out above, the court upon convicting the accused for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, sentence the accused to imprisonment for a term of 8 years from the date when he was arrested and remanded in custody awaiting his trial, in terms of section 333 proviso of the Criminal Procedure Code.

14. As the accused has been in custody for close to 11 years and has, therefore, served the imprisonment terms of 8 years in full, there shall be an order for his immediate release from custody, unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 21ST DAY OF MARCH, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Mr. Miyenda for Mr. Kipnyekwei for Accused.

Ms. Macharia, Ass. Director of Public Prosecutions