



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 6 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

KASSEM CHANGWONY.....ACCUSED PERSON

RULING ON SENTENCE

1. Kassem Changwony (the “Accused Person”) was originally charged with murder of James Waweru Mbira contrary to section 203 as read together with section 204 of the Penal Code. He was first arraigned on 08/01/2014. He denied the charges.

2. By a Plea Agreement dated 02/05/2018, the Accused Person pleaded guilty to the charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code. After due caution, and after satisfying myself that the Plea Agreement was entered into knowingly and voluntarily, I recorded a conviction and called for pre-sentencing report and victim impact statements (if desired) and set the case for a sentencing hearing.

3. The agreed facts of the case are laid out in the Plea Agreement as follows:

[O]n 1st January, 2014, at about 9:00pm, at Tuyoitich village within Solai Division, the Deceased went to the House of Mercy Chepkemoi Yatich. Shortly thereafter, the Accused appeared and met the Deceased in the same [house] of Mercy Chepkemoi. Since both were drunk, a quarrel ensued between the Deceased and the Accused each blaming the other why [they were] following the footsteps of the other (sic) wherever they go as the[y] exchanged bitter words to each other. Immediately, the Accused took a lantern lamp which was in the kitchen and hit the Deceased on the head. The owner of the house, Mercy Chepkemoi ran outside to call neighbours to come and assist to take the Deceased to the hospital.

The two men by the name William Kipkemoi and Stephen Chirchir came to the scene and found the Deceased lying down outside the house of Mercy Chepkemoi whereby they rendered first aid before calling one of the brothers to the Deceased by the name Braison Chepsergon to come and take the Deceased to hospital for treatment...On 7th January, 2014, the Deceased was pronounced dead while undergoing treatment...

4. The Court invited the Victim’s family to file any Victim Impact Statements or come to address the Court if they so wished. This being a case where the Deceased and the Accused Persons are brothers, the Victim’s family is the same as the Accused Person’s family. They filed an affidavit of impact through a brother to the Deceased and the Accused Person, Walter Laktano Kessem. He also appeared in Court but said that his affidavit represented the family’s views and he wished to add no more. The affidavit spoke more towards accepting the downgraded charge of manslaughter but spoke of the family having no “bad feelings against the Accused who is our brother.”

5. Mr. Chigiti, the State Counsel, informed the Court that the Accused Person is a first offender. He recommended imposition of five years probation adding that the Prosecution had received a very positive report from the area chief about the Accused Person’s antecedents.

6. The Probation Report filed at the request of the Court was wholly positive and found the Accused Person fit for non-custodial sentence.

7. I begin by noting that the Accused Person has been in custody since 08/01/2014. That is slightly more than four-and-a-half year. In the circumstances of this case, even if the Accused Person was not fit for non-custodial sentence, that period would probably have been sufficient custodial sentence. Whatever reflection; whatever reform; whatever lesson the Accused Person was to learn; and whatever penitence was needed from the Accused Person for his thoughtless actions that fateful January night, has been accomplished in those four-plus years.

8. There are no aggravating circumstances in this case. While sad that the life of a brother was cut short by a blitz of momentary madness, it is not possible to say in any way that respects the meaning of words that the homicide was planned. It was caused by a spontaneous act fuelled by drunken envy which sooner turned to sore and lugubrious bereavement and remorse.

9. I have considered the following relevant factors in fashioning an appropriate sentence for the Accused Person in this case:

- a) The Accused Person pleaded guilty to the reduced charge of manslaughter.
- b) The Accused Person demonstrated genuine remorse.
- c) The family of the victim has expressed a strong wish that the Accused Person be committed to non-custodial sentence.
- d) The Accused Person is a first offender.
- e) The Probation Report is quite favourable and recommends non-custodial sentence which, it says, will provide an opportunity for the Accused Person to be rehabilitated.
- f) While not rising to the level of negating *mens rea* to the commission of the crime, the Accused Person was drunk at the time of commission of the crime. So was the Deceased. Indeed, the two were engaged in a drunken brawl.
- g) The circumstances of the crime do not point to a particularly well-planned or violent conduct on the part of the Accused which should attract societal opprobrium or disapproval in the form of a prison sentence.
- h) The Accused Person was remanded for more than four-and-a-half years because he could not post bail.

10. Given all these factors, my considered conclusion is that this is an appropriate case for a non-custodial sentence. I have taken the sentiments of the victim's family seriously in coming to this conclusion coupled by the fact that Probation Report recommends it. **I, therefore, sentence the Accused Person to serve a Probation Sentence for a period of three years under the supervision and direction of the Probation Office, in his Sub-County.**

11. Orders accordingly.

Delivered at Nakuru this 28th day of June, 2018.

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JOEL NGUGI

JUDGE