



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NUMBER 15 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

P M N.....ACCUSED

SENTENCE

P M N, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 28th day of January 2013 at [particulars withheld] in Eastleigh Section III within Nairobi County murdered J A N. He was convicted of the same on 19th June 2017. This court was informed by the Prosecution Counsel that the accused does not have previous criminal records and should be treated as a first offender. The matter was then deferred to 21st June 2017 to receive mitigation before sentencing.

Mr. Kariu mitigated on behalf of the accused. He told the court that the accused is remorseful for the death of the deceased; that he was a minor in Form 1 when the offence was committed; that he is an only child of a single mother who is ailing from cancer; that at the time of this incident the accused was residing in an area where drug abuse was rampant and as a result he became a victim; that he has reformed while in custody and that he ought to be given a chance to contribute to society. Counsel urged the court to commit the accused to a non-custodial sentence.

This court record shows that the accused was 16 years when he committed this offence. On 11th May 2017 when he testified he told the court that he was 21 years old confirming that he was 16 years old when the offence was committed. Section 2 of the Children's Act No. 8 of 2011 defines a "**child**" to mean any human being under the age of eighteen years. This makes the accused a child when he committed the offence. Under the same Act, a child cannot be sentenced to death. The operative date is the date when the offence was committed not when the accused is convicted. The penalties applicable to children under the Children's Act are provided for under Section 191 (1) of that Act. It states as follows:

191. (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways -

(a) by discharging the offender under section 35 (1) of the Penal Code;

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation

of Offenders Act;

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;

(k) by making a community service order; or

(l) in any other lawful manner.

The accused is about 21 years of age. His age does not allow him to be committed to most of the above sentences under Section 191 of the Children's Act. This presents a dilemma to this court. The same dilemma as to what sentence to impose was faced by the court of Appeal in Criminal Case No. 118 of 2011 JKK v Republic [2013] eKLR. The Court was determining an appeal where a minor charged with murder. He was convicted and sentenced to death. The Court of Appeal found that the accused was a under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The Court reasoned as follows:

“The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.”

The Court sentenced him for 12 years custodial sentence. Similarly in Dennis Kirui Cheruiyot v Republic [2014] eKLR the same Court of Appeal was handling an appeal in which an accused aged 20 years at the time of sentencing had been 15 years when the offence was committed. In that case the accused had been charged and convicted of with murder. He was sentenced to life imprisonment. The Court reduced the sentence to 10 years imprisonment.

I have considered the mitigation. I have also noted that the accused is remorseful. The circumstances of this case are peculiar. The accused and the deceased are said to have been friends. The accused, after stabbing the deceased three times on a sensitive part of the body, the chest, which stab wounds were deep enough to perforate the left lung and cut the heart the accused stabbed himself on the left thigh. This in

my view was intended to draw attention away from the accused as the perpetrator and make him a victim of the attack as well. For a young school going boy, this action was very critical. As stated by the court of appeal, the accused is now of age and must be brought to bear the responsibility of his actions. None of the sentences provided under Section 191 is appropriate for the accused because of his age. However Section 191 (1) (l) of the Children's Act allows the court latitude to deal with the accused in any other lawful manner. In my considered view, a custodial sentence is appropriate. I have considered that he has been in custody for 4½ years. This period has been taken into account during this sentencing. The accused is hereby sentenced to serve five years imprisonment. He has right of appeal within 14 days after today's date. Orders shall issue accordingly.

Dated, signed and delivered this 23rd day of June 2017.

S. N. MUTUKU

JUDGE