REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 40 OF 2017

(FORMERLY ELDORET HCCR NO. 35 OF 2016)

REPUBLIC .....PROSECUTOR

VERSUS

JAMES KIMOSOP.....ACCUSED

RULING

INTRODUCTION

1. This is a ruling on sentence for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code following the conviction of the accused on his own plea of guilty to the lesser charge of manslaughter. The Accused was initially charged with murder contrary to section 203 as read with 204 of the Penal Code which was upon a plea a bargain agreement reduced to manslaughter. The Court convicted the accused on his own plea of guilty to the offence of Manslaughter on a charge prepared following the acceptance by the Court of the plea agreement pursuant to section 137H of the Criminal Procedure Code (CPC), upon being satisfied of the factual basis of the plea agreement and that the accused was at the time of the agreement competent, of sound mind and had acted voluntarily in terms of section 137G of the CPC.

2. The facts of the case as presented by the DPP, and accepted by the accused, were as follows:

> ***"7. The deceased and the accused herein are brothers. On the 13th day of April 2016 at around 6.00pm the accused sent his sons Kipkemboi and Kiprop aged 13 years and 10 years respectively to cut down tree branches for his animals at a nearby bush which was owned by his brother, the deceased. The deceased went to the accused's house to inquire why the accused had sent his sons to cut down the tree leaves without consulting him. The two brothers argued over the issue and a fight ensued. The deceased picked a stone and threw it at the accused. The accused person told his son to drop the panga he was using to cut the branches. The two brothers ran for the panga and the deceased managed to grab it. The accused got hold of the deceased and he fell down, dropping the panga. The accused collected the panga and cut the deceased and inflicted injuries on his body. He died on the spot. The accused then ran away and went to Marigat police station where he surrendered to the police and was arrested. The scene was visited and the body was removed to Kabarnet District Hospital. Post mortem on the body of the deceased was done on the 18th April, 2016 and the cause of death was established to be multiple injuries and spinal cord injury due to sharp force trauma due to assault. The accused was taken to court and charged with the offence of murder which has now been reduced to manslaughter. The accused was thereafter presented before the doctor at Kabarnet District hospital for mental***

assessment who confirmed he was mentally fit to stand trial."

3. Upon conviction and in order to assist the Court in reaching an appropriate sentence, the Court called for a pre-sentence report from the Probation Department in accordance with section 137I of the CPC, which provides as follows:

> *"**137I. Address by parties***
>
> *(1) Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with section 216.*
>
> *(2) In passing a sentence, the court shall take into account—*
>
> > ***(a) the period during which the accused person has been in custody;***
> >
> > *(b) a victim impact statement, if any, made in accordance with section 329C;*
> >
> > *(c) the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;*
> >
> > *(d) the nature and amount of any restitution or compensation agreed to be made by the accused person.*
>
> ***(3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report."***

PRINCIPLES

4. In ***Republic v. Philip Muthiani Kathiwa***, Machakos High Court Criminal Case No. 14 of 2015, the Court considered the issue of appropriate sentence in a case of manslaughter upon a plea of guilty and said:

> ***"The Principles***
>
> *3. The objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.*
>
> *4. Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. See **Mokwa v. R** (1976-1980) KLR 1337. The accused herein acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked by with a panga. The use of the poisoned arrow on the deceased, in the circumstances if this case, was excessive force, and the accused was guilty of Manslaughter.*
>
> *5. In considering the appropriate sentence, same offences should attract similar consistent penalties. In **Andrew v. R** (1976-1980) KLR 1688, in a case where the appellant and his co-accused had in a fight started by them the deceased was stabbed, the Court of Appeal found manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In **Orwochi v. R** (1976-1980) KLR 1638, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of eh appellant a young man aged 25 who had been in custody for 15 months before the sentence in*

the trial court and six months before appeal was heard and determined.

6. The decision of the Court of Appeal in ***Muoki v. R*** *(1985) KLR 323 (Madan, Kneller JJA. & Platt, Ag. JA) is relevant. The Court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that*

"Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

DETERMINATION

5. The accused's mitigation was he was sorry; that he surrendered to the police immediately he realized his mistake; he is married with 3 children all of school going age; and he therefore prayed for a non-custodial sentence.

6. The Probation Officer's Report recommended a non-custodial sentence as follows:

"The family have agreed that accused be released on non-custodial sentence. This follows agreement by all family members that he has learned his lesson and his children need him for care and guidance.

Your honour, deceased and accused are siblings. The family has discussed and agreed unanimously that he be released under a non-custodial sentence as he has expressed remorse, and also so that he may take up the responsibility of his family. He is therefore recommended for probation."

7. The DPP did not object to the accused being placed on a non-custodial sentence.

8. Having considered the facts of this case as set out above, it appears to me, firstly, that although the accused killed his brother following a domestic quarrel and ensuing fight, the accused had used excessive force in his attempt to ward off or subdue his attacker, if it is assumed that the deceased was the aggressor when the fight broke out. The accused is the one who called for the panga, which his children were using up the tree to cut the tree branches. There was no evidence that the deceased was armed with anything more than a stone which he threw at the accused, and the accused's calling for the panga which he subsequently used to cut up his brother was unwarranted in view of the threat that he wished to counter.

9. Secondly, the accused would appear to be a person of violent temper who does not flinch at using a panga to stop a confrontation by his brother resulting from his own wrongful action of harvesting tree branches for his brother's shamba without permission. Even if the confrontation did not result in the death of his brother, the accused would have been liable to be charged with malicious damage to property of his brother in addition to any charges for the fighting or assault. I consider that the appropriate sentence should seek to deter the *Cain and Abel* syndrome, which I, with much concern, have noted is prevalent in these parts of the Country.

10. It is a principle of sentencing that a sentence must reflect the accused's blameworthiness for the offence. See ***Omuse v. R*** (2009) KLR 214, where it was held that the **sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender** and that the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence. In this regard, the accused's offensive conduct of harvesting what does not belong to him was the genesis of the fatal confrontation, and the accused should in social retribution pay for his sins.

11. In terms of section 137I (2) (b) of the CPC, I have taken into account that the accused had been in custody for over one (1) year, and therefore having regard to the conventional sentences in the cases cited above of 3 ½ to 5 years, I find that the appropriate sentence is an imprisonment for a term of two years, the period running from the date of this sentence.

12. For the above reasons, Although I have noted the accused's mitigation, I do not consider it appropriate to place the accused on probation.

Orders:

13. Upon conviction for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, the accused is sentenced to serve an imprisonment of two (2) years from the date of this sentence.

DATED AND DELIVERED THIS 27TH DAY OF JULY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances**:**

Mr. Tarus for the Accused.

Ms. Macharia As. Deputy Director of Public Prosecutions.