



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 32 OF 2015

REPUBLIC.....PROSECUTOR

Versus

DAVID MAKALI MUTISO.....1ST ACCUSED

EMMY MUSIMBI.....2ND ACCUSED

SENTENCING REMARKS AND VERDICT

Before me is one David Makali in this matter already convicted with the offence of manslaughter contrary to section 202 as read with section 204 of the Penal Code. The trial was concluded after the prosecution called thirteen (13) witnesses in support of the charge of murder contrary to section 203 of the Penal Code but on evaluation by this court it was reduced to that of manslaughter. This is the offence in which you will be sentenced pursuant to the conviction.

I have heard the mitigation by Mr. Sekento, learned counsel holding brief for Mr. Kivuva your regular counsel. Learned counsel prayed for leniency on the following grounds:

That you are a first offender and a young man married with children. Learned counsel further submitted that you are remorseful and do regret the offence coupled with the fact of your family you deserve non-custodial sentence. Learned counsel further advanced the argument that the pre-sentence report paints a positive picture about your character and conduct within the community. That aspect according to learned counsel should persuade this court to apply some level of leniency in this matter.

Mr. Akula, the senior prosecution counsel submitted and confirmed that you have no previous criminal record. He therefore urged this court to treat you as a first offender. The learned prosecution counsel prayed for a deterrent sentence on the basis that killing of a human being without any recourse is a serious offence. That the legitimate expectation by the society is for offences of this nature to be appropriately punished as a measure of protection.

During the sentencing hearing the father of the deceased represented the family. In his victim impact statement he deposed that death of the deceased who was their first born son has been tragic and traumatic. It is not only a loss to them as a provider who supported them both financially and socially but it has led to the mother developing hypertension. The father urged this court to take into account the said circumstances while considering the verdict.

All these factors are relevant in sentencing. The offence of manslaughter is punishable by a maximum

penalty of life imprisonment under section 204 of the Penal Code. The intention of the legislature was to provide for weighty sentence for the courts to apply in the events circumstances of the case do permit. Under this penalty courts are allowed some level of exercise of discretion and only reserve the maximum to the very serious nature of the offence to warrant imposition of life imprisonment.

I do not consider your case to fall among those few demanding for the maximum penalty as provided for under section 205 of the Penal Code. The starting point in determining the appropriate custodial sentence for this offence is to consider whether there are any aggravating factors. The deceased was a young man aged on or about 24 years. His life was prematurely terminated by your unlawful act of inflicting serious bodily harm.

The degree of injury to the head was extensive. Upon examination by the pathologist in his postmortem report the cause of death was due to head injury due to the blunt force. Your conduct during the beatings and after the death of the deceased demonstrates that you were reckless and negligent in the manner you participated in killing the deceased.

Even when the deceased sought for forgiveness you could not hear of it.

I have also considered that you armed yourself with a piece of wood which had a fixed nail on it in order to intensify the assault. It is also on record that you went to considerable length to drag the body of the deceased to the nearby dumpsite to conceal the evidence.

I have considered the impact statement of the father Joseph Kamonde. He has set out the effect of the murder of their son in circumstances which are unexplainable. The father observes that they will live permanently with the loss but with deep sense that was caused by a criminal mind.

In my judgement these aggravating factors outweigh the mitigation, the pre-sentence reports and the report that you have no previous conviction. The only factor i take note of is that you have been in remand custody since 2/11/2015. This period served will be discounted from the sentence i pass against you.

In this regard, i give weight to the grave nature of the offence and the aggravating factors which supports the emphasis reinforcing the length of custodial sentence. I am satisfied in all the circumstances of this case overall interest in the matter i sentence you to ten (10) years imprisonment.

14 days right of appeal explained.

Dated, delivered and signed in open court at Kajiado on 4th day of August, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Sekento for Kivuva for the 1st accused present

Mr. Akula for the DPP present

Mr. Mateli – Court Assistant