



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRC NO. 58 OF 2017**

**(FORMERLY ELDORET HCCR NO. 80 OF 2016)**

REPUBLIC .....PROSECUTOR

VERSUS

GILBERT KIPKORIR KOECH.....ACCUSED

**JUDGMENT**

[1] The Accused who was originally charged with murder contrary to section 203 as read with 204 of the Penal Code later pleaded guilty to manslaughter following a plea bargain agreement, the factual basis of which as urged by the DPP and accepted by the Court was that the accused's intention to kill was not clear and there was some element of self-defence as the deceased had charged towards the accused.

[2] The accused was examined by a Psychiatrist and certified fit to plead. The Court was satisfied upon examination on oath of the accused that he had voluntarily entered into the plea bargain agreement reducing the charge from murder to manslaughter and his intention to plead guilty to the reduced charge.

[3] The facts of the case as set out by the Prosecution and accepted by the accused were that:

**Facts**

*“On the 31<sup>st</sup> day of October, 2016 at about 1.00pm at Kituro village the deceased was in the company of his friends Francis Kipchumba and Timothy Wabwoba. They were at the homestead of one John Kiprono in a motor vehicle Reg No. UAN 780 pickup offloading nappier grass. The accused then arrived and confronted the deceased and they started arguing. They were almost fighting when Francis Kipchumba ran and separated them, after they were separated, the accused ran away from the scene but the deceased followed him armed with a stone which he threw at the accused. The accused then removed a knife which he used to stab the deceased on the chest. Francuis Kipchumba and Timothy Wabwomba waited for the deceased to come back and when he did not turn up, Francis went to check and found the deceased outside the compound dead lying in a pool of blood. Police officers from Kabarnet police station visited the scene and removed the body to Kabarnet referral hospital mortuary. Post-mortem was conducted on the body of the deceased on 9<sup>th</sup> of November 2016 and the doctor formed an opinion that the cause of death was severe chest trauma due to cardiac injury due to stab wound. The accused was arrested later by members of public and rearrested by police officers. The accused led the police to the place where he had hidden the knife suspected to have been used to kill the deceased. He was 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.*”

The knife used by the accused; rough and fair sketches of scene of crime and surroundings; the post-mortem examination report; and the accused's mental fitness certificate were produced as exhibits in the case .

[4] The Probation Officer's Pre-sentencing Report was negative for non-custodial sentence as follows:

### **Conclusion**

*"My lord, the accused is aged 24 years and he has no previous conviction. He pleads the court to treat him with leniency.*

*Social enquiry revealed that the accused family is still living in fear to an extent they were unable to initiate reconciliation process. The deceased family is still bitter and is yet to come into terms with the loss, more so that the accused family has not made attempts to reconcile with them. His community members raised concerns over his safety and it could be untimely to have him within the community.*

### **Recommendation**

*From the above prevailing conditions non-custodial sentence seems inappropriate. However this is subject to the discretion of the court."*

### **Conviction**

**[5] The court accepted the accused's plea of guilty after confirming his acceptance of the facts as set out by the Prosecution, and, accordingly, convicted him for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code. .**

### **Sentence**

[6] In mitigation, counsel for the accused urged as follows:

*"Accused is remorseful for what happened. There was no mens rea for taking the life of deceased. The accused is a young man of 24 years. He was a student at the Kenya School of Government pursuing Food and Technology Diploma, and he operated a hotel where he raised fees for himself. He is a first offender. We urge that the court exercises leniency. The offence was committed under extreme provocation by deceased. He was being chased around by the deceased and throwing stones at him. We pray for leniency so that he can restart his life. He has pleaded guilty. I pray for Probation Officer's Report. He may go to Eldoret away from Kituro."*

Counsel, therefore, urged that the accused may be exiled to Eldoret, as it were, consistently with alleged Kalenjin Custom of banishing a person who had killed another.

### **Excessive force**

[7] It would appear that the accused over-reacted and responded to the alleged provocation by deceased's stone(s) throwing. He is said to have remove a knife and stabbed the deceased. Evidence does not show that the accused's life was in any way threatened by the stone with which the deceased was armed. There was no evidence that more than one stone was used and the danger that a stone, as distinguished from a rock or boulder, would pose cannot be assumed to have been fatal. I find this to be use of excessive force in meeting the alleged threat. The accused was wholly to blame for the act that caused the death of the deceased, his blameworthiness is not diminished by any alleged provocative acts of the deceased. The Court recalls that at the beginning, it was the accused who on finding the deceased and others going on with their business of off-loading nappier grass "confronted and an argument ensued [and] they were almost fighting when Francis separated them".

[8] Despite the fact that the accused is a young man of 24 years attending college before the incident resulting in the killing of the deceased, the Court considers that the circumstances of this case of use of excessive force leading to the killing of the deceased who was only armed with a stone calls for a custodial sentence. The Court also notes the concurring view of the Probation Officer as to non-suitability of a non-custodial sentence. See the decision of this Court in HCCRC NO. 40 OF 2017 (FORMERLY ELDORET HCCR NO. 35 OF 2016), **REPUBLIC V. JAMES KIMOSOP.**”

[9] I consider that a custodial sentence will serve minimalist retributivism, where the sentence while meting out just punishment to the accused for his wrong doing, also permits his rehabilitation to appropriate social behaviour as a young man with full life ahead, and at the same time deter other potential offenders. The sentence of imprisonment should be such as to permit the accused to resume his college studies after serving his due time.

[10] The Court of Appeal in **Orwochi v. R** (1976-1980) KLR 1638 thought the period of 21 months to be adequate punishment for manslaughter in circumstances of self-defence not too dissimilar to the present case as noted by this Court in Machakos HC Cri. Case No. 14 of 2015, **REPUBLIC V. PHILIP MUTHIANI KATHIWA**, as follows:

*“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 the 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.”*

[11] I have considered the offer by Counsel for the accused that the accused could go to live with relatives in Eldoret if the Probation Officer’s report is negative for non-custodial sentence on account of volatility of the situation on the ground at his present residence. It is, however, not the proper role of the Court to assist the accused to avoid just punishment for his criminal act. I consider, however, that the accused who is 24 years old has been in custody since November 2016, a period of ten (10) months. I think that an imprisonment term of three (3) years with possibility of remission will permit the accused to leave prison after serving 24 months or in the next 14 months early enough for him to resume his college studies, at the age of slightly over 25 years.

## **ORDERS**

[12] For the reasons set out above, having convicted the accused on his own plea of guilty to the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, and having considered the facts of the case, sentence the accused to an imprisonment for a term of 3 years to be reckoned in terms of the Proviso to section 333 of the Criminal Procedure Code, from the date of his remand upon arraignment on 22<sup>nd</sup> November 2016.

[13] Right of appeal explained.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2017.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Chebii with Mr. Chepng'oswo for the accused person

Ms. Kenei, Prosecution Counsel for Director of Public Prosecutions for DPP.