



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL CASE NO. 10 OF 2016
REPUBLIC
VERSUS
EVERLYNE KAWIRA MUGAMBI.....ACCUSED
JUDGMENT

The accused was initially charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** the particulars being that 2nd November, 2016 at Uaso Nyiro Trading centre in Kieni West Sub-county within Nyeri County, she murdered Joseph Gitari Ashford.

She entered a plea of not guilty but soon thereafter her counsel and the state engaged in plea bargain negotiations. The negotiations eventually culminated in a plea agreement which was registered in court on 17th May, 2017. The essence the agreement is that accused agreed to enter a plea of guilty to a lesser charge of manslaughter.

Consequently, the state filed fresh information according to which the accused was charged with the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The particulars for this substituted charge are that on the 2nd November, 2016 at Uaso Nyiro trading centre in Kieni West Sub County within Nyeri County, the accused person unlawfully killed Joseph Gitari Ashford.

As noted the accused person entered a plea of guilty for this offence after the court had explained the plea agreement to her. She confirmed under oath that she understood its import and more particularly the provisions of **section 137A** of the **Criminal Procedure Code** which is the basis upon which the agreement was made.

The facts upon which the charge against the accused was based were that, on the 9th of November, 2016 at Uaso Nyiro trading centre, the county of Nyeri, both the deceased and the accused person had been drinking in a bar when at around 11 PM, they retired back to their house, a short distance away from the trading centre.

While in the house, they disagreed apparently over food. They then engaged each other physically and fought. It is in the course of the fight that the deceased was apparently stabbed. His body was found in the house. He had been stabbed on the chest and the middle finger. Meanwhile, the accused ran away but was arrested while on her way to Meru, where her parents live. She was found with some of the deceased's personal items including his identity card and employment documents.

The accused confirmed these facts to be true and was accordingly convicted on her own plea of guilty.

The counsel for the accused mitigated on her behalf and submitted that the deceased and the accused had all along enjoyed a cordial relationship. It is because of this sort of relationship that they had even been drinking and chewing khat together on the fateful evening.

She also submitted that the accused had no intention of killing the deceased but that her action may have largely been influenced by the effect of alcohol and khat on her sense of judgment.

Counsel also asked the court to consider that the deceased and the accused person had a child together. The child is a little over a year old and needs the motherly care in an environment more suitable than a prison. She therefore urged the court to consider a non-custodial sentence.

Before meting out the sentence against the accused person, I directed the probation officer to file a report on the accused person's social background. The report was duly presented in court and I have had time to consider it. It reveals that the accused hails from a poor family. Her parents eke out their livelihood from menial jobs.

The accused herself dropped out of school due to early pregnancy; she rejoined school after birth but dropped out again when she could not raise school fees. She then started working in a bar as a maid at Chogoria; it is while she was so engaged that she met the deceased. They cohabited as a married couple; they then moved to Thika after the deceased sold his share of land which he had inherited from his parents. They moved together with the accused person's child but he was later to be brought back to the accused person's parents because of constant quarrels and physical confrontations between the deceased and the accused.

Despite the accused's child departure, the deceased still subjected the accused to physical violence. When she couldn't bear it any more, she moved out to live on her own; however, the deceased would always follow her. To avoid him, the accused started living with her sister at Mweiga in Nyeri. Undeterred, the deceased followed her there. Somehow they reconciled and the accused left her sister's house and moved in with the deceased in a house of their own at Uaso Nyiro. It is here that the deceased died barely a week after they moved in.

Despite this unfortunate event, the accused was described as obedient and hardworking but her character changed when she started working as a barmaid.

She regretted having killed the deceased; the two were used to fighting and it was never her intention to kill the deceased.

The probation officer also engaged the victim's family and reported that they were aware that the deceased and the accused person were living together as husband and wife though the accused had not been formally introduced to the deceased's family. The family was also aware of the differences between couple but never thought their differences would result into a fatality. They have, however, no grudge against the accused person.

The relatives of the accused are remorseful and have urged that the accused be given another chance to pick up her life afresh. It was reported that she has acquired some skills in processing of soap and detergents and also in baking of cakes. Given another chance she would employ these skills in taking care of herself and catering for her two children.

Section 205 of the **Penal Code** prescribes the sentence for the offence of manslaughter; it states:-

205. Punishment of manslaughter

Any person who commits the felony of manslaughter is liable to imprisonment for life.

The offence is a felony and owing to its gravity the maximum penalty on conviction is equally severe. However, the penalty is not mandatory meaning that the court has the discretion not to impose the maximum penalty if circumstances so demand; such circumstances would, in my humble view, include the circumstances under which the offence was committed, whether the accused person is remorseful and if there are any mitigating circumstances that would warrant a less severe sentence than the prescribed maximum penalty.

Coming to the accused person's case, I appreciate that she is remorseful. She killed the deceased after a drunken stupor. Her sense of judgment may probably have been impaired. Considering her history with the deceased, that they were used to fighting but still lived together, I am persuaded that she did not set out to kill the deceased in what has turned out to be their last confrontation.

Equally important to note is that the accused is a mother of two minors one of whom is a toddler. These innocent souls require and, as a matter of law, are entitled to their motherly care which, in my humble view, they will be deprived of if their mother is incarcerated.

On the other hand, in order for the scales of justice to balance, the offence for which the accused person has been convicted cannot go unpunished for justice must not only be done but it must be seen to be done. I have to juggle between punishing the offence, subject of course to the mitigating factors I have pointed out, and the competing interests of the minors. This balancing act leads me to sentence the accused person to three years imprisonment save that the sentence shall be suspended on condition that the accused does not commit any other offence that attracts a sentence of at least six months imprisonment irrespective of the option of a fine. For this reason, she will be subjected to the supervision of the probation officer during the three years that the sentence is suspended. She is otherwise set at liberty unless she is lawfully held.

Signed, dated and delivered in open court this 24th day of November, 2017.

Ngaah Jairus

JUDGE