



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCR NO. 30 OF 2017

(FORMERLY ELD HCCR. NO. 52 OF 2015)

REPUBLIC.....PROSECUTOR

VERSUS

JOSIAH KEITANY CHELIMO.....ACCUSED

JUDGMENT

1. The accused was initially charged with murder contrary to section 203 as read with section 204 of the Penal Code which was upon plea bargain ground reduced to manslaughter contrary to section 202 as read with section 205 of the Penal Code. The court accepted the plea bargain agreement between the accused and the DPP as urged by the DPP on the grounds of provocation of the applicant by the deceased.

2. The facts as read by the DPP and accepted by the appellant were that:-

“On the 26th day of July, 2015 at around 6.00pm, the accused left his home to the trading centre. While on the way he heard some noise of people quarrelling. He decided to go back and check what was happening since the noise was coming from near his home. When he approached the scene he saw the deceased ISAAC KIPYEGON CHIRCHIR being escorted by NICHOLAS KIPSANG MICAH CHELIMO while his hands were tied with a rope. The two were escorting the deceased to the assistant chief's office for creating disturbance. The accused then heard the deceased say that even though he was being taken to jail he would come back and that he must die with one of those who were taking him to jail. Immediately the deceased saw the accused, he said that he had injured the accused one with an arrow and he did not die and that this time he was going to kill him. The deceased had earlier assaulted the accused with arrows, an offence which had made the deceased be imprisoned for 2 years. The deceased had completed the said sentence in October 2014. The words uttered by the deceased angered the accused who took a stone and hit the deceased on his forehead so severely that the deceased fell on the ground and died on the spot. The Assistant Chief arrived shortly thereafter and found the deceased dead on the road. The accused was nowhere to be found. On the 27th day of July 2015 at about 5.00am, the accused person presented himself to the Assistant Chief who escorted him to Kabartonjo AP camp which he was re-arrested by police officers from Kabarnet Police Station.

The post mortem was conducted on the 6th day of August, 2015 where it was established that the deceased's cause of death was head injury secondary to blunt force trauma. The accused person was thereafter presented before the doctor at Kabarnet District Hospital for mental assessment who confirmed that at that time he was mentally fit to stand trial.

The accused person was initially arraigned before court on the 7th day of October, 2015 on the offence of Murder which has now been reduced to that of manslaughter.”

3. The accused responded to the facts saying in Kiswahili language “ni ukweli” – it is the truth, meaning the facts are true, and the court accordingly accepted the plea of guilty and convicted the accused for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

4. The DPP urged that the accused would be treated as a first offender as he had no previous records on the accused.

5. In mitigation, counsel for the accused Mr Tarus urged as follows:

“Accused is sorry for the incident. Provocation by the deceased was so great since the deceased had previously injured him earlier and he was almost dying. The accused is a young man of 28 years. His mother has mental illness and the father passed in and the accused is the one responsible for his siblings. We pray for non-custodial sentence.”

6. A pre-sentence Probation Officer's report dated 20/9/2017 concluded as follows:

“The youthful offender before court regrets committing the offence. Home report indicates that the accused was infuriated by the deceased’s anti-social behaviour and his subsequent attempt to attack him for no apparent reason. It is probably for this reason that the accused took the law into his hands and fatally hit the deceased. According to local administration and community members they have no objection, if the accused is ordered to serve non-custodial sentence.”

Appropriate sentence

7. In determining the appropriate sentence in this case, the court considers that the accused was provoked by the deceased, who had previously seriously injured him, when the deceased said without remorse that “he had injured the accused once with an arrow and he did not die and that this time he was going to kill him.” The accused presented himself to the police the following day after the incident on 27/7/2015.

8. Provocation is in accordance with paragraph 23.8 of the Kenya Judiciary’s Sentencing Policy Guidelines, the lead “mitigating circumstances [that] warrant a more lenient penalty than would be ordinarily imposed in their absence.” As court has on record decision imposed and imprisonment term of 5 years for cases of manslaughter under plea bargain agreement.

9. Provocation is also a defence to murder see *Maina Tumken v. R* [1965] EA. 496 C.A, where it was held that

“when the appellant killed the deceased he was still acting on the heat of passion without regarding his self control; accordingly the plea of provocation was available to the appellant and the conviction of murder shall be reduced to manslaughter.” See also Sub section 207 and 208 of the Penal Code.

10. In this case, the accused was provoked by the words uttered by the deceased recalling the letters previous attack on the accused and threatening to kill him this round. The accused on the heat of passion immediately took a stone and hit the deceased on his forehead killing him on the sight. The attack by the accused was according to evidence spontaneous and the accused had no time to regain self control. See *Yovan Vs Uganda* [1970] EA 405.

11. Having considered the provocation as a mitigating circumstance, the age of the accused and his family circumstances on responsibility that he has, and the positive pre-sentence report indicating that the deceased’s family and community do not object to a non-custodial sentence, I take the view that a suitable non-custodial sentence may be imposed in this matter.

Orders

12. Accordingly, for the reason set out above and having convicted the accused on his own plea of guilty for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, I sentence the accused to serve Probation for a period of (3) years under supervision of Baringo Probation Officer.

DATED AND DELIVERED ON 18TH DAY OF DECEMBER, 2017.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Appellant in person

Ms. Macharia, Ass. Director of Public Prosecutions