



**REPUBLIC OF KENYA**

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

**HCCR NO. 18 OF 2017**

**(FORMERLY ELD HCCR. NO. 2 OF 2012)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARGARET KABON TALAA.....ACCUSED**

**NELSON KIPTANUI THOMAS.....ACCUSED**

**PHILEMON CHEPTOO KIPSANG .....ACCUSED**

**JUDGMENT**

1. The accused Margaret Kabon Talaa, Nelson Kiptanui Thomas and Philemon Kiptoo Kipsang were initially charged with the murder of Kibii Sumukwo contrary to section 203 as read with 204 of the Penal Code. The charge was reduced to manslaughter owing to section 202 as read with section 205 of the Penal Code following approval by the court on a plea bargain agreement on the basis of lack of intention to kill the deceased.

2. The facts of the case as presented by the DPP and accepted by the (3) accused persons were that:-

*The 1<sup>st</sup> and 3<sup>rd</sup> accused persons in this matter are mother and son respectively while the 2<sup>nd</sup> accused was a friend to the 3<sup>rd</sup> accused. The deceased was the husband to the 1<sup>st</sup> accused and father to the 3<sup>rd</sup> accused person. On the 29<sup>th</sup> day of December at around 8.00pm the deceased arrived home while drunk and found his wife at home. The accused argued with his wife and a fight started between the two. The 1<sup>st</sup> accused overpowered the deceased and started beating him with sticks since he was drunk. The 1<sup>st</sup> accused beat the deceased as she called the 3<sup>rd</sup> accused to come and assist her. The deceased was used to beating the 1<sup>st</sup> accused and her children and chasing them from the house whenever he came home drunk. The 3<sup>rd</sup> accused who was in his house within the same compound responded and came out with a panga and cut the deceased on the head. During the commotion, the 2<sup>nd</sup> accused arrived and took the panga from the 3<sup>rd</sup> accused which he used to cut the deceased on the leg. A smaller sister to the 3<sup>rd</sup> accused screamed and sought for help from the neighbours when she saw her father was overwhelmed. By the time neighbours arrived, the three accused had disappeared from the scene. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons were arrested by members of public the following day while the 3<sup>rd</sup> accused was arrested later. Police from Kabarnet Police Station visited the scene and the body of the deceased was taken to Kabarnet District Hospital Mortuary. Post-mortem on the body of the deceased was done on the 19<sup>th</sup> of January, 2012 and the cause of death was established to be severe haemorrhage secondary to penetrating head and limb injuries. The accused persons were taken to court and charged with the offence of murder which has now been reduced to manslaughter. The accused persons were thereafter presented before the doctor at Moi Teaching and Referral Hospital for mental assessment who confirmed they were mentally fit to stand trial.*

3. Upon confirming the certificate of the accused as fit to plead and noting their admission of the facts, which together with the charge were put to them in Tugen Language which they professed to understand, the court accepted their plea of guilty and convicted each of them on their own plea of guilty

4. The DPP urged the court to treat the accused as first offenders as they had no previous records on the accused.

5. Mr Kandie presented mitigation on behalf of the three accused persons as follows:-

***i. Margaret Kabon Talaa***

She is 53 years widow and mother to (3) children including accused (3) the remaining (2) children are aged (12) and (9) respectively. Whose whereabouts are unknown.

1<sup>st</sup> accused regrets the action he is remorseful. He is elderly and has blood pressure and ulcers. She did not resist arrest. Before being arrested she was a farmer rearing goats and a sole breadwinner. The deceased was a habitual drunkard who never contributed. She is a first offender and the family has come to terms with the loss of the deceased. She has been in custody since 29/12/2011. We pray for a non-custodial sentence. She has referred on the goats that she had there. No one to take care of household

**ii. Nelson Kiptanui Thomas**

Accused is 26 years. He has lost an uncle. He has been living with an uncle who is now deceased. He is an orphan. He has (3) siblings who look upon him. He is asthmatic. We pray for non-custodial sentence as he is a first offender who has been in custody since 29/12/2011. He is remorseful and there is no tension any more between her family members and the community at large.

**iii. Philemon Cheptoo Kipsang**

Accused aged 28 years who has lost his father. The mother who is accused number 1 who is before court. He has two siblings aged (12) and (9) respectively whose whereabouts are unknown. He is the first born and has an injured pelvis; he has been treated throughout the trial. He is remorseful and was a sole breadwinner before being arrested. He had his household and was rearing goats. He is a first offender and we pray for non custodial sentence. He has been in custody since 29/12/2011 and his family has come to terms. He has testified. Probation Officer's Report may be taken. He has owned up to causing the death of the father which is a courageous act. He did not resist arrest. He was not in control of his action in causing a malice that resulted to the death of his father.

6. A pre-sentence report ordered by the court for each accused person contained a similar conclusion in respect of the (3) accused persons in terms as follows:

***His attitude towards the offence***

*He pleads to be treated with leniency to take care of his younger siblings.*

***Community attitude***

*The local administration and village elders were available for interview they echoed the sentiments of the deceased's family members and indicated that the accused is no longer acceptable within the community. They indicated that the whole community is unwilling to welcome him.*

***Recommendation***

*Social enquiry revealed that the accused is not welcomed in the neighbourhood and is treated as an outcast. None of the community members is willing to help in his resettlement for fear of possible violence towards the accused. His family members were not traced for interview.*

***Conclusion***

*Owing to the negative sentiments expressed by his immediate community and unavailability of any family member willing to help in his reintegration, he is recommended to be dealt with otherwise.*

**Appropriate sentences**

7. The use of a dangerous weapon - a panga to cut up the deceased and the concerted attack upon him by the (3) accused persons, in my view, calls for a deterrent punishment in the form of a custodial sentence. However the court must also consider the different roles played in the crime relied on by the accused persons and their respective mitigating factors.

8. It is accepted as a principle of assessment of sentence that the accused's moral blameworthiness is to be considered. See **Ambani v. R** [1990] KLR 161, **Macharia v. R** [2003] 2 EA 559 and **Omuse v. R** [2009] KLR 214.

9. It is also a principle of sentencing as observed in **Omuse v. R**, (*Supra*) that it is wrong in principle to impose different sentence on persons who had been convicted of the same offence, except good reason, as held in **Marando v. R** [1980] KLR 114. See also **Fatehali v. R** [1972] EA 158 (C.A).

10. A justifiable reason for disparity in sentences was adverted to the **Marando** in applying **R. V Ball** [1951] 35 CR. App. Rep 14 where **Hilbery J.** At P.166 said

***“The differentiation in treatment is justified if the Court, in considering the public interest, has regard to the differences in the characteristics and antecedents of the two convicted men and discriminates between them because of those differences.”***

I consider that the respective rules regard by the accused person in exerting a crime is a proper antecedent that may justify disparity in sentences.

11. From the evidence as stated in facts, the 1<sup>st</sup> accused as the deceased's wife who was frequently beaten by the deceased when he came home drunk might reasonably be excused for having been suffering from the "battered wife" syndrome. Her adult son 3<sup>rd</sup> accused and his friend the 2<sup>nd</sup> accused cannot claim such diminished respectively for their actions.

12. The post mortem shows that the deceased's cause of death was "severe haemorrhage secondary to penetrating head and limb injuries." These injuries were from the facts the result of cuts with a panga inflicted by the 3<sup>rd</sup> accused son of the deceased and his friend the 2<sup>nd</sup> accused, where it is said that-

***"The 3<sup>rd</sup> accused who was in his house within the same compound responded and came out with a panga and cut the deceased on the head. During the commotion, the 2<sup>nd</sup> accused arrived and took the panga from the 3<sup>rd</sup> accused which he used to cut the deceased on the leg."***

13. The facts show that the 1<sup>st</sup> accused had in the fight with the deceased following argument had "over powered the deceased and started beating him with sticks since he was drunk. The 1<sup>st</sup> accused beat the deceased as she called the 3<sup>rd</sup> accused to come and assist her."

14. The 3<sup>rd</sup> accused, son of the deceased, does not appear to have had a justification to cut his father with a panga on the head as his mother had already overpowered him beating him with sticks. The 3<sup>rd</sup> accused should have sought to separate the two fighting parents not to cut one of them on the head with possible consequence of killing him. The 3<sup>rd</sup> accused is the primary proprietor of the fatal injuries on his father who by the time was no threat to his mother or to himself as he had been "overpowered" by his mother.

15. The 2<sup>nd</sup> accused friend of the 3<sup>rd</sup> accused son of the deceased had even lesser justification to inflict the cut to the deceased on his leg. He should have taken the panga from the 3<sup>rd</sup> accused to disarm him, not to use it to inflict injury of his own on the deceased. His mob-justice attitude saw him inflict injuries that were fatal to the deceased.

16. While I find that the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were equally morally blameworthiness as the agents of the death of the deceased because it was by term injuries that the deceased succumbed, the 1<sup>st</sup> accused's moral blameworthiness with respect to the death of the deceased may only extend, on the facts presented, to her calling for the 3<sup>rd</sup> accused to assist her. Having succeeded in sub-dicing the deceased in their fight, she should in victory have left the deceased's husband defected.

17. I have considered the respective mitigation presented for the accused and particularly note the moving responsibilities by the 1<sup>st</sup> accused to the (2) other children aged 12 and 9, and the youthful ages of the 2<sup>nd</sup> and 3<sup>rd</sup> accused.

18. All the accused have been in custody since 29/12/2011, a period of close to 6 years, which must be taken into account in terms of section 333 (2) proviso of the CPC.

19. In Note ***Wanyonyi v. The Republic*** [1980] KLR 116 (**Maden, Law and Patter, JJA**) where the appellant had been convicted on his own plea of guilty to manslaughter and sentenced to imprisonment for 8 years, the court held as follows:-

***"The sentence for eight years imprisonment can't be said to be wrong in principle, but we feel that the appellant may have been very much under the influence of the chang'aa he had admittedly consumed on the afternoon of the crime, to the extent of including influencing his resentment against the deceased. In the circumstances and having regard to the appellants previous good character and to his long period of defection before trial (fifteen months) we feel that his sentence is indeed heavy and reduce it to one of five years imprisonment."***

While there was no evidence the 1<sup>st</sup> accused was drunk, the effects of repeated battering by her husband may diminish her responsibility in similar fashion.

### **Conclusion**

20. I find that the 1<sup>st</sup> accused as a frequently battered wife of the deceased. She was influenced to resentment of the deceased by the incident on the material date rekindling memories of past abuses and in the ensuing fight, there is no indication of intention to fatally injure her husband as her weapon of choice was a stick.

When called upon by his mother to assist her in her fight with the father, the 3<sup>rd</sup> accused had no justification to bring a panga and cut his father on the head reckless of what injuries he would inflict.

Less still the 3<sup>rd</sup> accused's friend who found the fray had no excuse to cut the deceased. As an independent person he should have helped in the separation of the fighting family members.

The blameworthiness of the 2<sup>nd</sup> and 3<sup>rd</sup> accused outstrips that of the 1<sup>st</sup> accused in the causing death of the deceased with which they are charged.

## **Orders**

21. Accordingly, for the reason set out above, having convicted the (3) accused persons on their 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 as follows:-

- i. Accused 1, Margaret Kabon Talaa, is sentenced to serve 5 years imprisonment. As she has been in custody for close to 6 years since 29/12/2011, there shall be an order that she be released from custody forthwith unless she is otherwise lawfully held.
- ii. Accused 2 Nelson Kiptanui Thomas and accused 3 Philemon Kiptoo Kipsang are sentenced to imprisonment for eight (8) years beginning 29/12/2011.

Right of appeal.

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

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:** -

Ms Kandie Advocate for Mr Mwaita Advocate for 3<sup>rd</sup> accused

Mr Chepkilot advocate for 1<sup>st</sup> and 2<sup>nd</sup> accused

Ms. Macharia, Ass. Director of Public Prosecutions