



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCR NO. 26 OF 2017

(FORMERLY ELD HCCR. NO. 83 OF 2014)

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD KIPKOECH MAKIMBOI.....ACCUSED

JUDGMENT

1. The accused was initially charged with murder contrary to Section 203 as read with 204 of the Penal Code. The charge was reduced to manslaughter upon a plea bargain agreement entered into by the accused and the prosecution and approved by the Court on the basis of the accused's killing of his friend deceased was not premeditated and there was therefore lack of intention necessary for the murder charge.

2. The Court examined the accused in accordance with Section 137 of the Criminal Procedure Code and established that the plea bargain was unequivocal and independent. The court also notes the accused's certificate of fitness to plead dated 11/2/2015. The charge of manslaughter was then put to the accused who pleaded guilty and subsequently accepted the facts as set out in the plea bargain agreement and stated before the court, where upon the court convicted the accused on his own plea of guilty.

3. In mitigation, counsel for the accused, Mr Tarus said as follows:

“Accused is 24 years. He deeply regrets the incident and is remorseful. He was extremely provoked and he had no intention of injuring the deceased. He was prospecting to go to College – Teachers College. He has been in custody for almost 3 years. He is the 4th born of a family of 6 children and his parents are ageing. He prays that the Court be lenient on him and put him on a non-custodial sentence”.

4. The DPP indicated that he had no previous record of the accused and he could be treated as a first offender.

5. A pre-sentence Probation Officer's Report requested by the court, however found that the deceased's family and the accused's family live within the same village and the area chief on behalf of the community sought a deterrent sentence to curtail the state of lawlessness which he saw as being fuelled by alcoholism. The Probation Officer noted that the family of the deceased were discontent that there may be no reconciliation and suggested it was untimely to have the accused released into the community.

6. Faced with the negative Probation Officer's Report counsel for the accused, reiterated that the accused had been in custody since November 2014 and urged the accused's family were still pursuing reconciliation which is a long term process.

7. I have considered the facts of the case that the accused and the deceased were friends until 3/7/2014 when upon drinking alcohol a disagreement arose and they fought with the deceased stabbing the accused on the head. The deceased had become unconscious and he was hospitalized for 3 days. The deceased ran away until 26/11/2014 when they met and argument ensued over the previous incident and they started fighting and the deceased then removed a knife which he used to stab the accused on the left foot. The accused then grabbed the knife from the deceased and stabbed him accused in the stomach and chest killing him.

8. While I agree with the community's need for a deterrent sentence to curb the state of lawlessness prevalent and driven by alcoholism in these parts, as observed by the Assistant for the Area in the Probation Officer's Report, the Court is also enjoined to consider the blameworthiness of the accused in reaching the appropriate sentence. See **Ambani v. R** [1989] KLR 161. Apart from mere retribution to punish the offender for his criminal act in a just manner, other objective of sentence include in addition to deterrence, rehabilitation, restorative justice, community protection and denunciation. See Sentencing Policing Guidelines for Judiciary of Kenya.

9. In this case, the accused was twice provoked by the stabbing with a knife on his head and foot by the deceased in the two encounters I consider the accused's blameworthiness to be diminished to the extent that it is the deceased who initiated the mutual stabbing that resulted in his death. See again, **Omuse v. R** (2009) KLR 214.

Alcohol driven violence resulting in death of the parties on slightest provocation is a primitive disposition which must be discouraged by the lawful sentences of the accused in the interest of both community protection and denunciation of the conduct. A rehabilitative sentence is always necessary for the longer term reform of the community's members.

10. In reaching an appropriate sentence in this matter, the Court must consider whether the objectives of sentencing cannot be met through a non-custodial sentence. See Sentencing Policing Guidelines page 21.

11. I consider that for the accused person diminished blameworthiness, a sentence of imprisonment for 5 years would meet the justice of the case. I then consider that a College education as sought by the accused in his mitigation would rehabilitate him to keeping away from crime.

Section 333(2) Proviso of the Criminal Procedure Code requires the Court in passing a sentence of imprisonment to take into account the time spent by the accused person in custody while awaiting trial.

12. The accused has been in custody for 3 years since his arrest on 27/11/2014. An offender sentenced to 5 years imprisonment would with remission, for which I have the reason to suppose the accused herein would be disentitled be liable to serve only 40 months or 3 ½ years. Such a sentence would allow the appellant herein aged 25 years to pursue his College education after serving his five (5) years sentence with remission in full.

Order

13. Accordingly, for the reasons set out above, having convicted the accused for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, I sentence the accused to an imprisonment term for 5 years beginning the date of his arrest on 27/11/2014.

14. For avoidance of doubt, remission is in the discretion of the Commissioner of Prison.

DATED AND DELIVERED ON 14TH DAY OF DECEMBER, 2017.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Accused in person

Ms. Macharia, Ass. Director of Public Prosecutions