



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 22 2013

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN KIPYEGO NDIWA.....ACCUSED

RULING ON SENTENCE

Martin Kipyego Ndiwa, the accused, was initially charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the murder charge were that on 10th February 2013 at General Service Unit (GSU) Camp, Ruaraka within Nairobi County he murdered Patrick Bargoria. The plea was taken on 13th May 2013 and the case was set down for hearing following the accused's plea of not guilty. Hearing commenced on 2nd December 2013 when one witness, Mr. Zachary Nyambane, testified. For reasons appearing on the court records the case did not proceed beyond that first witness until 21st March 2016 when the file was placed before me for the first time. On that date this court was informed that the accused, through his defence counsel Mr. Mathenge, had offered a plea bargain for the lesser charge of manslaughter. This took a while as the court waited for acceptance of that offer by the Office of the Director of Public Prosecutions. Finally on 23rd May 2016 the plea agreement was accepted and recorded by the court. This ruling is in respect of the sentence following a plea of guilty by the accused on the lesser charge of manslaughter.

The accused now faces manslaughter charge contrary to section 202 as read with section 205 of the Penal Code. The particulars of the charge are that on the 10th February 2013 at General Service Unit Camp at Ruaraka within Nairobi County the accused unlawfully killed Patrick Bargoria. This court has read the Plea Agreement signed by the DPP or his representative and the accused person and his defence counsel and I have satisfied myself that the requirements of Sections 137A to 137M of the Criminal Procedure Code all inclusive have been met in the plea bargaining process.

The accused pleaded guilty to the manslaughter charges and the facts were presented by the prosecution counsel. The circumstances surrounding this offence were presented as follows that a quarrel ensued between the accused and the deceased on 10th February 2013 at the Officers' Mess at the GSU Camp Ruaraka where both were taking beer. The court was told that the accused demanded back his wrist watch being held by the deceased as security over Kshs 2,000 he had given the accused. This led to a quarrel and a physical fight. Other patrons intervened and peace was restored for a moment. The accused however continued to demand his watch back. He was hit on the head with an empty beer bottle by the deceased leading to a scuffle as a result of which the accused stabbed the deceased on the chest causing him fatal injuries. The deceased was taken to Kenyatta National Hospital where he died while undergoing treatment.

The post mortem on the body of the deceased was performed on 11th February 2013. The doctor's

opinion is that the cause of death is exsanguination due to a severe chest injury due to multiple stab wounds. The accused was arrested and charged with this offence after he was examined and found fit to stand trial.

The accused admitted the facts. The court asked him to confirm or add anything that he may wish to bring to the court's attention. He then told the court that both he and the deceased were referred to Kenyatta National Hospital for treatment.

After satisfying myself that the plea was properly taken and that the accused has confirmed that he stabbed the deceased causing him fatal injuries, this court convicted the accused on his own plea of guilty. The court was asked by the prosecution to treat the accused as a first offender because the prosecution did not have any previous criminal records in respect to the accused.

In mitigation before sentence Mr. Mathenge for the accused, who mitigated on behalf of the accused, told the court that the accused was remorseful for the death of the deceased; that the death shocked him to an extent of causing him mental disability immediately after it occurred; that he is a young man of 37 years with three children aged 17, 14 and 12 years who have been in custody of relatives during the three years the accused has been in custody. Counsel told the court that the accused had been operating a barber shop at the GSU Camp Ruaraka for 15 years and during that period there had been no complaint against him or irresponsible behaviour on his part; that he was friendly to the officers and that he suffered injuries on his death as a result of the scuffle between him and the deceased. Counsel mitigated that the accused has pursued several courses while in custody and has attained several certificates (copies of various certificates in Theology were exhibited) and that the accused has also undertaken peer counseling course that will be useful to him in future. Mr. Mathenge asked this court to order that the accused serves a non-custodial sentence.

I have considered the unfortunate circumstances which led to the stabbing and eventual death of the deceased. The facts as presented by the prosecution counsel and admitted by the accused show that the accused was hit with an empty beer bottle by the deceased and he sustained injuries. The accused also told the court that both he and the deceased were referred to Kenyatta National Hospital for treatment. This was not refuted by the prosecution. I have seen the P3 Form in respect of the accused and it confirms that he had injuries. The assault on the accused by the deceased may have contributed significantly to accused's behavior of stabbing the deceased although before the stabbing the accused was the aggressor in persistently demanding his wrist watch back. Even after the other patrons intervened and cooled down tempers, the accused continued demanding for his watch.

The injuries sustained by the accused are multiple and severe. The chest cavity was penetrated and the left lung perforated. The heart was penetrated at the left atrium and left ventricle. These are fatal wounds. In view of this it is my view that a custodial sentence is appropriate.

I have taken into account that the accused has stayed in custody for over three years. I have taken into account the circumstances surrounding this offence including that the accused was assaulted and suffered injuries. I have also considered he is a first offender and that he is remorseful and regret the death of the deceased. I will and do hereby sentence the accused to serve five (5) years custodial jail term. He is hereby informed of his right of appeal within 14 days from today. Orders shall issue accordingly.

Dated, signed and delivered this 25th May 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Esther Macharia, prosecution counsel

Mr. Mathenge, defence counsel

Mr. Martin Kipyego Ndiwa, the accused

Mr. Daniel Ngumbi, court clerk