



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 78 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

M W.....ACCUSED

SENTENCE

M W (hereinafter referred to as “the Accused”), was initially charged with the offence of murder contrary to section 203 and section 204 of the Penal Code. An offer was subsequently made by the Defence counsel to plead to the offence of manslaughter, which offer was accepted by the Prosecution. The Accused thereafter on 25th July 2016 pleaded guilty to the offence of manslaughter, contrary to section 202 as read with section 205 of the Penal Code. The particulars of the offence were that on the 1st day of October, 2015 at [particulars withheld] village, Mlolongo division, Athi River Sub-County within Machakos County, the Accused unlawfully killed P W.

The facts leading to the offence were that on 1st October, 2015 at around 3.00 a.m. at [particulars withheld] village, Mlolongo Division, Athi River Sub-County, within Machakos County, the Accused woke up to take his medicine, when he noticed that the deceased P W (hereinafter referred to as “the deceased”), who was his son aged 7 years, was awake. The Accused asked the deceased why he was awake and the deceased replied that he wanted to be awake and look. The answer annoyed the Accused who decided to discipline the deceased by slapping him. This woke up the wife of the Accused, E P K, who was the deceased’s step-mother who intervened and stopped the Accused. They went back to sleep. After a short while the deceased started complaining of a stomach ache and called out for the step-mother who gave him water to drink, and washed him after noticing that he had urinated on the seat.

At 6.00 a.m. the next morning the stepmother gave the deceased warm water and went out for a short while. When she came back she found the Accused pouring water on the deceased, who was not moving. The Accused then took the deceased to a nearby hospital called Mariakani where the deceased was pronounced dead. The accused was advised to report the matter to Mlolongo police station and obtain a permit. The police advised him that since the child died at hospital there was no need for a permit and the hospital could give a letter for the accused to take the deceased to the mortuary. The Accused was given the letter and took the deceased to Shalom Mortuary and he thereupon started funeral arrangements.

The next day on 2nd October, 2015, word went around in the village that a man had killed his child, and the police decided to investigate and visited the home of the Accused. The police then visited the mortuary and noticed fresh bruises on the deceased, and upon inquiry from the Accused’s wife, the police found out that the Accused had a habit of beating the deceased.

The Doctor who performed the post mortem on the deceased classified this case to be one of battered baby syndrome, and the Prosecution produced the signed Post mortem report as Prosecution exhibit 1.

The Accused admitted the above-stated facts that were narrated to the Court by Ms. Mogoi Lillian, the learned Prosecution counsel.

The Accused was then convicted by this Court of the offence of manslaughter on his own plea of guilty, and I am now called upon to pass sentence, bearing in mind that the maximum sentence for the offence of manslaughter is life imprisonment under section 205 of the Penal Code.

Mr. Kituku, the learned Defence counsel, submitted in mitigation that the Accused person has no previous record, was remorseful and it was painful for him to lose his child on such a manner. Further, that this was a case of disciplining gone wrong, and it is the Accused person who took his son to hospital. It was also stated that the Accused's has three other children who are also minors, and that they together with his wife totally depend on him as the sole breadwinner of the family. According to the Accused, there are reconciliatory proceedings that took place at home with the in-laws, and his counsel pleaded for a lenient sentence as the Accused had saved the courts time by pleading guilty.

Ms Mogoi Lillian, the learned prosecution counsel, submitted that from the evidence it was clear that the accused did not intend to kill the child but his act of disciplining the deceased led to his death. Further, that the prosecution did not have any previous record of the accused, and he could be treated as a first offender. The learned counsel also informed that Court that she was unable to trace the deceased's biological mother for purposes of preparing a victim impact statement, and relied on the report filed in Court by the Probation service

The Court called for a pre-sentencing report from the Probation Service, which report was filed in Court on 20th September 2016. It was noted therein that the Accused is a first offender and has admitted committing the offence against his own child and asks for forgiveness. He is also remorseful and willing to serve under a non- custodial sentence. Further, that he was the sole bread winner to his young family which is currently staying at his in-laws, and that the wife is anxious to receive him back home so that they can get on with their marriage life.

The report indicated that the deceased was born out of wedlock and had been in the custody of the Accused for only two months before he met his death. Efforts to reach the mother of the deceased were not successful but a family spokesman who is an uncle to the deceased said their family has no objection to the offender being granted a non-custodial sentence. He stated that the deceased was in the custody of the Accused according to the Luhya customs, and hence they have nothing to demand from the offender or his kinsmen.

The local administration from Lupida sub-location, the Accused's rural home, gave a positive report about Accused. His parents and relatives pleaded with the court to consider giving him a lenient sentence. Further, that his family catered for all the burial expenses and had reached an agreement with the mother to the deceased. The Probation Service thus found that the Accused's home report was suitable for a non-custodial sentence for him to undergo counseling on anger management, and recommended him for a probation sentence, subject to this Court's discretion.

I have considered the facts of the case and the circumstances in which the deceased's death occurred, as well as the mitigation and pre-sentencing report by the probation service. I also studied the post mortem report produced as an exhibit in Court, and find that there are aspects of the report which I cannot reconcile with the plea that the Accused had no intention of harming the deceased.

Firstly, the cause of death of the deceased indicated in the post mortem report is asphyxiation due to suffocation with severe musculoskeletal injuries due to blunt force trauma which was repeated. In layman terms the deceased died as a result of being deprived of oxygen by some unknown means or cause, and had injuries to his body caused by being hit with something with great force. This cause of death in my view contradicts the facts given and admitted by the Accused as to the manner the deceased died.

In addition the observations in the postmortem report as to the appearance of the deceased's body were that he had nail bruise marks of various ages both old and new in the anterior abdominal wall, thighs, chest, and upper arm; nail bruise marks on both cheeks; and there was petechial scleral haemorrhage (small red spots indicative of bleeding in the eyes, which are a sign of asphyxiation by strangulation or smothering). These findings led the doctor who conducted the postmortem to note that the deceased's death qualified as one of battered baby's syndrome.

The deceased was therefore the subject of repeated beatings by the Accused, as was also corroborated by the Accused's wife in the facts that were narrated to the Court. I therefore find that the Accused must shoulder the responsibility for, and reflect on the painful loss of life of an innocent and defenceless child, and that a non-custodial sentence is not appropriate in the circumstances of this case.

I accordingly sentence the Accused to five (5) years imprisonment. Such time of imprisonment shall take into account the time the Accused has been in custody.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 28TH SEPTEMBER 2016.

P. NYAMWEYA

JUDGE