

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 18 OF 2016.

REPUBLIC.....PROSECUTOR

VERSUS

LUKA ONDIAMI MOGAKA alias AMINA..... ACCUSED

SENTENCE

1. LUKA ONDIAMI MOGAKA, the accused person herein, pleaded guilty and was consequently convicted on a lesser charge of manslaughter following a plea bargain agreement struck between him and the state on 15th November 2016. The particulars of the offence were that on 23rd May 2016, at GK main prison at Kisii Central Sub County within Kisii County unlawfully caused the death of JOHN MUHERE THOMAS.

2. The facts of the case, as read out by Miss Mbelete, counsel for the state were that the accused and the deceased were both convicts serving different sentences at the Kisii GK Prison when on the material day, the duo were sent out to cultivate the prison farm whereupon they picked up a quarrel that resulted in the accused hitting the deceased twice on the head with a jembe.

3. The deceased was rushed to Kisii Level 6 Hospital where he died while undergoing treatment. A post mortem examination of the body of the deceased revealed that the cause of death was severe head injury secondary to blunt trauma on the head.

4. In mitigation, Mr. Okemwa advocate for the deceased submitted that the accused was remorseful as the offence was not intentional. Mr. Okemwa stated that the deceased had provoked the accused by touching his (accused's) private parts in an attempt to have unnatural sex (sodomy) with him which prompted the accused to repulse the deceased by hitting him on the head. Mr. Okemwa pleaded for leniency for the accused whom he stated was a married with 5 school-going children who solely depended on him for their upkeep.

5. The Probation Officer's report filed on 30th November 2016 recommended a non-custodial sentence for the accused.

6. I have considered the circumstances surrounding the case, the accused's mitigation and the probation officer's report.

7. I have further taken note of the mitigation tendered by Mr. Okemwa for the accused regarding the reason behind the attack on the deceased by the accused.

8. It is apparent to me that the accused acted with excessive force to repulse the deceased who had attempted to have unnatural sex with him. This court takes note of the fact that a victim of sexual assault can, in the heat of the moment, react violently to ward off an assailant but this is not to say that the actions of the accused were justified or lawful. It is my finding that the accused used excessive force in the circumstance, but considering the compelling mitigation tendered by his counsel, this court is inclined to give him a non-custodial sentence.

9. Consequently, the accused is hereby sentenced to serve 2 years probation during which period he will be supervised by the Probation Officer of his area.

Delivered, dated and signed in at Kisii on **30th of November**, 2016.

W.A. OKWANY

JUDGE

In the presence of:

Miss Mbelete for the State

Mr. Okemwa for the Accused

Omwoyo court clerk