



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL CASE NO. 14 OF 2015**

**REPUBLIC**

**VERSUS**

**PHILIP MUTHIANI KATHIWA.....ACCUSED**

**RULING**

**Introduction**

1. This is a ruling on sentence following the conviction of the accused, who was initially charged with murder, on his own plea of guilty to a lesser charge of manslaughter. The facts of the case were set out by the Prosecution as follows:

*“The deceased on 18<sup>th</sup> May, 2013 at about 12.00noon assaulted the accused while in a certain bar at Kaseve market and the deceased was chased away from the market. Later on at about 1.30p.m on the same date, the deceased who was still drunk went to Esther Muthoki Kathiwa who is the deceased’s sister, armed with a whip and a somali sword. The deceased asked the accused why he was assaulting his sister who was married in that homestead. The deceased then went to the mother of the accused and threatened to cut her with the sword. One Angela tried to intervene but in the process the deceased cut her on her left arm. This act provoked the accused and while armed with bow and arrow shot the deceased. The postmortem was conducted on 24<sup>th</sup> May, 2013 and the cause of death was confirmed as cardiopulmonary arrest as a result of arrow poisoning hemorrhage. The accused was arrested and charged. It is evidence that the deceased went to the accused’s homestead with intend to harm. The accused acted in self-defence contributing to the death of the deceased. I produce the postmortem of 24<sup>th</sup> May, 2013 as exhibit.”*

2. Upon his plea of guilty, the Court convicted the accused and called for pre-sentencing report for the Probation Officer, which dated 4<sup>th</sup> November 2015 was filed in Court on the same date, and after taking submissions thereon by counsel for the accused and counsel for the State, reserved the ruling on sentence.

**The Principles**

3. The objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.

4. Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. See **Mokwa v. R** (1976-1980) KLR 1337. The accused herein acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked by with a panga. The use of the poisoned arrow on the deceased, in the circumstances if this case, was excessive force, and the accused was guilty of Manslaughter.

5. In considering the appropriate, same offences should attract similar consistent penalties. In **Andrew v. R** (1976-1980) KLR 1688, in a case where the appellant and his co-accused had in a fight started by them the deceased was stabbed, the Court of Appeal found manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In **Orwochi v. R** (1976-1980) KLR 1638, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of eh appellant a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.

6. The decision of the Court of Appeal in **Muoki v. R** (1985) KLR 323 (Madan, Kneller JJA. & Platt, Ag. JA) is relevant. The Court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that

*“Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”*

7. Upon the submission by Counsel for the accused in this case that the accused had been in custody since 18<sup>th</sup> May 2013, the Court has called for court file in Criminal Case No. 24 of 2013 and satisfied itself that the accused was presented before the court on 27<sup>th</sup> May 2013 upon a charge of murder of one Raphael Mutuse Kavita on the 18<sup>th</sup> May 2013. The accused had sought to plead guilty to a lesser charge of manslaughter and subsequently the prosecution presented the wrong set of facts necessitating their entry of a **Nolle Prosequi** which the Court (Thuranira-Jaden, J) approved on 17<sup>th</sup> February 2015 and the accused was on the following day 18<sup>th</sup> February 2015 charged with the same murder in this case file. So the accused has been in custody since arrest on 18<sup>th</sup> May 2013, **a period of 2 years and 6 months.**

8. Although it would appear the court is only required to take into consideration the period of remand of the accused in cases where the court is considering a sentence of imprisonment under section 333 (1) of the Criminal Procedure Code, I consider that if the remand period is taken as a period when the accused has stayed in restriction akin to an imprisonment term, it may properly be taken into account when considering other forms of punishment because the accused will have suffered the loss of liberty and the comfort of life outside prison for the said period.

9. The Probation Officer’s Report recommended as follows:

**“Report of Probation Officer (Nungari Ngari) dated 4<sup>th</sup> November, 2014**

**Conclusion/Recommendation**

*Your honour, before you is a 26 year old married man and father of two young children. He is the family’s sole breadwinner. He is remorseful for the offence and pleads for the Court’s leniency. He is an alleged first offender and has a fixed place of abode. He has close community ties.*

*His home report is positive on non-custodial rehabilitation. The social inquiry established that prior to the offence the accused and deceased had no conflicts. The relationship between the two families who hail from the same clan and village was cordial before the offence and it has not soured. The community is positive towards the accused and the incident is deemed to be an unfortunate accident by both families and the community. Customary compensation according to Kamba customs and reconciliation has been initiated by the Ambua clan. The accused is not deemed to be a threat or at risk if released.*

*Based on the foregoing, the accused person is found suitable for a non-custodial sentence and he is hereby **recommended to serve a probation sentence** subject to the best discretion of the Court.”*

## **Conclusion**

10. The maximum sentence for manslaughter is imprisonment for life, as prescribed section 205 of the Penal Code. On the basis of precedents set out above, the Court considers that, if a custodial sentence were to be imposed, an imprisonment for a term of 3 ½ years would meet the justice of the case considering the need to punish and deter future offences. The Court, however, considers an non-custodial sentence to be appropriate in this case for reasons that:- the accused has been in custody for 2 ½ years; the accused is a young man of 26 years with productive life ahead who responded to an attack by the deceased; although, the family of the deceased have lost their loved one, it was the deceased who was to blame for the incident that led to his killing; the accused merely responded to the attack; and the Probation Officer’s report that the two families had agreed to reconcile upon payment of customary compensation.

11. Taking the recommendation by the Probation officer and the period of remand of the accused into consideration, I take the view that the accused will be sufficiently punished by the cumulative effect of the 2 ½ year period already served in remand custody and further a probation sentence for a period of 1 year during which, in accordance with sections 7 and 8 of the Probation of Offenders Act cap. 64, the accused will not commit any other offence or breach the terms of the Probation Order while the Probation Order is in force. The probation term will also afford the accused the necessary counseling for which Counsel for State sought directions.

## **ORDERS**

12. For the reasons set out above, the accused is sentenced to serve a Probation Sentence for a period of 1 year under the supervision and direction of the Probation Office, Machakos County.

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF NOVEMBER 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Shijenje for the Republic

Mr. Mutinda Kimeu for the Accused

Ms. Doreen - Court Assistant.