



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 73 of 2004

REPUBLIC..... PROSECUTOR

VERSUS

PHARIS GITHUA MBUGUA..... ACCUSED

SENTENCING

The accused has been convicted for the offence of manslaughter. He has now sought, through his learned advocate, a non-custodial sentence.

In the light of that request, this court did request for a Probation Officer's Report.

The Probation Officer interviewed the colleagues of the accused in prison. He also interviewed the members of the family of the deceased. Having done so, the Probation has concluded that the home environment was still very hostile to the accused. Therefore, he recommended that the accused could not, at present, benefit from a non-custodial sentence.

The accused has been in custody for 13 years now. He stayed in custody for many years before his trial could commence, because he was insane, at the time.

Having received appropriate treatment, the trial commenced, when the doctors certified him as being fit to plead to the charge, and fit to undergo trial.

In the Judgment of the court, the accused could not be convicted for murder because at the time he killed his father, he did not have the mental ability to formulate the intention to commit murder.

Having been in custody for 13 years now, and having been given treatment, the accused is believed to be relatively alright. Indeed, he expresses a desire, if he were to earn his liberty, to have a family of his own.

I would therefore have been inclined to give him a non-custodial sentence. I say so because to punish the accused for having done something which he was at the material time, incapable of knowing to be wrong, is akin to punishing him for being unwell. That would not be the purpose for which punishments were laid down.

In any event, he has been in custody for 13 years.

Yet, at the same time, it is not unreasonable for the members of his family to feel scared of what the accused may or may not do.

His own mother, who has made sure that whenever the accused is in court, he is dressed decently, is now 83 years old.

The accused was never really close to her, even before the incident giving rise to this case. He had been close to his father, whom he ended up killing.

In the circumstances, the fear of the family is well-founded.

I therefore accept the Probation Officer's recommendation that a non-custodial sentence would be ill-advised.

Although the accused was incapable of formulating the intention to commit murder, he killed his father. He did so when he was insane. In other words, he was not responsible for his actions, when the act was done. That therefore brings the accused squarely within the provisions of section 166 (1) of the Criminal Procedure Code. In effect, the accused was guilty but insane.

Of course, he is not insane now. Nor does that section anticipate his state of mind currently.

The law prescribes steps to be taken by the court when dealing with an accused person who was insane at the time he committed the offence.

In the result, and in accordance with section 166 (2) of the Criminal Procedure Code, this court shall report this case for the order of the President of the Republic of Kenya. Until such time as H.E. the President will direct the place at which the accused will be held in custody, I direct that the accused shall remain in prison custody.

It is so ordered.

J.A. OCHIENG
JUDGE
16/2/2010