



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

HIGH COURT CRIMINAL CASE NO. 11 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT NDUNGU NDERITU.....ACCUSED

JUDGMENT ON SENTENCE

1. Following the conviction of the accused for manslaughter under **Section 202** of the **Penal Code** by the judgment of 9th April 2020, this matter came up for sentencing hearing on 23rd November, 2020. The court heard mitigation from the accused through his counsel, and also received a Probation Officer's Report.
2. **Section 205** of the **Penal Code** provides that a person who commits the felony of manslaughter is liable to imprisonment for life.
3. The prosecution submitted that the accused had no previous conviction.
4. In his mitigation, the accused expressed his remorse and contrition for his actions leading to the death of his girlfriend with whom he lived as husband and wife. He said he had had time to reflect and consider the consequences of his actions and how he can rehabilitate and reform his life. Even in his evidence prior to conviction, he had testified to his remorse and anticipated reform when he said:

“I tried to apologise to my mother..... I wrote a letter of apology to Daniel Otoo (the deceased's father). I wrote the letter because I was made aware of the wrong I had done, that I had caused death.”

In concluding his evidence-in-chief, he said:

“I ask the family to kindly forgive me. I owe an apology to my family and ask them to forgive me.”

5. Counsel submitted that the accused's actions were not motivated by malice but by mental illness. Although the court did not find that the accused was insane at the time of the killing, the court did find that the accused had no *mens rea* for killing.
6. Counsel also said the accused was a first offender, that he had maintained good behaviour; that he should be afforded a non-custodial sentence to enable him seek medical assistance for his condition. Counsel further said that the accused wanted an opportunity to give back to society, and to use his education for good.
7. I have also carefully considered the Probation Officer's Report dated 20th November, 2020. It points out that from the Probation Officer's investigations, the accused was traumatized by the events leading to the death of his wife; that the community empathises with the family of the deceased but anticipate and are ready to take an active role in initiating forgiveness and reconciliation.
8. The offender's family have sought forgiveness from the victim's family. They are ready to participate in reconciliation process if given a chance and have asked the court for a lenient sentence. The victim's father has not come to terms with the cruel death of his daughter. He feels the offence was intentional due to the number of stabs the deceased suffered from the offender. He, father, said his daughter had previously been physically and violently abused in the past, although this did not come out in evidence.
9. The Probation Report observes that the offender's family, the community, and the offender and his history, show that there is a basis for the court to exercise leniency. The Report, however, concludes as follows:

“However, considering the victims’ family views, attitude and their reception of the court’s verdict of reducing the charge to Manslaughter we hesitate to recommend him for a non-custodial sentence though he is suitable. The family of the victim is still hurting, grieving and yet to come to terms with the great loss. We feel they should be given time to grieve and heal.

We believe the court will be guided by the above social findings in arriving at a suitable sentence regarding the offender.”
(Emphasis added)

10. I have taken all the foregoing matters into account. I also note the aggravating circumstances, as shown in the evidence and stated in my judgment, that the offender used great force and behaved in a “*maniacal*” manner by stabbing the deceased many times. Equally, I also note the mitigating circumstances highlighted in the judgment that:

“.....his (the deceased’s) most mediate actions to the killing show he was not in his normal mind: such as his hostility, the wild running around, the incoherence and incongruence of his behaviour and is forgetfulness.”

It is notable that the offender’s hostility was exhibited not only to the deceased but to all others near him at the time.

11. I also take into account the objectives of sentencing, which are set out in the **Judiciary Sentencing Policy Guidelines Paragraph 4** as follows:

“1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’ communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”

12. The **Guidelines (Paragraph 4.2)** indicate that these objectives are not mutually exclusive and may in fact be in conflict with each other. However that:

“As much as possible, sentences imposed should be geared towards meeting the above objectives in totality.”

13. At this moment, the deceased’s family will favour retribution and denunciation; the community and the offender appear to favour rehabilitation and restorative justice. As earlier stated, **Section 205** of the **Penal Code** provides that the offender is “*liable to imprisonment for life*”. In sentencing, this court must balance all positions and mete a sentence geared towards achieving all the objectives of sentencing in totality.

14. In **Omuse v Republic [2009] KLR 214** it was held that the sentence imposed on accused person must be commensurate to the moral blameworthiness of the offender; and that the proper exercise of the court’s discretion must consider that fact and the entire circumstances of the case.

15. In **Republic v Philip Muthiani Kathiwa [2015] eKLR**, the High Court in Machakos considered the issue of the principles applicable for the meting of appropriate sentence in cases of Manslaughter upon a plea of guilty. Whilst in the present case there was no guilty plea, the principles in the **Philip Muthiani** case are nevertheless instructive. They are:

“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 sentence, 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.”

16. In light of all the foregoing, and considering the fact that the offender was taken into custody on 25th June, 2017 and has remained in custody since then the sentence will take into account the three and a half (3 ½) year period of custody in accordance with **Section 333 (1)** of the **Criminal Procedure Code**.

17. In my view, the offender needs time on his own to personally deal with the issues that led him to make the decisions he did; he needs to be responsible to commence the rehabilitative process himself and make whatever efforts necessary to face his dragons. Thereafter he can plug into external rehabilitative opportunities and efforts.

18. Accordingly I hereby sentence the offender to ten (10) years imprisonment with effect from 25th June, 2017 which term shall be conditioned as follows:

- a) The first five years of the term shall be spent in prison.
- b) The remainder of the term following thereafter shall be non-custodial on probation, and the offender shall serve the initial two (2) years of the non-custodial sentence on probation in a Rehabilitation and or Community Services Programme to be designed by the Probation Officer.
- c) Should the offender come into conflict with the law and be convicted for any offence during the ten year period of the sentence, the probationary sentence shall stand revoked and the offender shall serve the full term thereof incarcerated in prison.

Administrative directions

19. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

20. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

21. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 4th Day of February, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Mr. Wairegi for the Accused
3. Robert Nderitu Ndungu - Accused present - Naivasha Maximum Prison
4. Court Assistant -