



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL CASE NO 2 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GUYO UREN BOCHA.....1<sup>ST</sup> ACCUSED**

**MUSA HURREIN BOCHA ALIAS HUKICHA BOCHA....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Guyo Uren Bocha and Musa Hurren Bocha alias Hukicha Bocha (1<sup>st</sup> and 2<sup>nd</sup> Accused respectively) are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 15<sup>th</sup> day of April 2017 at Saware area, Waldena location in Tana Delta County within Tana River County jointly murdered Osman Boba.
2. The Accused took plea before Ongeri J on 13<sup>th</sup> June 2017 and pleaded not guilty to the charge. When the case came up for trial on 27<sup>th</sup> February 2018, Mr. Gekanana learned defence counsel for both Accused informed the court that the Accused persons wished to plea bargain with the State under Section 137 of the Criminal Procedure Code. On his part, Mr. Kasyoka the learned prosecution counsel informed the court that the local Chief who was one of the prosecution witnesses had informed him that the families of the Accused and the deceased had commenced reconciliation. Counsel told the court that he would await the plea offer by the defence.
3. The court adjourned the trial to allow the parties time to enter into plea negotiations. The court also directed the probation officer to file a social inquiry report in respect of the Accused. I took over the matter when the plea negotiation was on-going.
4. The plea negotiations and execution of the plea agreement was not without delays and occasioned several adjournments due to logistical challenges posed by the vast geographical terrain. The parties eventually filed an executed agreement on 3<sup>rd</sup> July 2019 for consideration by the court.
5. The court considered the agreement against the facts of the case and the social inquiry report. The court found the agreement acceptable. Further, and in accordance to the dictates of Section 137F and 137G of the Criminal Procedure Code, the court satisfied itself that the Accused understood their rights under the law, and comprehended the plea negotiation process and executed the plea agreement voluntarily.
6. The Accused pleaded guilty to the lesser charge of manslaughter contrary to Section 202 of the Criminal Procedure Code.
7. The facts of the case as stated by the Prosecution Counsel follows. On April 15<sup>th</sup> April 2017, the deceased who was in the company of his wife went to water his livestock. The well in question was under the control of the family of the Accused persons. The 1<sup>st</sup> Accused ordered the deceased to stop watering the animals and a fight ensued when he refused. The 2<sup>nd</sup> Accused who is the 1<sup>st</sup> Accused's brother rushed to his aid and together overpowered the deceased and injured him fatally. A postmortem was done and the postmortem report dated 16<sup>th</sup> April 2017 (Exhibit 1) showed the cause of death as haemorrhage and severe and acute traumatic head injury. The prosecution also exhibited a death certificate (Exhibit 2). Each Accused accepted the facts as true and each was convicted on his own guilty plea.
8. Having convicted the Accused, I called for a pre-sentence report and a victim impact statement. At the sentencing hearing on 28<sup>th</sup> October 2019, I heard submissions from Mr. Gekanana for the Accused. He submitted that the Accused were remorseful and that the families of the Accused and the deceased had reconciled. The prosecution on their part submitted that they were not opposed to a lenient sentence and that the Accused were first offenders. The court observed that the pre-sentence report had not been filed.
9. On record now to aid the court in considering an appropriate sentence are the pre-sentence reports, the victim impact statement and the executed plea agreement.

## Sentence

10. The purposes of sentencing as captured in The Judiciary Policy Sentencing guidelines (2014) are:-

- 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/her 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.**
- 5. Community protection: to protect the community by incapacitating the offender.**
- 6. Denunciation: to communicate the community's condemnation of the criminal conduct.**

These purposes are not exclusive in themselves and their application is dependent on the unique circumstances of each case.

11. The Principal Probation Officer filed a pre-sentence report, a victim impact statement dated 23<sup>rd</sup> September 2019, and a statement attributed to the victim's brother one Yusuf Hanti dated 18<sup>th</sup> June 2018. Yusuf Hanti stated in his statement that he was the spokesman of the deceased's family. That their family and the Accused's family were known to each other, were related through marriage and both belonged to the Orma community. He stated that the incident sparked animosity between the two families with each family withdrawing their daughter who was married in the other family; that the Orma Council of Elders (Matadeda) made a decision that the Bocha family (Accused's family) relocate from Waldena to Assa Kone; and that the Osman's (Victim's) family be compensated 70 head of cattle which was later reduced to 48 due to the drought which had diminished the Bocha family's herd.

12. Yusuf Hanti further stated that after his family received the 48 cattle, they voluntarily returned 4 cattle and the two families reconciled with the offenders' family being unconditionally received back into the community and locality. That the family bore no further grudge against the Accused and were not opposed to any lenient sentence the court may impose on the Accused.

13. The Probation Officer in his report dated 1<sup>st</sup> October 2018 stated that both the victim and Accused's families were related through marriage and lived in the same locality. That the tension following the death of the deceased was so great that the marriages in question were "**revoked**" and the offending family "**banished**" from the locality on the intervention of the Council of Elders to maintain peace and tranquility in the community. That subsequently, after fulfilment of the agreed compensation, the two families reconciled and the offending family was allowed back to the locality and complete harmony was restored. The victim's family was satisfied with the compensation and reconciliation and was quoted as having stated that "*if they had powers they would terminate the murder trial altogether.*"

14. I have considered the mitigation of the 1<sup>st</sup> and 2<sup>nd</sup> Accused as well as the submissions of the respective parties. I have also considered the pre-sentence Probation Officer's report and various documents filed in support of the accused's mitigation.

15. This case presents a unique blend of criminal justice as we know it and a traditional justice system. No doubt the Accused were rightly charged with the offence of murder which, through a plea bargain sanctioned by Section 137 of the Criminal Procedure Code, was reduced to manslaughter. While the Accused were spending time in pre-trial custody, the traditional justice system kicked in first in the instant "banishing" of the offenders' family from the locality and the temporary "termination" of subsisting inter marriages between the two families, and; subsequently, in the reconciliation of the two families presided over by the Council of Elders whose verdict was the compensation of the bereaved family to the tune of 77 cattle which was subsequently reduced to 48.

16. The plea negotiations and subsequent agreement between the Prosecutor and the Accused though not directly linked to the traditional reconciliation agreement, provided a neat and statutorily procedural ending. The court accepted the plea agreement for reason that the facts of the case did not *prima facie* disclose mensrea on the part of the Accused.

17. As earlier stated, the Accused on their part pleaded guilty to the lesser offence and were convicted on their own plea of guilt. They pleaded in mitigation that they were remorseful and that their family had reconciled with the deceased's family and reinstated community harmony. In this sense therefore, the traditional justice in the case can be said to have provided mitigation worthy of consideration by the court and removed the sting out of the penalty.

18. A keen look at the traditional system deployed by the affected community vis-a-vis purposes of sentencing enumerated at paragraph 10 of this Judgment including retribution, deterrence, restorative justice, community protection and denunciation of the criminal conduct shows a distinct similarity and gives the court a measure of comfort that the said purposes have been met substantially. I also observe that the Accused have been in pre-trial custody for 3½ years.

19. In the circumstances of this case, having considered the purposes of sentencing, mitigation as well as the victim impact statement, I am persuaded to grant the Accused a non-custodial sentence.

20. Each Accused is sentenced to serve 3 years probation.

21. Orders accordingly

JUDGMENT DELIVERED, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF APRIL, 2021

.....

R. LAGAT KORIR

JUDGE

Judgment delivered in the virtual presence of the 1<sup>st</sup> and 2<sup>nd</sup> Accused (virtually linked at Malindi G.K Prison), Mr. Omwancha holding brief for Mr. Gekanana for the Accused, Mr. J. Mwangi for the DPP, Juma and Kiprotich (Court Assistants).