



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO. 4 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

PAUL ASKARI KALUNDE.....ACCUSED

JUDGMENT

1. **PAUL ASKARI KALUNDE** who was originally charged with murder contrary to section 203 as read with 204 of the Penal Code later pleaded guilty to manslaughter following a plea bargain agreement.

2. The accused was examined by a Psychiatrist and certified fit to plead. The Court was satisfied upon examination on oath of the accused that he had voluntarily entered into the plea bargain agreement reducing the charge from murder to manslaughter and his intention to plead guilty to the reduced charge.

3. The facts giving rise to the case for the prosecution are that:

“On the 18th day of March, 2018, the accused was at Rekeke village in Kimara area that is in Taveta Sub County when he picked a fight with the deceased John Mathendu who was his grandfather. The two were at the deceased’s compound and the accused came at the deceased with a knife and threatened to kill him when he found him lying under a tree. This was witnessed by one Rehema Elizabeth who came to see what the shouting was about. She stated that Paul Askari on seeing her turned towards her and threatened to kill her as well. Elizabeth ran off and went to call Margaret Mkamburi who came to see what was happening she found Paul Askari holding a knife. She stated that Paul went ahead and started stabbing the deceased several times on the stomach, abdomen, thighs and the back of his head causing his death.

The deceased was an old man and he was not able to defend himself. Paul then said that he had finished his work and then ran off while still holding the bloody knife. The area chief was then informed and he reached out to the police while members of the public ran after the accused.

Police officers from Taveta Police station responded quickly and went to the compound where the deceased was and found him lying in a pool of blood. The scene was photographed and the body of the deceased moved to Taveta Sub-County District Mortuary. In the same period, the accused was arrested by members of the public who wanted to lynch him but he was rescued by a prisons officer who kept him safe within the Taveta Prison compound where he was then picked up by the police.

The accused person was then taken for mental assessment and he was found to be fit to plead. The accused person was then charged with the offence of murder which the State now substitutes to that of manslaughter.

The accused person knowingly, voluntarily, and truthfully admits the facts contained herein.

4. The belted pouched knife which the accused used to stab the deceased; and the Post mortem examination report and mental fitness certificate for the accused were produced in evidence.

5. Having considered the accused’s acceptance of the facts, the Court accepted the accused’s plea of guilty and convicted him for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.

6. In mitigation, counsel for the accused urged as follows:

“We seek that court considers that prior to the offence, the accused was not mentally stable. He had been seeing a doctor since 2016. The necessary receipts were produced to confirm he was attending clinics at Rukeke dispensary where a psychiatrist was attending to

him. The accused used to have seizures prior to committing the offence and is still under medication. He goes for examination monthly for injections at Rukeke dispensary. The deceased was the accused person's grandfather and the accused is very remorseful. He is a young man and has a whole life ahead of him. He does not come from a well off family. I have had a chance to look at the probation officer's report and it confirms that the accused has had mental problems since childhood. Our prayer is that the accused person be acquitted, non-custodial sentence to continue with the clinics as there has been great improvement. If court is inclined to have him confined then he should be placed in a mental institution for at least one year for medication and counseling."

7. The Probation Officer's Pre-sentencing Report was positive for non-custodial sentence of Probation. The probation officer in his conclusion mentioned that the accused was a youthful offender who is unwell and undergoing treatment. He stated that the area administration and the community are not opposed to his release on non-custodial sentence option. He mentioned that the only reservation is on the security of the vulnerable but having being on bond for some time with no reported incident, they grant him the benefit of doubt.

8. The probation officer further stated that the deceased's family members who are also the accused person's relatives have expressed willingness and commitment to support him continue with his treatment and further undertake to ensure he does not pose a threat to the community. That the accused has promised to steer clear from matters likely to land him in conflict with the law.

9. The prosecution prayed for a jail term of 8 years.

10. I have considered all the factors carefully. The mitigating factors are that;

- a) The accused person is a first offender
- b) The accused person is remorseful
- c) The accused has been sick, he has seizures which affect him mentally
- d) His family which is the family of the deceased and the community are ready to support him

11. I will take these mitigating circumstances into account while determining the sentence.

12. On the the accused's mental problem, Dr. Joseph Jumba, a consultant psychiatrist at Mathari National Teaching & Referral Hospital filed a report and concluded that the accused is normal and has a normal mental status. He recommended an ECG examination.

13. The ECG examination was done at Coast Neurology Centre Ltd. It revealed that the accused person suffers from epileptic related seizures. These seizures do not necessarily indicate that the accused person has a mental problem. This issue was not properly proved.

14. The aggravating factors are that;

- a) The accused person picked a fight with the deceased
- b) The accused person used a weapon in the form of a belt pouched knife
- c) He threatened to kill the accused person and actually killed him by stabbing him several times on his abdomen, thighs and back of the head, he even stated that he had finished his work and ran away
- d) The deceased was a defenseless old man

15. What the Accused Person has been convicted of is a serious offence, one to which a non-custodial sentence is inappropriate given the circumstances. Indeed, as I have outlined above, there are many aggravating circumstances here which outweigh the mitigating circumstances. Above all, wanton disregard to human life, as shown by the Accused Person must attract a custodial sentence at the very least. If this Court allows the accused person to serve a non-custodial sentence, he will not feel the consequences of the crime he committed and he might just commit it on someone else and blame it on his seizures.

16. The probation officer recommended a non-custodial sentence so that the accused person can continue with his medication and treatment. In my considered view, this can be done while the accused is in custody since it is not a daily routine.

17. The Judiciary Sentencing policy guidelines are silent on the path to take in manslaughter cases hence the starting point in the determination of a custodial sentence for offences of manslaughter would be case law. In **V M K v Republic [2015] eKLR**, 10 years imprisonment was given for manslaughter. Courts are inclined to impose life imprisonment where a deadly weapon was used in committing the offence. In this case a knife was used to stab the victim; a knife is considered a dangerous weapon.

18. In consideration of the matters herein above, and in consideration of the plea bargain herein, and in consideration of the accused health. I hereby sentence the accused person to serve a custodial sentence of seven (7) from 18/3/2018 being the date of his arrest.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MAY, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Mukangu for State

Ms. Peris Court Assistant