



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 52 OF 2012

REPUBLICDIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

GAO.....1ST ACCUSED

SOO.....2ND ACCUSED

RULING

1. This ruling is on the sentencing of the second accused, the first accused having been acquitted. The second accused was convicted of the offence of manslaughter, contrary to section 202(1) as read with 205, of the Penal Code, Cap 63, Laws of Kenya, which exposes him to a penalty of up to life imprisonment.
2. After his conviction, I called for a probation officer’s social enquiry report. A social enquiry was carried out, a report was compiled, dated 5th March 2021, and was lodged herein on 9th March 2021. The report is fairly favourable to the second accused. He is described as a quiet person, who is respectful and hardworking. He has no history of drug abuse. He is said to relate well with the community, although he is said to largely keep to himself, perhaps for fear of rejection. The family of the victim is said to have had come into terms with their loss, and have no ill-feelings towards the second accused. The community is said to be no longer hostile to him, and do not consider him as a threat.
3. The report indicates that the second accused has turned out to be a loner, probably as a consequence of the unfortunate incident. He does not roam around the area, and does not keep company of members of the local community, preferring to stay indoors during his free time. He is said to be remorseful. He is also described as disciplined and trustworthy. He is said not to be threat to the community, and that during trial he was no bond, and he did not display any antisocial tendencies at the time.
4. I had ordered for age assessment, to determine the age of the second accused, as at the date of the commission of the offence, given that where an offender is a minor, age would be a matter of consequence in sentencing. An age assessment report was prepared by Dr Sembene Mutakha, dated 3rd March 2020, and filed herein on even date. The same was largely of no use, since it merely confirmed the second accused to be above eighteen, but making no reference whatsoever as whether that related to his relative age as at the 24th December 2021, when the offence was committed. I gave more time for a further assessment to be done, but as at 2nd June 2021, when I was due to sentence the second accused, no second assessment had been done.
5. As there is no age assessment report, and the prosecution did not lead any evidence as to his age at the material time, I shall deem his age to that which he stated to the court on 31st December 2012, when he took plea, 14 years. The offence was committed on 24th December 2012, and it shall have presumed that he was a minor of 14 years at the material time.
6. A statement on mitigation was made on 2nd June 2021, by his advocate, Mr. Elungáta. He stated that the second accused was very remorseful for what happened, and that he had been regretting the incident. He said that the second accused was a minor of 13 years of age at the time. He asked for a non-custodial sentence, which would assist him to readjust and fit within the community. He also asked me to consider the time that the second accused spent in custody. The prosecution, through Ms. Omondi, stated that the second accused had no previous record.
7. I have considered the trial record and the judgement, and in particular the circumstances under which the offence was committed. The second accused was a child at the material time, just getting into teenage. The chaos of that fateful evening was probably too much for his young mind to handle. I have noted that he had a good relationship with the deceased, and the dispute, that led up to the death, was not between them, and there was, therefore, no excuse for his conduct except the heat of the moment. He just happened to be in the way, and got sucked into the events. I have considered the probationer’s report, the age of the second accused at the material time, and the fact that he is a first offender, whose is remorseful. I have noted too that his conduct, during the trial, while he was on bond, was exemplary, and that he has largely stayed away from trouble over the period. I have also noted the sentiments of the family of the victim, as well of the general community. I have also noted the period that he has spent in custody, from the time of his arrest up to the time his bond was processed, and I have also considered the time spent in custody after his conviction.

8. A person found guilty of manslaughter is liable to be sentenced to life imprisonment. That, however, leaves discretion to the sentencing court to consider alternatives, such as fine, probation, community service, among others. Since the offence was committed when the second accused was a minor, that, ideally, should be taken into account, and the sentences to be considered should accord with what is prescribed as appropriate treatment for minor offenders, under the Children Act, Cap 141, Laws of Kenya, for if the trial had been concluded while he was still a child, then he would have benefitted from the modes of treatment prescribed under that law. Under section 190 of the Children Act, a child should not be subjected to imprisonment or detention. Instead, the court ought to consider the modes of treatment set out in section 191, of the Children Act, and which include discharge, probation, rehabilitation, fine, committal to borstal institution, community service, among others.

9. Having taken everything into account, I am of the persuasion that the second accused person herein would benefit from a non-custodial sentence. I am of the conviction a probation order would assist him readjust, and to obtain counselling that he so much needs, given that he has been said to have turned into a loner after the incident.

10. Before I pronounce the order, I need to comply with section 4(3) of the Probation of Offenders Act, Cap 64, Laws of Kenya, by explaining to the second accused the effect of a probation order: that if he fails to comply with the terms of the probation order or commits another offence while on probation, he will be liable to be sentenced on the original offence. I shall also take time to have the second accused indicate willingness to comply with the provisions of the order.

11. The final orders that I shall make in the circumstances are:

(a) that the second accused person is hereby placed under the supervision of a probation officer, to be assigned by the officer in charge of probation services within Kakamega County, effective from the date of this order, for a period of three years, during which the second accused shall not leave the geographical confines of Kakamega County without the prior permission of the probation officer or the court; and

(b) that the second accused shall be released from custodial confinement to the hands of the probation office forthwith, unless he is otherwise lawfully held.

12. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3rd DAY OF June 2021

W MUSYOKA

JUDGE