



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 41 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD MAINGE MUTISO.....1ST ACCUSED

JOHN MUHINDI MUASYA.....2ND ACCUSED

SENTENCE

1. The accused herein, **Edward Mainge Mutiso**, and **John Muhindi Muasya** are charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that the accused, on the 1st day of August, 2013 at Katani Area in Athi River District within Machakos County, murdered **Makau China**.

2. On 5th July, 2021, after considering the evidence adduced in this case, I acquitted the 2nd accused of the offence of murder and set him free but while similarly, acquitting the 1st accused of the offence of murder, I substituted the charge and convicted him of the offence of manslaughter instead.

3. In arriving at my decision as regards the 1st accused, I expressed myself as hereunder:

“In this case, it is clear from the evidence on record that prior to the incident, there was no bad blood between the deceased and the accused. To the contrary, it would seem that they were in good terms prior to that date. That the 1st accused used excessive force in wadding off the deceased is not in doubt. However, what caused the disagreement was a minor disagreement over the use of the soap by the deceased. From the evidence, the deceased was drunk and probably had he been sober the incident might not have occurred.”

4. Upon conviction, I directed that a pre-sentencing report be prepared by the probation officer which was done.

5. According to the said report, the 1st accused (hereinafter referred to as “the accused”) was described as a hardworking interactive person by community members and that he related well with his peers. He was described as a gifted dancer by prison authorities and that he was a member of Sakata dance group at Machakos GK Prison. It was reported that the accused and the deceased were friends since childhood and were both working at the dumpsite as lorry off-loaders. According to the report the death of the deceased arose over his disagreement with the accused over reject powder soap from the company off-loading the same.

6. According to the report the accused was remorseful and regrets the incident as the deceased was his friend and prays for leniency as he had undergone training in “*crime si poa*” while in prison.

7. It was reported that the families of both the accused and the deceased were waiting for the outcome of the case to guide them on the next move. Accordingly, the process of reconciliation and compensation had not yet kicked off though the deceased’s family has no grudge against the accused as they don’t think that he intended to kill the deceased. Accordingly, they had no problem with the accused being given a non-custodial sentence. The accused family, according to the report expressed willingness to initiate reconciliation and compensation process according to the Kamba traditions and customs. Similarly, the local administration had no problem with the accused as he was not considered a threat to the community.

8. The pre-sentencing report concluded by recommending a non-custodial sentence.

9. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015 discussed the provisions of section 329 of the *Criminal Procedure Code* which provides:-

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

10. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case R vs. Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

11. In a New Zealand decision namely R vs. AEM (200) it was decided:

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

12. In R vs. Harrison (1997) 93 Crim R 314 it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

13. As regards the sentence, the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015, as a guide in sentencing held that:

“[71]...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

14. Though loss of life is a very serious matter, from the probation report, it is clear that the deceased's death arose from poor anger management by the accused and that he did not intend to kill the deceased who was his friend. The fact that the death of his friend arose from his own poor judgement is enough to prick his conscience

15. His family, the community and the local administration has no issue with him being given a non-custodial sentence.

16. As appreciated by the Supreme Court in Muruatetu Case (supra):

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

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.”

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

17. Since it has been indicated that what has delayed the commencement of reconciliatory process is this case, in my view, the accused ought to be placed on non-custodial sentence so as to enable him move the process. Having considered the circumstances of this case, I place the accused on probation for a period of 6 months during which period he will undergo counselling and therapy and also commence the reconciliatory process. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 14TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

The accused online

Mr Ngetich for the State

CA Susan