



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 19 OF 2020

REPUBLIC.....ODPP

VERSUS

JC.....ACCUSED

RULING (SENTENCE)

1. On 3rd November 2021 the accused person JC pleaded guilty to the lesser charge of **Manslaughter Contrary to Section 202 as read with 205 of the Penal Code** pursuant to a plea agreement. She had originally been charged with **Murder Contrary to Section 203 as read with 204 of Penal Code**.
2. The particulars of the charge are that on 10th April 2020 at [particulars withheld] Village Kuresoi South Sub County within Nakuru County she killed JNN.
3. The facts of the case as given by the prosecution were that on that day the accused had decided to leave the deceased who was her husband. She began to pack her belongings. The deceased came and tried to restrain her. He took the child (she had a very young baby then) from her so that she would not leave with the baby. A fight broke out between the two (2). The mother of the accused came to separate them. The deceased, John, pushed his mother to the ground. When she tried to get up the accused thinking that she would take the knife that was on the table and injure her picked the knife that was on the table and stabbed the deceased three (3) times on the pelvis. He was taken to hospital, treated and came back home. However, he was discovered in the morning having died at night. He had slept alone and bled a lot and died at an unknown time.
4. The accused had left for her parent's home.
5. The Report of the death was made at Kamwaura Police Post and later at Keringet Police Station. The accused's mother and her uncle took the accused to Keringet Police Station where she was charged with murder. The prosecution produced the knife and post mortem report as exhibits.
6. The accused pleaded guilty to the charge and the facts and was convicted accordingly.
7. In its address to the court the prosecution submitted through Ms. Murunga that accused was a first offender. The state proposed fifteen (15) years imprisonment.
8. Ms. Ogange for the accused submitted that the defence was proposing two (2) years non-custodial sentence. That the accused was in a troubled marriage for seven (7) years, and when she decided to leave her husband on 10th April 2020, a fight broke out between her and her mother in law provoked by her husband's drunken tendencies, that, feeling over powered in the fight by her mother in law and her husband she acted in self defence. That committing the offence was an error of judgment and she was remorseful. That she would live with the reality had she had killed the father of her child.
9. Ms. Ogange referred the court to **Republic vs Irene Kerubo Wambua & Another [2019] eKLR** where in similar circumstances the court gave the accused a three (3) year non-custodial sentence. She submitted further that the accused was the mother of the two (2) girls, aged 9, and 3 ½ years old, the sole breadwinner of the family with the responsibility of raising the two, that the two (2) children were now separated one living with the paternal grandparents (the youngest) the other living with the maternal grandmother, and despite a court order to re-unite the children, the accused's mother had difficulty in going to collect the child as directed by the children officer. That her own step father had expressed the view that it was not his duty to take care of the accused's children. Further that when the accused learnt that her husband had died she presented herself to the police and had cooperated with the prosecution. That in a similar case **Republic vs Truphena Ndonga Aswani [2021] eKLR** the court had sentenced the accused to one (1) day non-custodial. Ms. Ogange urged the court to consider the two (2) years non-custodial sentence.

10. I asked for a pre-sentence report from Probation and After Care Services Nakuru. It was filed on 19th April 2021 by Ms. Kongani Probation Officer. The report clearly indicates that the accused is a first offender with no criminal history, a child of a dysfunctional family whose married life appears to mirror that of her mother, having had two (2) broken relationships with the last one turning tragic. The report also indicates that the accused's marriage was full of turmoil and violence, with the accused going back and forth between her matrimonial home and her parent's home. The victim was known to abuse drugs and alcohol. The accused was however very remorseful and regretted her actions. The family of her husband, her in-laws had forgiven her but want to keep the four (4) year old child born out of the said relationship, a fact that had reared its head severally because they have been reluctant to release the child to her. The Probation Officer proposed a two (2) year non-custodial sentence.

11. I have carefully considered the submissions by both the state, defence counsel, the report from the Probation and After Care Services.

12. The issue for determination is what is the appropriate sentence in the circumstances?

13. This case presents the clear scenario of the effects of the Criminal Justice System on children of the adults who come into the system. The Criminal Justice System has no visible available safe guards for these children who, upon the arrest of their parents and left without any known care provision, despite the fact that the moment their parents get arrested they immediately become children in need of care and protection by dint of **Section 119 of the Children Act** and the same arresting officers become duty bound by to act in accordance with their role as **authorised officers under Section 2 of the same Act**. This duty can be discharged in collaboration with the other authorised officers being the local chief as defined under the **Chief's Authority Act** and the Children Officer.

14. I take guidance from the **UN Rules for The Treatment of Women Prisoners and Non-Custodial Measures For Women Offenders, (Bangkok Rules)** resolution adopted by the General Assembly on 21st December 2010. At **part III** they provide for non-custodial measures. While we do not have gender specific options for diversion, pre-trial and sentencing alternatives for women offenders, we do have the **Probation of Offenders Act** and **Community Service Act**, which provide for non-custodial measures, and have provision for Social Inquiry Reports to guide court in taking into account the backgrounds of these women including any history of victimization and their care taking responsibilities.

15. Clearly it is time especially in light of the increase in gender and sex based violence that such a gender responsive policy was put in place to not only guide sentencing of women offenders but to enable courts deliberately take into consideration the women's caretaking responsibilities, the plight of children who are left at home, those who accompany their mothers to prison. This is clearly provided for in **Rule 57 and 58**. There is also the need to provide appropriate resources to enable;

“Suitable alternatives for women offenders in order to combine noncustodial measures with interventions to address the most common problems leading the women's contact with the criminal justice system.”

16. Rule 60 continues to give examples of what these would be in order to provide for the care of the children and women only services;

- Therapeutic courses and counselling for victims of domestic violence and sexual abuse.
- Suitable treatment for those with Mental illness/disability.
- Educational and training programs to improve employment prospects.

17. It is from the facts and the report from Probation and After Care Services that the accused herein was subjected to domestic violence from a spouse who abused both alcohol and drugs. It is also evident that there was a fight where both her mother in law and the deceased were restraining her not to leave the matrimonial home with her baby. In addition she dropped out of school due to family problems and her relationships have continued to feed from her dysfunctional family background. It is noteworthy that she regrets her actions, that the family of her deceased husband who are secondary victims hold no grudge against her and have forgiven her. She will have no choice but to share the child she had with the deceased with his parents. This calls for a sentence that will not only make it clear that what she did was wrong but also allow the restoration of the family relationships while at the same time taking care of the best interests of the two minor children.

18. Taking into consideration the totality of the circumstances of her case, it is evident she was a victim of circumstances and a non-custodial sentence would not be suitable.

19. With regard to the proposal by the prosecution, it is my considered view that it is not enough to simply recommend a number of years imprisonment but to also to clearly explain why they recommend certain sentences, for instance in this case, they recommend fifteen (15) years imprisonment. It is important that the prosecution support the recommended sentence so that it does not just stand out as a number of years but a recommended sentence based on some substantive reasoning. This will definitely go a long way in enriching the jurisprudence around plea agreements within our jurisdiction since the court still retains the discretion on the sentence.

20. In this case the accused is a first offender. Victim of domestic violence, mother of two minor children, girls separated as a result of the offence, with the family of the deceased refusing to release the youngest to her. This is a case that screams for a non-custodial sentence despite the fact that a person lost his life.

21. The accused has been in custody since May 2020, and has had time to reflect on her actions, a custodial sentence would not serve any purpose. Hence taking into consideration the totality of this case, I find that the period spent in custody is sufficient and order that she be placed on probation supervision for three (3) years.

22. During the period under supervision, Probation and After Care Services to assist her get counselling, and together with Directorate of Children Services, reunite her with her children. Parental responsibility falls directly into her hands, and while the grandparents may have access, they have no right to deprive her of the custody of the child.

23. Should there be any difficulty in this, counsel, the probation and children officers are at liberty to come before this court for appropriate orders.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAKURU THIS 7TH DAY OF DECEMBER, 2021

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

For State: Mr. Kihara

For accused: Ms. Ogange

Accused present