



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL CASE NO. 03 OF 2019

REPUBLIC.....PROSECUTOR

=VERSUS=

SAMUEL CHEBURET KURUI.....ACCUSED

JUDGMENT

1. The accused person, who was initially charged with murder, was convicted on his own plea of guilty to a reduced charge of manslaughter contrary to section 202 as read with 205 of the Penal Code. The court confirmed on oath the voluntariness of the plea bargain and noted the accused's certificate of fitness to plead dated 4th March 2019 before accepting his plea of guilty.
2. The facts of the case which the accused upon entry of his plea of guilty accepted were as follows:

“FACTS

*The deceased and the accused herein were neighbours. On the 15th day of January 2019 one of their neighbours by the names Isaac Kulei had hosted some visitors and had also invited some neighbours among them the accused and the deceased. The host had prepared some busaa for his visitors. Those who were taking busaa sat outside the house while those who were not taking sat inside the house. **The deceased and the accused were among others taking busaa so they sat outside. After some time the accused and the deceased became drunk and started arguing. The deceased who was armed with a panga. One of their neighbours by the name Chemutai Kurere tried to separate them but to no avail. The accused threw away the panga he was holding and snatched the jembe handle that the deceased was holding and hit him on the head inflicting a serious injury. The accused then dropped the jembe handle and ran away. The visitors and neighbours who were in the homestead tried to assist the deceased and one of them called a nurse from Kapkulei health centre who came and gave first aid to the deceased. The deceased was then rushed to Baringo County Hospital where he was pronounced dead on arrival.** The body of the deceased was removed to Baringo referral hospital mortuary where postmortem was done on 25th January 2019 and cause of death was found to be acute head injury due to blunt force trauma following assault. The accused was arrested by members of public on the 18th January 2019 at Koriema trading centre and handed over to the police. He was taken to Court and charged with the offence of murder which has now been reduced to manslaughter. He was thereafter presented before the doctor at Moi Teaching and Referral hospital for mental assessment and was declared mentally fit to stand trial.”*

3. The DPP confirmed that they had no record of previous convictions of the accused.
4. In mitigation, counsel for the accused urged a non-custodial sentence as follows:

“Mr. Mwaita in Mitigation

On behalf of the accused, I mitigate that he is remorseful from the action. It was not his wish to do so. He seeks forgiveness from the family of the deceased and the Court. He is a first offender. He is a middle aged man of 37 years. He is a first born in a family of 7. He is married with 4 children. 1st born in standard 6 and last born is 4 years and has not gone to school. He is a casual labourer. His wife is a house wife. His level of education is standard 8. He is a partial orphan.

His father is deceased. His mother is 65 years. His mother and the other 6 siblings depend on him beside his nuclear family. He requests for a lenient sentence so that he can attend to the nuclear family, the aged mother and also make peace with the family of the deceased who are neighbors. That is all.”

5. The Probation officer's presentence report was negative for non-custodial sentence and recommended as follows:

“CONCLUSION

Your lordship, before Court is an offender age 37 years. He is remorseful and apologetic of the offence committed stating that he acted under the influence of alcohol thereby fatally wounding the deceased who was his friend and a clan member. He pleads to the honorable Court to give him a chance to re-unite with his family with an absolute promise not to commit such grievous act in future.

The deceased family however is yet to come to terms with the loss and is against the rehabilitation of the accused in the community. They are of the opinion that the accused be subjected to a deterrent sentence to curtail his violent behavior.

The local administration equally described the whole incident as unfortunate and attributed it to alcoholism where both the deceased and the accused were intoxicated at the time of the commission of the offence. In their opinion reconciliatory talks aimed at appeasing the deceased family have not been initiated and there is still open animosity towards the accused by the deceased kin.

RECOMMENDATION

Given the open animosity towards the accused by the deceased kin, coupled with the fact that no reconciliation has taken place, a community-based sentence seems to be unsuitable for this case. It is therefore my opinion that it may be dealt with otherwise subject to the discretion of this honorable Court.

Kiprono M.K.

Probation Officer

Baringo County

Date: 27/11/19.”

Sentence

6. The court has previously lamented the prevalence of unlawful killings in the area and sought to discourage them by deterrent imprisonment sentences for periods of between 5 years for cases of extreme provocation and 8 years for other cases of unintentional killing in alcohol-driven situations. In considering the prevalence of the offence to determining the appropriate sentence in a particular case, the court is not punishing the accused for the offences of others because the sentence is tailored to meet the particular offender having regard to such factors affecting the particular case as the gravity of the offence, the moral blameworthiness of the offender, and the community and public interest concerns in the matter. I respectfully agree with Porter, Ag. J, (as he then was) in **Thathi v. R** (1983) KLR 354 that the prevalence of a type of offence may aggravate a matter and justify a severe penalty.

7. The Court of Appeal has approved the range of five to eight years as not being excessive in manslaughter cases in Note **Wanyonyi v. The Republic** [1980] KLR 116 (Madan, Law and Potter, JJA) where the appellant had been convicted on his own plea of guilty to manslaughter and sentenced to imprisonment for 8 years, the court determining as follows:-

“The sentence for eight years imprisonment can’t be said to be wrong in principle, but we feel that the appellant may have been very much under the influence of the chang’aa he had admittedly consumed on the afternoon of the crime, to the extent of influencing his resentment against the deceased. In the circumstances and having regard to the appellants previous good character and to his long period of detention before trial (fifteen months) we feel that his sentence is indeed heavy and reduce it to one of five years imprisonment.”

8. Similarly, in **Wero v. R**. (1983) KLR 349, the Court (Madan, Kneller JJA. & Chesoni, Ag. JA.) in same scenario as here where the accused who had been “charged with murder was convicted for manslaughter and sentenced to eight year’s imprisonment after he plead guilty to the reduced charge” held that –

“The sentence of eight year’s imprisonment where the case was on the borderline between murder and manslaughter was legal, appropriate and not manifestly excessive.”

9. In **Andrew v. R (Note)**, (1980) KLR 153, another case of plea of guilty to a reduced charge of manslaughter, the Court of Appeal (Madan & Potter JJA. & Simpson, Ag. JA.) considered the period of almost one year that the appellant had been in custody and reduced a sentence of imprisonment for eleven years to five years.

10. See also **R v. Margaret Kabon Talaa & 2 Ors.**, KBT HCCRC NO. 18 of 2017 applying **Wanyonyi v. R**, supra, and **R v. Julius Tetea Kate alias Samu**, KBT HCCRC No. 60 of 2017.

The present case

11. The circumstances of this case do afford mitigating reasons as to impel the court to depart from conventional sentence of imprisonment for eight (8) years. The court notes that, although the accused demonstrated readiness to fight the deceased in the fact that he had armed himself with a *panga*, which he later threw away and disarmed the deceased of his *jembe* handle which he then used to inflict the fatal blow,

the deceased and the accused were fighting while drunk, and the accused's mental status is certified as having "a mental illness but currently stable", and the court cannot tell how far back his illness went. In addition, in this case, just like, **Wanyonyi** and **Andrew**, the accused has been in custody for 10 months. The court will, therefore, impose a sentence of five (5) years from the date of the sentence.

Orders

12. Accordingly, for the reasons set out above, the accused having been convicted on his own plea for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, is **sentenced to imprisonment for five (5) years commencing from the date of this sentence**, having already considered the period pre-trial detention in accordance with section 333(2) of the Criminal Procedure Code.

13. The effect of section 379 (3) of the Criminal Procedure Code is explained to the Accused. Right of Appeal on ***extent or legality of the sentence*** only.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF JANUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

MS. Mwaita & Co. Advocates for the Accused.

Ms. Macharia, Ass. DPP for the Respondent.