



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 7 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON MERIN.....ACCUSED

SENTENCING

1. The accused was initially charged with the Offence of Murder contrary to section 203 as read with section 204 of the Penal Code. Particulars were that on the night of 22nd April 2019 at Engumi area within Namelock Township in Loitokitok Sub-County, within Kajiado County he murdered **Isayah Leeiyo Taliah**.
2. The accused then went into plea bargain with the Office of the Director of Public Prosecutions in terms of section 137A of the Criminal Code. Upon reaching an agreement, the court explained to him his rights to be tried in accordance with the law, and the fact that if he entered into a plea bargain agreement he would waive some of his rights.
3. The court was satisfied that the accused understood his rights under the plea bargain arrangement and that he would lose his right of appeal on conviction, except with regard to sentence. The court further scrutinized the plea bargain agreement and was satisfied that it was proper. It then allowed the accused to plead to a lesser offence of manslaughter. He pleaded guilty. The facts were then read to him and he admitted them. He was convicted on his own plea leading to this sentencing.
4. In mitigation, Miss Ng'ania, learned counsel for the accused, submitted that the accused is a first offender and urged the court to consider the circumstances under which the offence was committed. According to counsel, this was a family dispute where the accused had gone for his wife at her parents' home after she left the matrimonial home due to some domestic misunderstandings. Counsel submitted that the offence occurred during a routine disagreement but unfortunately, the accused killed his brother-in-law.
5. Mr. Njeru, learned Assistant Deputy Prosecution Counsel, submitted, that although the accused had saved the court's time by pleading guilty, the court should consider the rights of the victim's family. He urged the court to impose a custodial sentence.
6. I have considered this case and the mitigation by counsel for both sides. The facts of the case are that on 19th April 2019, the accused had a domestic disagreement with his wife. The wife went to her parents' home leaving behind children. In the evening, the accused went for her and dragged her back to the matrimonial home while beating her. Concerned with the beatings, her grandmother came for the children and took them to her home.
7. On 21st April 2019, the accused went for the children but being at night, the family was reluctant to let the children go. The accused started banging the doors and the window to the deceased's house. At this point, the deceased went out to try and convince him to go and come back the following morning. The accused bounced on the deceased and hit him on the head with a panga and ran away. The deceased was rushed to Namelock Dispensary where he was pronounced dead on arrival.
8. From the facts of this case, it is clear that the deceased had not provoked the deceased at all. He was only trying to persuade the accused to go home since it was late at night and come for the children in the morning. He was calming a situation that would have turned ugly given that the accused was threatening to set the houses on fire.
9. The accused over reacted since the deceased was not involved in his domestic issues at all. He died trying to assist the deceased settle his own domestic issues. However, the accused used what was, in my view, excessive force when he cut the deceased with a panga. He knew or ought to have known that his actions would lead to serious injury or loss of life.
10. Looking at the facts of this case and the circumstances under which the, offence was committed and taking into account mitigation on behalf of the accused and the sentiments made on behalf of the victim's family, it is the view of the court that the accused's behaviour is inexcusable. It calls for a sentence that will balance the scales of justice to serve society by sufficiently punishing the accused for the offence he committed. That calls for a custodial sentence.

11. I note from the record that the accused was first produced in court on 7th May 2019. That means he has been in remand for nine months up to now. Section 333 of the Criminal Procedure Code requires the court to consider the period an accused spent in remand or custody when passing sentence. The section 333 provides;

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. (Emphasis).

12. The position in the above section was amplified by the Court of Appeal in *Ahmad Aboifathi Mohammed & another v Republic* (Criminal Appeal No. 135 of 2016 [2018] eKLR, where the Appellants had spent time in custody but the trial court did not consider that period when passing sentence, and the High court failed to appreciate this fact when it dismissed the appeal and affirmed the sentence. The Court of Appeal observed that:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

13. Taking into account the above provisions and the Court of Appeal decision, I am of the view that eight years’ imprisonment is appropriate in the circumstances of this case. Consequently, the Accused is hereby sentenced to eight years’ imprisonment. The sentence to run from 7th May 2019.

Dated, Signed and Delivered at Kajiado this 14th day of February 2020.

E. C. MWITA

JUDGE