



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO. 69 OF 2017

REPUBLIC.....PROSECUTOR

=VERSUS=

VKT.....ACCUSED

JUDGMENT

[1] The accused who was initially charged with murder contrary to section 203 as read with 204 of the Penal Code had this charge reduced to manslaughter contrary to section 202 as read with 205 of Penal Code following a plea bargain whose factual basis, the court accepted as lack of premeditation or malice aforethought for the killing which followed a an argument between the accused and his deceased brother over an inheritance of land. The accused was certified mentally fit to plead by a Psychiatrist's certificate dated 15th July 2016.

[2] The facts of the case as presented by the prosecution and accepted by accused were as follows:

FACTS

The accused and the deceased in this mater were brothers. The two had a prolonged dispute over a piece of land that had been left behind by their late parents. On the 26th of June 2016, the accused was in the said land where he prepared a seedbed for planting tomatoes. He then started cutting trees in preparation to burn charcoal. At around 4:00 pm, the deceased came and asked the accused why he had prepared the land and what he intended to plant in it. The accused replied that he wanted to plant tomatoes and that is when they started arguing. The accused picked the panga he was using to cut trees and cut the deceased on the head and neck. He died on the spot. The accused then went to a neighbour's house and found two children, K, J and a lady by the name S and told them that he had killed his brother and showed them where the body was. The three raised alarm on seeing the deceased which attracted other members of public including the area chief. The chief called the police who arrived and collected the body to Eldama Ravine District Hospital. Postmortem was done on the 1st of July 2016 and the cause of death was established to be cuts to the major blood vessels and the trachea causing hemorrhage and airway obstruction. The accused was also arrested and the murder weapon, a panga recovered from him. The accused was charged with murder which has now been reduced to manslaughter. Thereafter the accused was taken to Moi Teaching and Referral Hospital where it was established that he was fit to stand trial."

Conviction

[3] The court convicted the accused on his own plea of guilty to the lesser charge of manslaughter c/s 202 as read with 205 of the Penal Code.

Sentencing proceedings

[4] The Probation Officer on request of the court filed a presentence report dated 17/12/2019 as follows:

"CONCLUSION

Your lordship, the accused before the honorable Court is polygamous with two wives. He has young dependent children. He is a class 6 dropout who is unskilled and unemployed. He came into conflict with the law when he caused the death of his only brother. He had been in remand for three years and recognizes his mistake and has asked for forgiveness from the family members though reconciliatory talks have not been formalized as the wife and the children to deceased feel sidelined. The first meeting called since demise of deceased in 2016, was called on the 23rd November 2019 at house of deceased. It ended in disarray after wife to deceased and her son raised their concerns about the release of the accused which was being proposed and passed by the other family members against their wish. The aunties started screaming and hurling insults at her and son when she gave her dissenting views;

the minutes of the days deliberations were mutilated but the son struggled and took custody of them. It is believed the other family members who are in support of the accused's release later wrote another set of minutes which they brought to this office as true deliberations of the reconciliatory meeting. The situation on the ground therefore is still tense as the wife to the deceased and her children are still bitter and traumatized especially since they have not been engaged in any reconciliatory effort, but hear rumors from outside that accused will soon be released into the community. They do not welcome his release as they feel they have been treated with contempt.

RECOMMENDATION

In view of the aforementioned it is apparent there is no harmony between members of the family of accused and that of the deceased, who are pushing in different directions as to fate of accused. Though they are not opposed to his release; the deceased wife and children feel that there are issues they have not discussed and agreed upon. According to the widow there is a show of might being exhibited by the accused family members as after the premature end of the meeting without a conclusion they went ahead to draft other minutes including her as one of the parties present indicating they had agreed to receive the accused something which is contrary.

Your lordship; going by the open animosity between the two parties; I am of the view that this case is **unsuitable** for a community-based sentence and may therefore be dealt with otherwise. This is however subject to the discretion of this honorable Court.

Kiprono, M. K.

Probation Officer

Baringo County

Date: 17/12/2019

[5] In mitigation, counsel for the accused, Mr. Chepkilot, urged the court as follows:

"Mr. Chepkilot in mitigation

Accused is remorseful and regrets his action. The accused and deceased had cordial relationship before the death of the parents when a dispute arose as regards the land. He acted out of provocation and he regrets his actions.

The family of the accused is in the process of reconciling only that the elder sisters have had difficulties in convening a meeting of reconciliation in accordance with Tugen culture, which requires that men should be the one to organize for such meetings. The sisters intend to meet this Saturday with help of the other relatives to have the reconciliation. The accused was before the incident diagnosed with system related H.I.V and he had not undergone any counselling and he was a frustrated man. He is 43 married with 2 wives and 5 children the youngest by 4 ½ years old and the eldest 19 years.

The accused was the sole bread winner. He regrets his actions and prays for a non-custodial sentence to provide for his children and provide love and affection.

Accused has been in custody since June 2016 and he has reformed during this time. His family members visit him often. He prays for a non-custodial sentence.

Sentence

[6] The court has considered the accused's mitigation. However, to release on non-custodial sentence so that he may provide for his family of two wives and children will be to allow the accused to benefit from his own wrong-doing in eradicating by killing his brother with whom they contested over a portion of land which he now, in the absence of his contender brother, seeks to enjoy alone with his family. This is a situation similar, in respect of the offence of murder, to the statutory injunction in section 96 (1) of the Law of Succession Act that "a person who while, sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person..."

[7] By his murderous act the accused has deprived the deceased's family of their provider and means of sustenance and their repulsion to amicable settlement of the matter is understandable.

[8] The accused attacked and cut with a panga his brother merely because had an argument over a portion of land which they inherited from their father. There is no evidence of provocation and there was no suggestion that he was drunk or otherwise intoxicated. The accused then went to their neighbours to tell them that he had killed his brother. It is not clear from the evidence whether this was an act of bravado or remorse at the act of killing. Even if the court grants to the accused the benefit of the doubt as to the nature of this piece of evidence and take it that he regretted his action, together with, as mitigated by counsel on his behalf, that he was a frustrated man having been diagnosed with system related HIV without the benefit of counseling, the heinous act of killing one's opponent in sober moment removes any diminished responsibility by drunkenness or other intoxication. The court still has a duty to encourage by deterrent sentence the unacceptable mode of settlement of disagreements by violent and fatal attacks on one's contenders in an argument or quarrel. That is an imperative of the principle of the rule of law.

[9] Moreover, the accused's unprovoked killing of his unarmed brother following an argument over the land using the panga which he had

been using in preparing the shamba for cultivation, while it may not have been premeditated, is clearly evidence of lack of self-control to peaceably resolve disputes without resorting to violence, which must be discouraged by deterrent custodial sentence.

[10] The Kalenjin ceremony for family reconciliation may go on in the interests of peace among and closure for the affected bereaved members of the family without affecting the legal consequences of the accused's criminal conduct.

Orders

[11] Having convicted the accused on his own plea of guilty for manslaughter c/s 202 as read with 205 of the Penal Code, the court considers that in the circumstances of this case an imprisonment for 8 years meets the justice of the case, having regard to the circumstances of case.

[12] As the accused has been in remand since July 2016, **the court sentences the accused to serve imprisonment for eight (8) years which sentence shall commence on 5th July 2016 when he was remanded awaiting his trial.** in terms of section 333 (2) Proviso of the Criminal Procedure Code.

[13] Right of appeal under section 379 (3) of the Criminal Procedure Code is explained.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chepkilot for the Accused person.

Ms. Muriu, Prosecution Counsel for the Respondent.