



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Coram: D. K. Kemei – J**

**CRIMINAL CASE NO. 6 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DENNIS NTHENGE CHARLES.....ACCUSED**

**RULING ON SENTENCE**

1. The accused herein **Dennis Nthenge Charles** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 12<sup>th</sup> January, 2009 at Ngelani sub-location, Ngelani location in Machakos District of the Eastern Province he murdered **Albanus Mutisya Kavita**. The accused entered a plea of not guilty whereupon a trial commenced culminating in the judgement of this court dated 30/04/2020 whereby he was found guilty and convicted for the offence of murder as charged herein.

2. Learned counsel Mr. Mwangera for the prosecutions indicated that the accused is a first offender.

3. Mr. Muumbi learned counsel for the accused submitted that the accused is a first officer and who is very remorseful. He submitted that his family attempted reconciliation efforts with the family of the deceased but which were turned down. Counsel added that the accused committed the offence while drunk. It was also submitted that the accused has already reformed and now prays for leniency as he regrets the incident and is willing to meet with the family of the deceased with a view to compensating them under Kamba customary laws.

4. A pre-sentence was called for by this court. The same is dated 28/05/2020. The report captures the circumstances under which the offence was committed namely that the deceased and his group had entered a certain bar belonging to accused's father and where the accused worked and that a disagreement arose out of the deceased and his buddies' conduct in engaging in a brawl with customers and then locking them from outside. It revealed that later in the night the accused and deceased met and an argument arose whereby the accused stabbed him with a knife leading to the death of the deceased. The report also captured the sentiments of the family of the deceased who are reported to be very bitter about the loss of their kin and that they rejected any overtures on compensation under Kamba customs. As regards the family of the accused, the report indicates that they are receptive and seek to have the accused back in the society and that they are still ready and willing to initiate the requisite compensation under Kamba customary law. The local administration indicates that the accused has no previous criminal records and that he is not a nuisance in the community since he is reported to be an industrious young man in the area who still has good relations with the clan members even while he was out on bond. Finally the Probation Officer opined that the offence had been committed due to alcoholism, lack of alternative dispute resolution, poor anger management and lack of self-control.

5. The offence of murder attracts a mandatory penalty of death sentence as provided for under Section 204 of the Penal Code. However, following the decision of the Supreme Court in the case of **Francis Kariuki Muruatetu and Another –Vs- Republic [2017] eKLR** the death penalty was declared as unconstitutional and which paved way for courts to receive mitigating circumstances from convicts before passing the appropriate sentences. The above decision has gone a long way in supporting the Judiciary Sentencing Guidelines for various offences including murder. Some of these guidelines include the following:-

***(a) Age of the offender;***

***(b) Whether the convict is a first offender;***

***(c) Whether the offender pleaded guilty;***

***(d) Commission of the offence in response to gender based violence;***

***(e) Character and record of the offender;***

*(f) Remorsefulness of the offender;*

*(g) The possibility of reform and social adaptation of the offender;*

*(h) Any other factor that the court considers relevant.*

Even with the above guidelines, the court still retains the discretion to decide the appropriate sentence to mete out on the offender. The discretion of course has to be exercised judiciously. This court noted all the essential features which cropped up during the trial as well as the demeanour of the witnesses which have already been captured in the judgement dated 30/04/2020. It transpired from the evidence that the deceased and his buddies had entered a bar belonging to the accused's father and created a fracas in which some of the patrons took off without paying up their bills. The deceased is reported to have left the said bar but was later caught up by the accused herein who was then operating the bar in question on behalf of his father and that a scuffle between the two arose whereupon the accused stabbed him with a knife. It is noted that the attack took place long after the fracas and which leaves no doubt that the accused had harboured ill will against the deceased since upon closing the bar he went in search of the deceased with the sole aim of teaching him a lesson for disrupting business at the bar leading to loss of sales in unpaid bills when customers took off without settling their bills. It appears to me that the accused had decided not to report the deceased's actions to the authorities for action but to sort out the matter himself by pursuing the deceased and killing him. The death of the deceased is attributed entirely to the accused herein. I am sure had the accused left the matter of the fracas until the following day to take it up with the authorities the deceased might be alive today. The act of the accused in pursuing the deceased away from the scene of the fracas was unnecessary and had he kept his cool he would not have found himself in the present circumstances. His actions has led to loss of life and which must be atoned.

6. I have considered the pre-sentence report as well as the mitigation presented. The said report appears not to have anything adverse to the accused save only that the victim's family is still bitter for the loss of their kin. The report captures some attempts at compensation but which were rebuffed by the family of the deceased. I am unable to fault the family of the deceased for rejecting overtures from accused's family since the life lost cannot be brought back. Both families of the accused and deceased want justice served.

As regards the sentence to be imposed, I need to take into account decided cases and the period spent in custody by the accused. In the case of **Jonathan Lemiso Ole Keni –Vs- Republic [2018] eKLR** an appellant who shot a person without any provocation was ordered to serve thirty (30) years imprisonment. In the case of **John Ndede Obago –vs- Republic [2018] eKLR** the Court of Appeal upheld a sentence of 30 years imprisonment in a case of murder where the Appellant assaulted the deceased several times causing his death. The circumstances leading to the death of the deceased herein were rather tragic as the accused had stabbed him with a knife on the stomach. The deceased was not armed at the time and therefore the use of such a weapon by the accused was excessive in the circumstances even if an argument had arisen between the two. The use of a knife was therefore uncalled for.

The accused was arrested on 13/01/2009 and remained in remand custody for a period of four (4) years before he posted bail. He has been out on bond for about seven (7) years before his conviction on 30/04/2020. Taking into account the period spent in custody as well as the favourable pre-sentence report, I am of the view that a sentence of ten (10) years imprisonment is appropriate in the circumstances. Consequently, the accused is hereby ordered to serve Ten (10) years imprisonment from the date of conviction namely 30/04/2020.

Orders accordingly.

**Dated and Delivered at Machakos this 8<sup>th</sup> day of June, 2020.**

**D. K. Kemei**

**Judge**