



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRC NO. 2 OF 2017

REPUBLIC.....PROSECUTION

=VERSUS=

SAMSON KALAMAI LEBENE.....ACCUSED

JUDGMENT

1. Upon the accused's acceptance of the charge of manslaughter contrary to section 202 as read with 205 of the Penal Code by a plea bargaining agreement dated 26/11/2018, the Court being satisfied of the factual basis of the plea as want of intention to kill and of the voluntariness of the accused's plea agreement, reduce the charge of murder contrary to section 203 as read with 204 of the Penal Code with which he was initially charged to one of manslaughter.

2. The accused pleaded guilty to the charge of manslaughter and accepted the facts of the case as set out by the Prosecution as follows:

"Facts

The accused and the deceased are husband and wife respectively. They were married for fourteen years and blessed eight children. On the 21st day of December 2016, in the morning, the accused went to the shamba which was within the compound and then came back and sat under a tree waiting to be served tea by the deceased. The children who were used to roam around the compound were not there and the accused inquired from the deceased on the whereabouts of the children. The deceased replied that she did not know and the accused was not happy with the answer. An argument arose between them and the accused picked a panga which was beside him and cut the deceased on the neck and limbs. The accused on realizing what he had done tried to administer first aid but in vain. The deceased bled for some time which caused her death. The accused called his brother who called the police from Marigat police station who collected the body and arrested the accused. The body was taken to Kabarnet District hospital mortuary. Postmortem was done on the 29th of December 2016 and the cause of death was found to be acute blood loss due to penetrating cut wound to the neck.

The accused was taken to Court and charged with murder which has now been reduced to manslaughter. The accused person was thereafter presented before the doctor at Moi Teaching hospital for mental assessment and was confirmed to be mentally fit to stand trial."

3. The accused's certificate of fitness to plead dated 27/2/17 was noted.

Conviction

4. The Court, consequently, convicted the accused for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code on his own plea of guilty.

5. Counsel for the accused in mitigation urged that:

"Mr. Mwaita in mitigation for the accused

On behalf of the accused, the accused is remorseful for the offence. He did not intend to kill his wife. It was a normal domestic scuffle but he regrets having used a weapon that is a panga.

He tried to resuscitate her by applying first aid but he did not succeed. He was married to the deceased and had lived together for

14 years with 8 children. As of 2016, the first born was 13 years old. The last born was 9 months old. Wherever they are, the children are missing parental help, counseling and guidance. We request for a lenient sentence. He regrets the offence. If possible, as the only parent surviving who can guide his children, he is willing to make amends for what has happened with his in-laws whom he has not been able to meet as he has been in custody.

While in remand he has been sick with a problem with his private parts. He was operated and is now healed but he has to be using warm water with salt. The accused has been in remand since 2016.”

6. The Court called for a pre-sentence Probation Officer’s Report which recorded as follows:

“Conclusion and Recommendation

Your lord, before Court is an offender with a remorseful attitude. Having pleaded guilty to the lesser charge of manslaughter, he is apologetic and deeply regrets the tragic incident stating that he had no pre-meditated plan to take away the life of his wife. Despite the intervention from the local administration to reconcile the two families, the deceased family has maintained a hardline position stating that they have not come to terms with the loss of their daughter and are still bitter partly because of what they term as the accused’s family slow pace in seeking for forgiveness soon after the incident and also for not taking care of the deceased children who are currently under the custody of the deceased mother. The hostility has also been heightened by the dowry which has not been paid by the accused family as dictated by custom.

Your lordship, given that the animosity and hostility still exists between the accused and the deceased family, a community-based sentence seems to be inappropriate at the moment. It is therefore our humble recommendation that this case may be dealt with otherwise.

Kiprono M.K

Probation Officer

Baringo Sub County

Date: 27/02/19

7. The Court has considered that the killing resulted from a domestic quarrel between husband and wife, and it was not premeditated. In his favour, the accused had “on realizing what he had done tried to administer first aid but in vain.” The Court notes from the Postmortem that the deceased died out of the excessive bleeding from the cut on the neck. The cause of death shown a postmortem Report as “acute blood loss secondary to penetrating cut wound to the neck.” The accused in remorse had called his brother and did not run away as he is reported to have been arrested when the brother “called the police from Marigat Police Station who collected the body and arrested the accused.”

Sentence

8. I have considered the Probation Officer’s pre-sentence report which is negative for non-custodial sentence. I consider that the sentence of imprisonment for five (5) years will meet the justice of the case for retribution and deterrence of the accused and assuagement of the deceased’s family noting that there were indications that the deceased’s family were open to reconciliation and payment of dowry in accordance with applicable custom. The Court cannot, however, enforce customary practices in criminal law.

9. The accused has been in custody since 16/1/17 when he was remanded awaiting trial, and has therefore been in custody for almost 2 years and 4 months.

Orders

10. Accordingly, for the reasons set out above and pursuant to section 333 (2) proviso of the Criminal Procedure Code which requires that the Court takes into account the period of pre-trial detention of an accused awaiting his trial, I sentence the accused to serve imprisonment for 5 years to be reckoned from the 16/1/2017 when he was first remanded by the Court.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mwaita & Co. Advocates for the accused person.

Ms. Macharia, Ass. DPP for the Respondent.