



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 07 OF 2017

REPUBLIC PROSECUTOR

VERSUS

JOHNSON AKHWIRA AMONI ACCUSED

SENTENCE

1. The accused was facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. He entered into a plea agreement with the prosecution and pleaded guilty to a lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The accused was convicted of the said offence.

2. The prosecution asked the court to treat the accused as a first offender. In mitigation the advocate for the accused Mr. Ondieki stated that deceased was a son to the accused. That it is the deceased himself who confronted the accused thereby occasioning the incident that led to the deceased's death. That the accused is aged 67 years and has been in custody for 2 years. He has never committed any other offence. That he has a hearing problem. He is remorseful for the loss of life. The advocate pleaded with the court to sentence the accused to a non-custodial sentence.

3. The court called for a pre-sentence report. The report notes that the accused has a wife and a family. That he is easily provoked, violent, vengeful and dishonest. That he has poor relationship with his family due to his anger. That the family members are not ready to receive him now and wish that he remains in custody as they still have fears due to the offence that he committed. That the local community members have no challenges with him as he has never wronged them save that they are worried about the safety of his immediate family members. That the "boda boda" group to which the deceased worked with have threatened to kill the accused when he is released. The probation officer concluded the report by stating that the life of the accused is at risk at home and asked the court to give him an alternative sentence.

4. The facts adduced against the accused were that his granddaughter who was daughter to the deceased was charging her phone using the accused solar power. When the accused learnt about it he took his granddaughter's mobile phone and threw it into the fireplace. The girl went and reported to her father, the deceased. The deceased went and confronted the accused. The accused lost his temper. He took a piece of wood and hit the deceased on the back of the neck. The deceased fell down and lost consciousness. The accused took an iron bar and severally struck the deceased with it as he screamed that he was going to kill him. The deceased died on the spot.

5. Sentencing is a discretion of the trial court. When exercising its duty of sentencing a sentencing court is required to consider the mitigating circumstances as well as any aggravating circumstances. In **Fatuma Hassan Sato –Vs- Republic 2006 (eKLR)** Makhandia J. (as he then was) observed that:-

“Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judiciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and exclude all extraneous factors”

6. The Court of Appeal in **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** discussed principles of sentencing and cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most

relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

7. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community's condemnation of the criminal conduct.

8. In the case of **Republic –Vs- James Kimosop (2017) eKLR** the court (**Ngugi J.**) adopted its ruling in:-

Republic –Vs- Philip Muthiani Kathiwa, Machakos High Court Criminal Case No. 14 of 2015, where the court considered the issue of appropriate sentence in a case of manslaughter upon a plea of guilty and said:-

The objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.

Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. See Mokwa –Vs- R (1976-1980) KLR 1337. The accused herein acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked with a panga. The use of the poisoned arrow on the deceased, in the circumstance of this case, was excessive force, and the accused was guilty of manslaughter.

In considering the appropriate sentence, same offences should attract similar consistent penalties. In Andrew –Vs- R (1976-1980) KLR 1688, in a case where the appellant and his co-accused had in a fight started by them the deceased was stabbed, the Court of Appeal found manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In Orwochi –Vs- R (1976-1980) KLR 1638, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of the appellant a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.

The decision of the Court of Appeal in Muoki –Vs- R (1985) KLR 323 (Madan, Kneller JJA. & Platt, Ag. JA) is relevant. The court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that "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."

The court in **Republic –Vs- Samuel Kariuki Kande (2017) eKLR** stated that:-

"One of the objectives of sentencing is to ensure that justice is done by ensuring that except exceptional circumstances, there is no disparity: same offences should attract similar consistent penalties. In his survey of case law in Philip Muthiani Kathiwa Vs- R (2015) eKLR Justice Muriithi concluded that a case of manslaughter where mitigating and aggravating circumstances balance or cancel each other out such as this one and where the judicial officer has concluded that a custodial sentence is the appropriate sentence, it should attract a sentence of three and a half years imprisonment. In this case, I have come to the conclusion that a custodial sentence is merited given the circumstances which I have outlined above as the only suitable way of expressing society's condemnation of the accused person's conduct or deter similar conduct in the future. Having noted the family's views and having considered all the mitigating circumstances, I am of the view that a custodial sentence of three and a half years is the appropriate sentence".

In **Republic –Vs- Kukat Kitilit (2018) eKLR** the court stated that:-

"On the principle that same offences should attract similar penalties, this court recalls that it has in previous similar cases of

manslaughter passed a sentence of imprisonment for periods ranging between 3 years to 8 years depending on the circumstances of the cases, the moral blame-worthiness of the accused and attendant factors including presence of extreme provocation, use of excessive force and whether the accused was the aggressor or merely acting in self defence. See Omuse –Vs- R (2009) KLR 214, R –Vs- Gilbert Kipkorir Koech, KBT. HCCRC No. 58 of 2017 and R. –vs- Margaret Kabon Talaa & 2 Others KBT HCCR No. 18 of 2017.”

9. Section 333 (2) of the Criminal Procedure Code requires a sentencing court where an accused person has been in custody prior to sentence to take into account the period spent in custody.

10. I have considered the mitigation by the accused person. He is aged 67 years. He has been in custody for two years awaiting trial. That the accused is hot tempered is evident from the fact that he continued to beat up the deceased even after the deceased had lost consciousness while screaming that he was going to kill him. And kill him indeed he did. Though the deceased is the one who had confronted him the accused used unnecessary force to beat the deceased till he died on the spot. I consider that a deterrent sentence is called for in the circumstances of the case as a lesson to the accused that he should learn to control his temper. I sentence the accused to serve eight years imprisonment commencing from the date of arrest on 7th February, 2017.

Delivered, dated and signed in open court at Kakamega this 9th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Ondieki for accused

Mr. Juma for State

Accused - present

Court Assistant - George

Fourteen (14) days right of appeal.