



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 26 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SYLVESTER MUTHANI ABUKHASIA.....ACCUSED

RULING

1. The accused herein was initially charged with murder contrary to Section 203 as read with Section 204 of the penal code. The accused and the prosecution entered into a plea bargain agreement in which the appellant admitted a lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the charge were that on the night of 22nd April, 2016 at Lusumu "A" village in Shikuthe Sub-location in Kakamega North he unlawfully killed Wilson Luvonga Lichina (herein referred to as the deceased).

2. The facts of the case were that the accused and the deceased were friends. That on the material night the accused and the deceased were together. The accused escorted the deceased to a church night vigil. However when the accused returned home later on in the night he found the deceased in his house together with the accused's wife. The deceased was half naked. He was armed with a panga. He attempted to cut the accused with the panga. The accused overpowered him and snatched the panga from him. He cut him with the panga on the head. Members of the public responded. The deceased was taken to hospital but died while undergoing treatment.

3. A postmortem was conducted on the body by a doctor who found the cause of death to have been due to a penetrating head injury secondary to sharp force trauma. The accused was charged with the offence.

4. The prosecution counsel asked the court to treat accused as a first offender. In mitigation, the advocate for the accused, **Mr. Munyendo** stated that the accused is aged 22 years. That the offence was committed out of extreme provocation. That it is the deceased who was armed and tried to cut the accused. That the accused has been in custody since 2016. That he has pleaded guilty to the charge thereby saving the court's time. That the accused is remorseful for committing the offence. The advocate pleaded for leniency in sentencing.

5. The court called for a pre-sentence report so as to enable the court reach an appropriate sentence. It was prepared by Mr. Masingila M. Gregory, Probation Officer Kakamega Central. The report recommended a non-custodial sentence while taking into account that the accused was a good friend to the deceased. That the accused's family has started a reconciliation process with the family of the deceased given that they come from the same home area. That the family of the deceased on the other hand is not opposed to the accused serving a non-custodial sentence and welcomed the process of reconciliation. That their bitterness has subsided and accepted the tragedy. That the community members too do not have any problem with him serving a non-custodial sentence.

6. Sentencing is a discretion of the trial court. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** 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. In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

- (a) age of the offender;*
- (b) being a first offender;*
- (c) whether the offender pleaded guilty;*
- (d) character and record of the offender;*
- (e) commission of the offence in response to gender-based violence;*
- (f) remorsefulness of the offender;*
- (g) the possibility of reform and social re-adaptation of the offender and*
- (h) any other factor that the court considers relevant.*

These factors are also applicable in a sentencing for the offence of manslaughter.

8. I have considered the sentences meted out for manslaughter in other cases. In **Republic –Vs- James Kimosop (2017) eKLR** in a case where the accused cut his brother with a panga and killed him on the spot while they were engaged in a fight, Muriithi J. sentenced the accused to a prison term of 2 years imprisonment after considering that the accused had been in custody for over one year. In the case the learned judge considered the Court of Appeal decision in **Muoki –Vs- Republic (1985) KLR 323** where the court approved a sentence of 3½ years for manslaughter as not being manifestly excessive. He also considered the sentence in **Andrew –Vs- Republic (1976–1980) KLR 1688** where the appellant and his co-accused had in a fight started by the deceased was stabbed and the Court of Appeal found as manifestly excessive and reduced a sentence of imprisonment of 11½ years to imprisonment for a term of 5 years. He also considered the sentence in **Orwochi –Vs- Republic (1976-1980) KLR 1638** where the Court of appeal reduced as manifestly excessive a sentence of 4 years imprisonment for an appellant who had in self defence during an ensuing struggle stabbed the deceased using a panga by which the deceased had attacked him, to the period spent in custody of 21 months.

9. I have also considered the mitigation, the pre-sentence report and the circumstances of this case. I have considered that the accused has been in custody since 13/5/2016 which makes it a period of 3 years. I have considered that the offence was committed under extreme provocation after the accused found the deceased in his house with his wife. It is the deceased who in the first place attempted to cut the accused with a panga. Taking all these into account I am of the considered view that the period spent in custody awaiting trial of three years is sufficient custodial punishment for the offence committed. I sentence the accused to serve three years probation to be supervised by the Probation Office, Kakamega Central.

Delivered dated and signed at Kakamega this 12th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Ondieki holding brief for Munyendo for accused

Mr. Ng’etich for state

Accused - present

Court Assistant - George