



**REPUBLIC OF KENYA**

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

**HCCRC NO. 84 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PKK.....ACCUSED**

**JUDGMENT**

1. Upon plea bargain agreement, the basis of which the DPP offered and the Court accepted as lack of premeditated killing, the murder charge herein was reduced to a charge of manslaughter contrary to section 202 as read with 205 of the Penal Code. The Court examined the accused on Oath, and noted his certificate of fitness to plead, to ascertain the voluntariness of the plea bargain before accepting the plea bargain agreement and the new charge.

2. Upon plea on the new charge of manslaughter, the accused pleaded guilty and the following facts of the case were presented by the DPP:

**“FACTS**

*7. The deceased and the accused in this matter are father and son. The accused and the deceased had long time dispute over land. On the 11<sup>th</sup> day of June 2017 at about 1:00 pm, the deceased Wilson Kipyegon was fencing the shamba in dispute while the accused was going to cut grass. The accused found the deceased fencing the land in dispute and confronted him demanding to know why he was fencing it. The deceased answered that there was nothing wrong with that as the land was his and he had a right to fence it. **An argument arose between the two and the [accused] who was carrying a panga chased the deceased who fell down after a short distance. The accused caught up with him and cut him on the head and neck and he died on the spot.** Police from Timboroa police station visited the scene, photographed the body and collected it to Eldama Ravine Referral hospital mortuary where postmortem was done. Cause of death was established to be multiple fatal injuries, exsanguination from transected major blood vessel, transected trachea and severed spinal code. The accused was arrested the following day and taken to Timboroa police station. A blood stained panga suspected to have been used by the accused was recovered from behind the house of the accused's grandmother. The accused was arraigned in Court and charged with murder which was now been reduced to manslaughter. He was there after presented before the doctor at Moi Teaching & Referral hospital for mental assessment and was confirmed to be mentally fit to stand trial.”*

**Conviction**

3. The accused admitted the facts set out above and the Court accepted his plea of guilty and convicted him for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, on 28/3/2019.

**Sentencing Proceedings**

4. The Ass. DPP intimated to the Court that she did not have previous records of the accused.

5. The accused's Counsel made submissions in mitigation as follows:

**“Mr Chepng'oswo**

*Accused is remorseful. He is a first offender. He is only 19 years. He was 17 years the date of birth is shown on 1/8/2000. This was an unfortunate incident following a land dispute. The accused regrets killing his father. He wishes to proceed with his studies. He pray for a non-custodial sentence.*

*The accused's ID card [xxxx] indicates his date of birth as 1/6/1999.*

*If the accused is given a chance, he wishes to pursue a course in surveying at Eldoret Polytechnic. The accused is the first born in a family of 7. He assists his mother to bring up the rest of the children. The accused is willing to reform.*

### **Court**

1. Presentence Report on 10/4/19.
2. Accused shall be remanded at G.K Prison, Nakuru.

**EDWARD MURIITHI**

**28/3/19”**

6. The Court then called for pre- sentence Report for the Probation Officer and set the matter for further consideration on 10/4/19.
7. On 10/4/19, a Probation Officer’s Report was filed, recommending a Probation sentence for the Accused as follows:

### **“HOME REPORT**

*The home report reveals that the deceased and the accused were very close. The deceased had bought another one acre piece of land in Charaya some kilometres away from Seguton where the family had settled. He (deceased) moved with his family and the other children leaving behind the accused to take care of the old land. The accused’s mother indicated that while the family relocated in 2017, there was drought in Charaya and hence had to return to Seguton for the sake of the animals. After the rainy season, the family went back and settled in Charaya. The deceased sold half an acre piece of land in Charaya and told the family that he wanted to sell the farm in Seguton to be able to take the accused to college and the rest to be spent in building a house. Unfortunately the deal never went through.*

*Those interviewed indicated that when the deceased went to Seguton, he carried a panga, a rungu and a jembe. That day he did not spend the night at his farm in Seguton and instead went to his brother’s home where he spent the night. The following day he went to his farm and started doing some measurements on the farm. When the accused came as he had gone to graze animals he found his father in the farm digging holes and when he asked him what he was doing, the deceased told him that he was marking the area he wanted to sell. They had an argument on the same as the family had indicated earlier that instead of selling the Seguton farm, it was better if he could sell that one of Charaya. The inquiry revealed that nobody knew what transpired after the argument as the accused run to the chief’s office who referred him to the police.*

*The family has had several sittings on resolving the issue and has also done the cleansing rituals. The family has already forgiven the accused and he also asked for forgiveness from all the family members indicating that he had no intention to kill his father.*

*The deceased’s brothers indicated that the accused had no issues with his father (deceased) and have no reason to think that he had intention to kill him. They said that they were aware that their brother (the deceased) had sold part of the land he had bought in Charaya and that the family was against him selling the land in Seguton and instead had suggested that he sells the other part in Charaya as the place gets dry more than in Seguton. They further indicated that they have forgiven the accused and has no issues with him and wishes that the Court be lenient on him and give a chance to reform on a non-custodial sentence.*

*His uncle (P) states that it was unfortunate that the incident happened but was unbelievable as the two were very good friends and nobody would wish the other to die. He indicated that the family has no issue with the accused and wish he be forgiven as discussed in their meeting.*

*The area administrator indicated that the accused has no record of criminality and is known to be a good friend of the deceased (His father) and could not understand what could have happened. The deceased was a farmer in the two farms and had no issue with anybody. The chief further indicated that she was aware that the family had a reconciliation meeting where they forgave the accused and rituals were done on the same.*

### **CONCLUSION**

*Your lordship, the above mentioned is a 19 years old single man and a first offender. He is a form four leaver who is unskilled. He does casual jobs and farming to earn a living. He is known to be a good citizen and close friend to the deceased. He is single and used his salary to supplement provisions for his folks. The family members who were interviewed indicated that they have forgiven him and have no issues with him as they are aware that he had no intention to kill his father. Both the deceased and the accused were in good terms and what happened could not be explained by anyone as they were known to be good friends and the incident was unfortunate.*

*The clan has since sat down and decided to forgive the accused since they know him as a good man and wishes that the Court may also forgive him. The area administrator indicated that the accused has no record of criminality and is known to be a good friend of the deceased (His father) and could not understand what could have happened. The family prays that he may be given a non-custodial sentence preferably a **Probation sentence** where he can be guided and counseled.*

**FRANCISCA KAMANDE**

**PROBATION OFFICER 1**

**FOR: SCPO-KOIBATEK.**

**DATE: 10/4/19”**

8. The DPP objected to the recommendation of the Probation sentence for the offence herein in submissions before the Court set out in the day's proceedings as follows:

**“10/4/19**

*Coram: Before Honourable Justice Edward Muriithi*

*Court Assistant: Kemboi*

*State: Ms Macharia*

*Accused: present*

**Mr Chebii for accused.**

*Probation Officer's Report of 10/4/19 is positive for probation sentence.*

**DPP**

*I do not consider the probation sentence is preferable considering the offence. The family members have not produced anything to Court to show that they have accepted to receive him in the society.*

**Mr Chebii**

*The family has agreed. We do not have a family report.*

**Court.**

- 1. Sentencing hearing on 25/4/19.*
- 2. Family of the deceased to attend Court.*

**EDWARD MURIITHI ,JUDGE**

**10/4/19.”**

9. Persons answering to the description of family of the deceased attended Court and the Court took their representations in the proceedings of the 25/4/2019 as follows:

**“25/4/19**

*Coram: Before Justice Edward Muriithi*

*Court assistant: Kemboi*

*State: Ms Macharia*

*Accused: Present*

**Mr Chebii**

*The family of the deceased who came from Kericho are present.*

- 1. Mr KAL I.D [xxxx] sworn and states in Kiswahili.*

*I am the grandfather to the accused. The father to the accused KK who is my brother. We agreed that the accused should be given a probation sentence. We had a family meeting which resolved this matter. Letter of the chief dated 11/9/2018.*

2. Richard Kipkurui Arap Siele I.D [xxxx] Christian sworn and states in Kiswahili.

*The deceased was my child under the clan as the father is my brother. The accused is therefore my grandchild. We have agreed as a family that the accused be forgiven.*

3. CCKC sworn and states in Kiswahili ID [xxxx].

*I am the widower of the deceased. He is the father of the accused. We have met as a family and have agreed to forgive the accused. The accused is my first child of 11 children. He was born in 1999. He is about 19 years. The last born is 3 years, a boy.*

**Mr Chebii.**

*The accused was 17 years old at the time of committing the offence. The family stood surety for him after the charge. The family has resolved to welcome back home. We pray that the accused be placed to probation.*

**Miss Kitilit**

*The accused was out of bond during trial and he attended all Court sessions. He never had any altercations with the authorities and the village. The report for the probation office is positive. We agree with a probation sentence. If he contravenes the probation terms the Probation Officer may request for warrant of arrest and he could serve custodial sentence.*

**EDWARD MURIITHI**

**Accused**

*The Probation Officer has explained the probation sentence to me.*

*I have nothing to say.*

**Court**

*Judgment on 29/4/19.*

**EDWARD MURIITHI**

**25/4/19”**

10. The Court set Judgment on 29/4/19 on which day the Court delivered a ruling indicating its inability to conclude a Judgment on the matters on the materials before it as follows:

**RULING**

*1. Having considered the record of the sentencing proceedings held on 25/4/2019, the Court does not feel confident that the views of the witnesses who purported to give the deceased's findings statement were representative of the deceased's family. Accordingly, the sentencing and final orders on the trial as Court further to order from representative for the deceased's side of the family – brothers and sisters in the absence of the parents to be availed. The Probation Officer shall assist the Court in perceiving the attendance of such members of the deceased's family on a date to be agreed before sentencing in the matter.*

*2. Mention on 22/5/19 for directions on further sentencing hearing.*

*Order accordingly.*

11. On 22/5/2019, Mr. Kiprono the Probation Officer, Kabarnet attended Court and together with the Counsel for the accused in the presence of the accused submitted as follows:

**“22/5/19**

*Coram : Before Hon Justice Edward Muriithi*

*Court assistant: Daisy*

*State: Joseck Abwajo*

*Accused: present*

Mr Kiprono for probation office.

Mr Chepngoso for Mr Chebii for accused.

**Mr Kiprono Probation Officer:**

The information I have is that the reasons why the biological brother and sisters are not coming is that the accused was born out of wedlock. The deceased's mother is also alive and they feel that the kin was killed by an outsider. They are not willing to come. The group that attended Court on 25/4/2019 are misleading as the minutes of the clan members the names of the biological relatives are listed but information from the chief were not there. The chief declined to approve and sign the minutes for the reasons that the biological brothers were not at the meeting. The biological brothers JK, AK AND DK. That is the information that I have gathered from the ground.

**Mr Chepng'oso**

I request for time to take instructions. We can come back on 12/6/19 when the Court is sitting on vacation.

**Court**

1. Directions on 12/6/19

**Further order**

2. Accused to be escorted to PGH Nakuru for treatment.

**EDWARD MURIITHI**

22/5/19”

12. The accused was not produced before the Court on the next two Court sessions despite Court order on 12/6/19 and 20/6/2019, on 27/6/2019 when he was presented before the Court, Counsel for the accused made final submissions as follows:

“27/6/19

Coram: Before Hon Justice Edward Muriithi

Court assistant: Kemboi

State: Ms Macharia

Accused: present

Mr chebii for the accused.

**Mr Chebii**

In the absence of a Probation Officer's report favourable to non-custodial sentence, we request for a lenient sentence. He is a step-son of the deceased. The accused is 18 years. He is remorseful. The incident was committed at the heat of the moment as they were quarrelling over something and unfortunately injured the step-father. We request for a lenient sentence. The charge was brought when he was a minor and now he is an adult. His conduct while on bond has been good. We pray for a lenient custodial sentence. He has been in custody for some time after conviction and before trial. I urge Court to consider both periods that he has been in custody.

**DPP**

I do not have anything to say.

**Court**

Judgment on 18/7/19.

**EDWARD MURIITHI**

27/6/19”

## **Sentencing hearing**

13. The Court had granted the accused the sentencing proceedings, being mindful of the caution by Court of Appeal in *Kyalo v. R (2009)* KLR 325 as to wholesale acceptance of probation officer's report, and in line with the Kenya Judiciary Sentencing Policy Guidelines (see paragraph 2.3 at 48 thereof) and the sentencing proceedings under section 329 including, if desired, Victim Impact Statements under section 329C of the Criminal Procedure Code and the Victim Protection Act No 7 of 2014 which provide in material parts as follows:

### **"The Judiciary Sentencing Policy Guidelines**

#### *2. The Sentencing Hearing*

*1. The court should schedule a hearing in which it receives submissions that would impact on the sentence. Whilst the pertinent information is typically contained in the reports, the hearing provides the court with an opportunity to examine the information and seek clarity on all the issues*

*2. The sentencing hearing also provides the offender with an opportunity to cross examine on any adverse information that would be prejudicial to him/her. This is in keeping with the spirit of the Constitution which guarantees the offender the right to adduce and challenge evidence."*

### **Section 329 of the Criminal Procedure Code**

#### **329. Evidence for arriving at a proper sentence**

*The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.*

#### **Section 12 (1) of the Victim Protection Act, No. 17 of 2014**

#### **12. Victim impact statements**

*(1) A victim of a criminal offence may make a victim impact statement to the court sentencing the person convicted of the offence, in accordance with section 329C of the Criminal Procedure Code (Cap. 75) and that statement may be considered by the court in determining the sentence of the offender."*

14. Under section 329 D of the Criminal Procedure Code, the giving of victim impact statements is not mandatory and no adverse inference may be made for failure by the deceased's brothers and sisters to make representation to the court. It only denies the court such relevant information as to the impact of the offence on the victim and/or his family as may be useful in determination of the appropriate sentence.

## **Sentence determination**

15. Having heard the accused's mitigation by Counsel and noting that he is a young man of 19 years with his whole life ahead of him and the killing was not premeditated but provoked by the action of the Deceased in seeking to sell the land upon which the accused had settled, contrary to the wishes of his family that an alternative parcel of land be sold, and the general sentiments of the section of the members of the family who testified to the cordial relations between the accused and the deceased.

16. The failure by the deceased's real, rather than clan, relatives – brothers and sisters – to attend court does not help the court reach a suitable sentence. It, indeed only makes it difficult because cannot ascertain their support or opposition to the non custodial sentence proposed by the Probation officer by their mere absenteeism but by representations made to the court.

17. The court has been left poorer in terms of evidence of victim impact assessment. Having failed to take advantage of the window for representation under the Criminal Procedure Code and the Victim Protection Act, the deceased's brothers and sisters cannot be heard to say that they were not heard on the issue of the appropriate sentence in the matter, although no adverse inference may be made on it.

18. Doing the best I can, as required of any court in every case that comes before it, I consider the appropriate sentence to be one that permits the realization of the objects of retribution and deterrence, and reform and rehabilitation of the offender into the society in view of his youthful age. I consider that retributive and deterrent purposes of the sentence will be served by a custodial sentence which is long enough to facilitate the discipline and reformation of the offender and short enough to allow early release for the offender to attend his polytechnic studies and make his contribution to nation building and for his welfare in future life.

19. There are both aggravating and mitigating circumstances in the case: The accused used a dangerous weapon to inflict grave injuries on his step father, severing the deceased's neck by multiple panga cuts clearly indicating a desire to kill rather than stop or dissuade the father from proceeding with intended marking off the portion he intended to sell. On the other hand, the accused's minor age made him easily impressionable to the perceived provocation of the step father in hiving off his land for sale, and the uncontroverted previous cordial relations with the father supporting the heat of the moment theorem of the defence.

20. In *R. v. Samson Kalamai Lebene*, KBT HCCR Case NO 2 of 2017, this court sentenced a husband who killed his wife following a domestic quarrel to imprisonment for five (5) years in circumstance where there were prospects of, but not accomplished, reconciliation between the family members in similar fashion as here, and I said:

***“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.”***

21. I think that, here too, a sentence of imprisonment for five (5) years fits the circumstances of the case indicating provocation of the accused who was a minor aged 17 years at the time of the offence.

**Orders**

22. Accordingly, for the reasons set out above, having convicted the accused on his own plea for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, the court sentences the offender to **imprisonment for four and half (4 ½ ) years to be reckoned from the date of sentence herein, having taken into account the seven (7) month period of remand in custody in pre-trial detention before he was released on bond and post-conviction detention awaiting sentence since 28/3/2019,** pursuant to section 333(2) Proviso of the Criminal Procedure Code.

23. Right of Appeal under section 379 of the Criminal Procedure Code explained.

*Order accordingly.*

**DATED AND DELIVERED THIS 18<sup>TH</sup> DAY OF JULY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Chepng’oswo & Mr. Chebii, Advocates for the Accused

Ms. Kitilit, Prosecution Counsel for the Respondent.