



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRC NO. 18 OF 2018

REPUBLIC.....PROSECUTOR

=VERSUS=

KB.....ACCUSED

JUDGMENT

The principles

1. As in **R. v. Alfred Kipkemoi Yator** KBT HCCRA NO. 91 of 2017 of 26/7/19, the Court has been asked, on the recommendation of the Probation Officer, to release on probation the accused herein who has pleaded guilty to the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.
2. In **R v. Alfred Kipkemoi Yator**, supra the Court rejected the request for non-custodial sentence of Probation on the principle of proportionality of sentence as follows:

Principle of proportionality of sentence

*14. The offences of manslaughter and murder as a result of drink-driven disagreements is a prevalent phenomena in the area to worrying proportions and deterrent sentences are warranted. The prevalence of the offence is an appropriate consideration (see. **Thathi v. R** (1983) KLR 354) both for deterrence and denunciation of the criminal conduct. In addition, if the offender were released on Probation sentence as recommended by the Probation Officer the object of rehabilitation “to enable the offender reform from his criminal disposition and become a law abiding person” may yet not be served. For the grave act of responding by bow and arrow to a verbal argument about land inheritance matter, the offender who so kills his opponent shall have been released with, as it were, only a slap on his arrow wielding wrist. It is a wholly disproportionate sentence to the serious offence of manslaughter.*

15. The Judiciary Sentencing Guidelines provide for the principle of proportionality as one of the principles underpinning the sentencing process at p. 12 thereof as follows:

“3.1 Proportionality

The sentence meted out must be proportionate to the offending behavior. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighed in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.”

Sentence in like case

*16. In a recent case, **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 and held:*

“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....”

17. I do not see in this case any circumstances to warrant a different sentence. Although the offender herein responded to stones thrown at him by his brother following a disagreement and only shot after he had been hit with a stone on the left hand after the deceased threw a panga at him, the accused had to his discredit armed himself with a dangerous and offensive weapon of a bow and arrow and he must pay for the consequences of the use of the said weapon in circumstances which did not call for such arms to respond to the threat posed by his stone throwing, even panga wielding, younger brother. He ought to have sought to disarm the opponent. However, having been intoxicated takes away the premeditation required for the offence of murder but calls for a

deterrent sentence to curb the menace of drink-driven social killings in the region.”

3. The Court does not hold that probation sentence shall never be meted out in the serious cases of manslaughter or murder. It actually may be the suitable sentence having regard to the age of the offender as a minor (s. 191 (1) (c) Children Act) or the elderly age of the offender and the blame-worthiness ascribed to him. However, the objects of punishment to deter potential offenders, to reform the particular offender and assuage the community must all be considered before a particular penalty or mode of punishment is arrived at as suitable in the given circumstances of the case.

4. It must never be seen that through Probation or other non-custodial sentence, the offender in a serious offence is getting an “*out of jail free*” card. It must not be an occasion for the criminal justice system to become a laughing stock for its ineffectiveness. Every form of punishment must seriously address the specific penal needs of the particular case. To release an offender on Probation to serve a selfish interest of the family of offender, even where the same is also the family of the victim, is to abuse the criminal justice system to become a method of settlement of private conflict within immediate family, families or community. The bigger picture of addressing larger community interests in the punishment and prevention, and reparation for, crime must always be borne in mind.

5. And the principle that the more serious the offence the stiffer the penalty is a rule of thumb in punishment. Probation and other non-custodial sentence should be used where the object of reformation of the particular offender coincide with the overall objective of criminal justice to prevent crime.

The facts of the case

6. The facts accepted by the accused following the plea bargain herein reducing the initial charge of murder contrary to section 203 as read with 204 of the Penal Code to one of manslaughter under section 202 and 205 thereof are as follows:

“FACTS

7. The deceased and the accused herein are father and son respectively. On the 17th day of October 2015, at about 3:00 pm, the accused returned home from a drinking spree and found the deceased alone in the house. He demanded that his father the deceased should give him a share of his land. The deceased informed him that he should wait for his other brothers so they can have a discussion on how the land was to be divided. The accused became impatient and could not hear any of this. He picked a piece of timber and hit the deceased severally, on the head, back and all over the body. The deceased became unconscious and the accused took a rope and hanged him in his bedroom beside his bed. On the 18th of October 2015, a neighbor by the name William Kipyegon discovered the body and called the area assistant chief who called the police. Police visited the scene and photographs of the body were taken. The body of the deceased was removed to Baringo County Referral Hospital where postmortem was done on 26th October 2015 and cause of death was found to be respiratory failure due to lung collapse due to blunt force trauma. The accused was arrested by members of public on the 19th October 2015 and taken to Kabarnet Police Station. He narrated to the police now he had attacked the deceased before hanging him. He was taken to Court and charged with the offence of murder which has now been reduced to manslaughter. The accused was thereafter presented before the doctor at Moi Teaching and Referral Hospital for mental assessment and was declared mentally fit to stand trial.”

7. As in Yator and Kalamai Lebene cases above, the circumstances in this case of drink-driven killing set up calls for the deterrence of such crime even with the self-inflicting injury consideration of same offender-victim axis of the matter. Granted the likely double loss of the offender's (and victim's) families, the justice system must not lose occasion to communicate its revulsion to the potential offenders and the community at large.

8. The offender in this case has been in custody since 4/11/2015, over four years today, and the family which lost the deceased at the hand of his son are shown to have agreed at a meeting of 23/10/2019 “*that since the accused committed the offence through the influence of alcohol and [is] now remorseful over the deeds, we as family now kindly request the Honourable Court to release him.*”

9. On the sentence of this Court in like cases, of imprisonment for five (5) years, the accused would served actual prison time of three 3 years four (4) months being the $\frac{2}{3}$ equivalent allowing from remission under section 46 of the Prisons Act.

10. Having already served the total prison time on a 5 year sentence, which this Court imposes for the offence of manslaughter contrary to section 202 as read with 205 of Penal Code, the Court shall direct that the accused shall be released from custody forthwith.

Orders

11. Accordingly, for the reasons set out above, the Court while convicting the accused herein for manslaughter contrary to section 202 as read with 205 of the Penal Code sentences the accused to imprisonment for five (5) years.

12. The sentence of imprisonment for five (5) years shall commence on **4/11/2015** pursuant to section 333 (2) Proviso of the Criminal Procedure Code and the accused has, therefore, served his sentence in full.

13. The accused shall, therefore, be released from custody unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mbeche & Co. Advocates for the Accused.

Ms. Macharia, Ass. DPP for the State.