



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL CASE NO. 6 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

PATRICK MACHARIA WAMBUI.....ACCUSED

JUDGMENT ON SENTENCE

1. The Accused was charged with Murder on 14th February, 2019. On 19th February, 2019 he pleaded not guilty to the offence. As regards bail, Probation Officer's pre-bail report was favourable and counsel sought time to confer with the accused's family on the issue.

2. On 30th April, 2019, the defence proposed a plea bargain agreement, which the prosecution initially rejected, and the court gave the parties time to consider the proposal. By 29th May, 2019, the prosecution was willing to consider a plea bargain and a draft was in place. At the mention on 2nd July, 2019, the parties availed the signed Plea Agreement pursuant to **Section 137A (i)** and **137B** of the **Criminal Procedure Code**, to which was exhibited as P. Exhibit 1, the Post Mortem Report dated 11th February 2019 by Dr. P. M. Ndegwa.

3. Accordingly, pursuant to **Section 137F** of the **Criminal Procedure Code** the accused was placed under oath in court and addressed by the court through counsel. Following questioning under **Section 137F** of the **Criminal Procedure Code** the accused stated in Kiswahili, in part:

“I understand my Section 137F of the Criminal Procedure Code rights through my lawyer. I am aware that I am innocent until proved guilty. That I have a right to remain silent and to call witnesses. I am aware I have a right to counsel. That by signing the Plea Bargaining Agreement I waive those rights to full trial. That by signing the Plea Bargaining Agreement I cannot appeal the sentence. That I have signed the Plea Bargaining Agreement voluntarily.....”

4. The court pursuant to **Section 137G** of the **Criminal Procedure Code** adopted the Plea Bargaining Agreement having noted that the accused acted voluntarily and was competent and of sound mind. The record of the factual basis of the plea pursuant to **Section 137H** of the **Criminal Procedure Code** was recorded as follows:-

“The brief circumstances surrounding the case are that on the 3rd day of February 2019 at about 1600hours, the deceased Boniface Nganga Gikunah, aged 36 years was drinking beer at a bar called Tripple Pub in Maai Mahiu Township with his friends Jackson Nyaga, John Chege and a barmaid called Abigael Njeri Ndauri. At an adjacent table the accused one Patrick Macharia Wambui was seated with some of his colleagues who later left him seated. After about an hour, the accused was seated alone still and had a glass of beer which he kept adding water in while drinking. He then asked the deceased to buy him a drink but the deceased told him that he cannot buy him any for when he has money he does not reciprocate. The deceased then proceeded to buy his friends alcohol leaving the accused out. The deceased then proceeded to joke that the accused was keeping adding water to the same alcohol which angered the accused.

The accused Patrick Macharia Wambui then stood up and walked to the deceased and told him that since he had refused to buy him a drink, he is going to get some money from his house so that he comes and buy drinks in the bar. He then left and after about five minutes, he came back through the back door past the counter and went straight to the deceased table who was with the barmaid one John Chege. He then stabbed the deceased with a kitchen knife three times on the chest and the rib cage. The deceased then ran out of the bar and could be seen squatting a few metres from the bar. He then fell down while blood was oozing from his body. Members of public then ran to see him and it is then that the accused started running away and it is then that John Chege gave chase of him. When he realized this he stopped and produced the knife he had earlier used to stab the deceased to scare him off and it is then that some sand harvesters by the roadside who saw the commotion came towards him and one of him hit him on the head with a spade. They later started beating him up and in the process a crowd gathered. Maai Mahiu based Police Officers arrived at the scene and rescued him. A kitchen knife was recovered at the scene and the accused was taken to Naivasha District Hospital for treatment.

Meanwhile the deceased was assisted and rushed at Carewell Dispensary and later referred to Maai Mahiu Maternity Hospital where he succumbed to the injuries and was pronounced dead. On 11th February, 2019 Dr. Ndegwa conducted the post mortem and concluded the cause of death to be exsanguination due to chest injuries due to penetrating sharp force trauma, post mortem form is P. Exhibit 1. The accused was later booked at Naivasha Police Station and on the 4th day of February 2018 he was arraigned in court and later charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.”

5. The court then convicted the accused with Manslaughter in accordance with **Section 137H (2)** of the **Criminal Procedure Code**. The defence sought a date for mitigation at a sentencing hearing, and asked for a Probation Officer’s Pre-Sentence Report. The Probation Officer’s Report was filed on 30th July 2019. Defence counsel filed written mitigation submissions on 19th September, 2019.

6. In his mitigation submissions, which I have carefully considered; counsel stated that:

“a. The accused is a first offender.

b. The accused committed the offence whilst a drunken stupor that he is remorseful and contrite.

c. The accused is married and has one child, and prior to the commission of the offence lived harmoniously with his family. That if given a custodial sentence the minor would grow up without the physical presence of his father.

d. The accused has been in custody since his arraignment, and the court should consider that period in its sentence.

e. That the accused is capable of reform if handed a non-custodial sentence, and is ready to enroll in anger management classes as part of his reform measures.

f. That by pleading to the offence of Manslaughter the accused saved the court precious time, which is an indication that he is contrite and has accepted responsibility for his actions.”

7. Counsel concluded by citing the case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR** where the Supreme Court observed:

“.....it is during mitigation, that after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence.”

8. I have also considered the Probation Officer’s Report. It indicates that the accused is the second born of a family of four, his parents separated when he was a small boy and he was brought up by his mother. He is 37 years old and dropped out of school in class 4 due to lack of interest, negative peer influence and serious family issues following separation of his parents. The accused married Leah Wanjiru in 2010, but the couple separated due to marital issues after the birth of their child.

9. The community’s attitude towards the accused is that half were not opposed to a non-custodial sentence while the other half opposed such a sentence. According to the report all agreed that:

“.....before the arrest the offender was a humble honest and hardworking man who earned through hard work in the construction sites.”

10. The accused’s family favours a non-custodial sentence but desires that he would stop alcoholic overindulgence. The accused’s own attitude to the offence is that he is remorseful. He begs for leniency and is pained at the loss of his friend.

11. The victim’s family are opposed to a non-custodial sentence, as they say they were not involved in the Plea Bargaining Agreement, and would have desired a round-table conference and compensation.

12. The accused’s area chief had no objection to a non-custodial sentence and recommended his relocation to a safer area if released, for his own security.

13. The Probation Report concludes and recommends that the accused be granted a probationary sentence of three years, which will enable him to undergo counselling aimed at restoring his self-worth, and that he should relocate from Maai Mahiu to Ndundori where his family is willing to assist him settle down.

14. This hearing on sentencing was held pursuant to the **Muruatetu** decision which determined that before sentence mitigating and extenuating circumstances must be heard by the court. Such hearing, the Supreme Court held, constitutes the accused person’s right to a fair hearing under **Article 50 (2)** of the **Constitution** at which a fair and due consideration of the factors set out in **Muruatetu** must be considered.

15. The Judiciary Sentencing Guidelines, 2016, contain factors to be considered at sentencing, and I have considered them herein as extended by the Muruatetu decision.

16. I have noted from the agreed facts that the accused was drunk when he stabbed his drinking partner thrice in the chest and ran out. The reason given was that the deceased declined to buy the accused a beer. After running out of the bar the accused stopped in realization of what he had done. He was caught up however, and beaten by members of the public and later arrested. As for the deceased he died and the post mortem report confirms the cause of death as:

“Exsanguination due to chest injuries due to penetrating sharp force trauma consistent with assault.”

17. The accused’s actions understood within the context of his social background set out in the Probation Report, demonstrate to mean unbalanced person in emotional and social upheaval, a state worsened by alcoholism. The defence in their mitigation also implicitly noted that the accused had anger management problems. Whilst I am alert to the fact that intoxication may be a defence to liability under Section 13 of the Penal Code, no tests were done on the accused or evidence availed to show the levels of his intoxication. I also note that the accused has a young child living with his wife from who he is separated.

18. The probation officer’s recommendation for a non-custodial sentence on condition of that the accused relocates is not wholly acceptable to me. The area Chief feared for the accused’s security and the victims’ family, having not been consulted at all in the Plea Bargaining phase, appear to be sour and are opposed to a non-custodial sentence.

19. Taking all the foregoing matters into account, I think a combination sentence is most apt in the circumstances, and will achieve the best outcome for the accused and all parties.

20. Accordingly, I hereby sentence the accused to ten (10) years imprisonment suspended after 24 months subject to the following conditions and terms:-

- a) The accused shall serve the first 24 months in custody with effect from the date of his first incarceration.
- b) Thereafter the accused shall serve a probationary sentence of three (3) years during which he will be engaged in a program developed by the Probation Officer to include anger management, a rehabilitation counselling and relocation adjustment. During probation the accused shall relocate from the Maai Mahiu area, and the Probation Officer shall maintain a record of the accused’s participation in the probation program.
- c) Should the accused fall afoul of the law during the incarceration or probation period leading to being charged for an offence other than a simple traffic offence, the suspended term of the sentence shall forthwith attach, and the accused shall serve the remainder of the term in prison custody.
- d) Should the accused complete the probation period successfully, he shall on such completion, be forthwith set at liberty unless otherwise lawfully held.

21. Right of appeal fourteen (14) days.

22. Orders accordingly.

Dated and Delivered at Naivasha this 11th Day of November, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Maingi for the State
2. Mr. Wairegi for Accused
3. Accused - Patrick Macharia Wambui - present
4. Court Clerk – Quinter Ogutu