REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 71 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

P M K.....SUBJECT

SENTENCE

1. P M K ("The Subject") is sixteen years old. He was charged with murder contrary to section 203 as read together with section 204 of the Penal Code. It was alleged that on 19/12/2016, at Kwa Amos Area, KiaMaina Location within Nakuru County, he murdered W N N.

2. The Subject denied the charges and a fully-fledged trial ensued. In the end, Justice Odero, in a Judgment dated 07/05/2018, found the Subject guilty of manslaughter. Justice Odero had left the station by then so it fell on me to read the judgment and conduct sentence hearing.

3. At the sentence hearing, I heard extensive addresses from the family of the victim (which is also the family of the Subject for the Deceased was a first cousin to the Subject) and the Defence. The Victim's family also filed a Victim Impact Statement.

4. In short, the Subject's family have requested the Court to ensure that the Subject ends up in custody for an extended period of time. They say they are genuinely worried and frightened by the possibility that the Subject could go back home. They think that if that happened, none of them would be safe. This is because, they say, the Subject has proved to be a person who is gratuitously violent. They point to the circumstances of the offence as demonstration of the Subject's violent tendencies.

5. Evidence in this case showed that the Subject attacked and badly injured a sister to the Deceased, a minor, immediately after he had harmed the Deceased and left him in the *shamba*. The Subject attacked the young girl without provocation or any discernible motive. They believe that the attack on the Deceased followed the same pattern. They are therefore convinced that it would be unsafe for them and especially the children in the family and other vulnerable family members were the Subject to be out of custody. M N , an aunt to the Deceased and the Subject told the Court that they are troubled by the fact that the Subject has a tendency to attack the vulnerable in society. As a visually impaired person herself, M N explained to the Court her anguish. She told the Court that the whole family is traumatized and that they live in fear since the Subject nonchalantly killed one member of the family and tried to kill another one.

6. Mr. Obutu, Counsel for the Subject, submitted that the Subject was remorseful and that the Subject prayed for forgiveness. He, however, reminded the Court that in making all decisions where a child is involved, the best interests of the child must be taken into account. He referred to sections 40 of the Children's Act and Article 53 of the Constitution.

7. Mr. Obutu urged the Court to consider the time the Subject has been in remand as sufficient time in custody. He prayed that the Subject be discharged under section 194 of the Children's Act as read together with Schedule 5, Rule 12(4) of the Act. In the alternative, Mr. Obutu urged that the Subject be send to a Borstal Institution for three years.

8. The Subject also addressed the Court. He apologized to the family and informed them that in the last one year while in remand he had greatly reformed.

9. I requested the Probation and After Care Services Department to prepare a social inquiry report. One was filed in Court. It tells the story of a deeply troubled young man who is involved in drug abuse and various other vices. It also tells the story of a family that is unwilling to welcome him back; and whose own mother says that if no custodial sentence is imposed, the rest of the family might retaliate in some fashion. The Probation Report recommends that the Subject be committed to a Borstal Institution for the maximum period of three (3) years.

10. The Probation and After Care Services Department has also filed a letter from Shikusa Borstal Institution indicating that there is a vacancy at the Institution to take in the Subject.

11. I have considered all factors in this sad case. The Subject, though a minor, committed a heinous crime that led to the death of another

minor – much younger than him. In addition, the Subject attacked and maimed another minor. There does not appear to be any logical explanation for this spontaneous and blood-chilling explosion of brutal violence by the Subject. The Subject has apologized for the actions and he says he is remorseful. It is possible that his actions were fuelled by drugs.

12. It is true that both the Constitution (at Article 53) and the Children's Act (sections 40 and 191) strongly recommend that institutionalization of children in conflict with the law should be the last option. I believe that last option is deserved in the circumstances here. The sheer brutality of the attacks; the unprovoked nature of that attack; the very tender ages of the victims – coupled with the antecedents of the Subject – all point to the necessity for a custodial sentence for the Subject. The views of the family and the refusal by the family to accept him back into their fold accentuate that imperative.

13. Section 191 of the Children's Act provides as follows:

> *(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—*
>
> *(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);*
>
> *(b) by discharging the offender on his entering into a recognisance, with or without sureties;*
>
> *(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);*
>
> *(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;*
>
> *(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;*
>
> *(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;*
>
> *(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*
>
> *(h) by placing the offender under the care of a qualified counsellor;*
>
> *(i) by ordering him to be placed in an educational institution or a vocational training programme;*
>
> *(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);*
>
> *(k) by making a community service order; or*
>
> *(l) in any other lawful manner*.

14. I dealt with the lacuna in the law regarding juvenile justice in ***Nakuru Criminal Petition No. 3 of 2015: Daniel Langat v R***. After citing from two recent Court of Appeal decisions (***R v Dennis Kirui Cheruiyot [2014] eKLR*** and ***JKK vs Republic (2013) eKLR***), I remarked as follows:

> *By relying on section 191(1)(l) of the Children's Act to fashion an appropriate sentence for the child offender in both cases, the Court of Appeal is drawing attention to the lacuna in our law regarding juvenile justice. Our statutory scheme envisages only two types of offenders: child offenders – those who are under eighteen years old – and adult offenders – those who have attained eighteen years of age. The statutory scheme does not, in any nuanced manner, distinguish the different developmental stages of children – especially those in teenage years who are, typically, both in need of care and protection but can be dangerous to the society due to their deviant behaviour. The statutory scheme stipulates that a child above sixteen years old can only be held in a borstal institution for a period not exceeding three years.*
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> *This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.*
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> *A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.*

15. This case squarely presents the dilemma I pointed out above. Still, in the circumstances, I am required to use all the tools at my disposal to fashion an appropriate sentence for the Subject. In doing so, I will rely on section 191(1)(l) of the Children's Act. I am properly guided

by the best interests of the Subject; the need to rehabilitate him as well as the need to fit the punishment to the crime as a way of enunciating the society's denunciation of the criminal act by the Subject. Further, I have taken into consideration that the almost-adult Subject is, at least at present, a danger to his family and society and there is need to give him an opportunity to reflect on his actions so that he can take the truly reformation and rehabilitative turn.

16. I am also convinced that in the circumstances of this case, the maximum three years to which the Subject can be sent to a Borstal Institution is not sufficient custodial sentence to serve the triple purpose of communicating the society's strong condemnation of the Subject's actions; the need to rehabilitate the Subject and giving him an opportunity to reflect on his actions; and the need to protect the family and public at large from the violent tendencies of the Subject.

17. According to our laws, the Subject can only be held in custody in a Borstal Institution for a maximum of three (3) years. In the present case, my view is that this period is not enough to fully rehabilitate the Subject and to ensure public and family safety and security.

18. Looking at the tapestry of our laws related to children who are in conflict with the law, I have not seen anything that prohibits a combination sentence in a Borstal Institution and, after serving in such a Borstal Institution, having reached the age of majority, to continue serving in an adult prison.

19. In the circumstances of this case, therefore, I sentence the Subject as follows:

a. He shall be held in custody at Shikusa Borstal Institution for a period of three years.

b. Thereafter, the Subject shall be transferred to an adult prison to serve a further sentence of two years.

20. Further, to ensure smooth transition from the Borstal Institution to the adult prison and to deal with any outstanding issues, the case will be mentioned before this Court at the Conclusion of the term at Shikusa Borstal Institution. The Officer-in-Charge of Shikusa Borstal Institution is hereby directed to make arrangements for the mention of this matter at that time. The same Officer shall file a report in Court regarding the progress on rehabilitation and reform of the Subject.

21. Orders accordingly.

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JOEL NGUGI

JUDGE