



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 59 OF 2015

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN MWAI NDETI.....1ST ACCUSED

JOSEPHINE KAMANTHE MWAL.....2ND ACCUSED

SENTENCING

1. The accused herein are husband a wife respectively. They were convicted on own plea of guilty for the offence of manslaughter contrary to section 202 as read with section 205 of the **Penal Code**. The particulars of the offence were that they, on 26th day of June, 2015 at Tana Ranch Village, Kiateneni Sub-location, Ndithini Location of Masinga Subcounty within Machakos County, they unlawfully killed **Elijah Wambua Mwati**.

2. According to the facts, as read by **Ms Mogoi**, the State Counsel, on the said day, the 1st accused was in the field looking after their cattle while the 2nd accused was at home with their son, **Dominic Muhia Mwale**. At about 5.30pm. the deceased, **Elijah Wambua Mwati**, the accused's son went home and demanded Kshs 1,000/= from the 2nd accused and when the 2nd accused informed the deceased that she did not have the money, the deceased got annoyed and decided to set their grass thatched house on fire while threatening to kill somebody.

3. The deceased then left while the 2nd accused sent **Dominic** to go and call the 1st accused from the field and the 1st accused was informed of what had transpired. At about 7.30pm the deceased came from the direction of his house carrying a *panga* and in sensing danger the 1st accused in self-defence the 1st accused armed himself with a piece of wood which he used to hit the deceased who fell down and the *panga* was snatched from him. The accused persons then tied the deceased with a rope on both hands and legs and forced him to sit down. When the deceased loosened the said ropes and tried to escape the accused persons went after him, apprehended him and tied him up once again and the deceased remained tied up for two hours.

4. At around 9.00pm the accused loosened the rope and the deceased stood up and once again tried to hit the 1st accused with his head at which point the 1st accused picked a piece of wood and started hitting the deceased on the leg till the deceased fell down while the 2nd accused brought a piece of rope which was used to tie up the deceased on the neck. The said rope was then pulled till the deceased stopped making any noise. In the meantime the 1st accused continued beating the deceased on the limbs. The accused then proceeded with their duties. Later on the accused discovered that he deceased was dead.

5. Under section 205 of the **Penal Code** the maximum sentence for manslaughter is life. Before sentencing the accused this court requested the probation office to provide pre-sentencing report. This court also requested for a victim impact report of the deceased family. The probation report was provided.

6. The probation officer by his report noted that the deceased was a troublesome young man who attacked family members and was at one time arrested but released. He at one point set on fire his parents' granary containing the family's harvest.

7. According to the Report the accused had eight children who were dependent on them. The accused was reported to be of good character and hardworking people. The community placed the blame on the deceased who was termed as violent and disrespectful. While the 1st

accused was aged 71 years, the 2nd accused was 63 years.

8. According to the report, the circumstances of the offence revealed that the death was accidental in self-defence of the accused's life from the deceased who was a well-known violent person who had developed mental disturbances arising from drug abuse.

9. It was indicated in the report that the loss of a family member had affected the family psychologically but the suffering of the parents while in custody affected the family members more than the death of the deceased.

10. The report recommended counselling to address the trauma, loss and grief to help the accused reconstruct their lives. Accordingly, it was recommended that the matter was one fit for community rehabilitation and a probation sentence.

11. In mitigation, the accused were remorseful and stated that they did not intend to cause death to the deceased.

12. The prosecution stated that the accused had no previous conviction and that they should be treated as first-time offenders.

13. I have considered the probation report and the mitigating circumstances. The Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition Number 15 of 2015** discussed the provisions of **section 329** of the **Criminal Procedure Code** which provides:-

“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...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

14. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case **R vs. Scott (2005) NSWCCA 152** **Howie J Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

15. In a New Zealand decision namely **R vs. AEM (200)** it was decided:

“... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

16. In **R Harrison (1997) 93 Crim R 314** it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

17. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, as a guide in sentencing held that:

“[71]...the following guidelines with regard to mitigating factors are applicable 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;

(h) any other factor that the Court considers relevant.

18. There is no doubt that the loss of life is a very serious matter. In this case however the deceased was the accused's child. It is highly unlikely that the accused will in these circumstances commit a similar offence. The accused are an elderly couple and at this stage of their lives, they are ordinarily expected to make peace with their fellow human beings and their maker. In my view the fact that their son lost his life in their hands is a much heavier sentence than this Court could ever hope to impose on them. They will have to live with that psychological trauma for the rest of their lives.

19. As appreciated by the Supreme Court in *Muruatetu Case* (supra):

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR*, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

20. The accused were arraigned in Court on 7th July, 2015 and were remanded in custody till 11th August, 2016 when they were eventually released on bond. This was more than one year later. I have taken into account the foregoing factors. To my mind the accused herein require therapy rather than punishment and ought to be placed on probation in order for them to undergo guidance and counselling.

21. It was indicated in the Probation Report that the Kamba Clan Amutei intends to put into place mechanisms to compensate the deceased's family for his death as per the Kamba customs. I therefore find it necessary to point out the role of culture under our current constitutional dispensation. Article 11 of the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and obliges the state to promote the same. As was appreciated in the South African Constitutional case of [Shilubana vs. Nwamitwa \[2008\] ZACC 9; 2009 \(2\) SA 66 \(CC\), 2008 \(9\) BCLR 914 \(CC\) at para 45:](#)

“It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.”

22. The same Court in [Bhe vs. Khayelitsha Magistrate \(Commission for Gender Equality as Amicus Curiae\); Shibi vs. Sithole; South African Human Rights Commission vs. President of the Republic of South Africa \[2004\] ZACC 17; 2005 \(1\) SA 580 \(CC\); 2005 \(1\) BCLR 1 \(CC\)](#) held that:

“[41] Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution...It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[45]The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the

Constitution.”

23. I agree with the same Court in **Sigcau and Another vs. Minister of Cooperative Governance and Traditional Affairs and Others (CCT167/17) [2018] ZACC 28** that:

“[76] If we are serious about giving customary law its rightful place under the Constitution, it would be prudent to allow it to develop in its own intrinsic way in accordance with the fundamental values and rights protected in the Constitution.”

24. It is therefore my view that as long as the cultural practices are not contrary to law or public policy, the same ought to be nurtured and promoted. In this case it would seem that the aim of the practice in question is meant to offer some solace to the deceased family as a result on such unfortunate circumstances. Such gesture would in my view enhance the process of the accused’s psychological healing.

25. Having considered the circumstances of this case, I direct that the accused will be under probation for a period of six months.

26. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 18th day of October, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Tamata for the 1st accused person

Mr Kaluu for Mrs Mutuku for the 2nd accused person

Ms Mogoi for the State

CA Geoffrey