



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**CRIMINAL CASE NO. 50 OF 2015**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**TIMOTHY NDOLO NGULU.....ACCUSED**

**SENTENCING**

1. The accused herein was 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 the accused on 27<sup>th</sup> day of May, 2015 at Mathunthini Village, Kathiani Sub-County within Machakos County, unlawfully killed **Titus Musyoka Ngulu**.
2. According to the facts on the said day, the deceased's wife, **Jane Mbula Musyoka**, was coming from Ithalini Market and upon reaching home, she found her daughter, **E W M**, aged 5years crying and she informed the mother that she had been beaten by the accused's son, one **Nguya**, the accused's son. Jane then went to the accused person's home to ask why the accused's son had beaten her daughter. When the accused heard the mother, the accused threatened to beat Jane who left and went back home.
3. However when the deceased, a brother to the accused returned home at 12.00pm and was informed by his wife Jane about what had transpired, the deceased took a *panga* and went to the accused's home and knocked the accused's door and demanded that the accused open the door. The deceased open the door and upon seeing that the deceased was armed also took a *panga* and went outside. The deceased then asked the accused why he was abusing his wife and thereafter an altercation ensued with the deceased raising a *panga* to cut the accused who got hold of the deceased and the two engaged in a fight during which the accused cut the deceased with a *panga* on the back of the head. The noise woke their mother, **Ester Kaleche**, who ran to the scene and separated the two. By then the deceased had been injured and was bleeding on the head. The mother with the deceased's wife, **Jane**, assisted the deceased and took him to his house. After trying to seek help from an ambulance and the village elder in vain, at 6.30 am the deceased passed away.
4. The post mortem report showed that the deceased died from the injuries to the head and heavy bleeding.
5. The Learned State Counsel, **Miss Mogoi**, submitted that the accused be treated as a first offender.
6. On behalf of the accused, **Mr Kaluu**, submitted that the accused was extremely remorseful and regretted that a life had been lost while he was in the process of defending himself against an aggression by the deceased. It was submitted that the accused was a father of 4 children with the first born being in form 1 and was until the time of his incarceration the sole breadwinner of his family and the mother all of whom relied on him. It was disclosed that the accused had been in custody for 3 years, a period which the Court was urged to consider in imposing the sentence.
7. 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 in addition to the victim impact statement.
8. According to the Victim Impact Statement by the deceased's wife, the deceased had 3 children, two girls and one boy aged 9 and 12 years with the youngest being in standard one while the eldest in standard 5. At the time of his death the deceased was the family's sole breadwinner.
9. According to the statement, the deceased was a humble man who loved his family. Although he used to take moderate alcohol he would remain calm even in his drunken state. The wife was however very bitter about the loss of her husband whose death was as a result of his

brother. The accused's action, who has never sent even a word of condolence to the family. The deceased's family was yet to come to terms with the death of the deceased. According to the deceased's wife, the accused person prior to the said incident was a violent man who was in conflict with almost every member of the family including his wife and his arrest led to relative peace. It was disclosed that the reason why the accused had remained in custody despite being granted bond was because no one was willing to stand surety for him due to his violent nature and drinking habits and use of cannabis sativa. The deceased's family's wish was that the accused serves custodial sentence for the sake of justice.

10. The Probation Officer's Report on the other hand disclosed that on the material day, the accused who had returned home drunk was asleep when the deceased, his younger brother, who was drunk knocked his door. The deceased demanded to know why the accused's child had beaten the deceased's child and forcefully entered the house. A fight broke out between the two and in defence the accused cut the deceased with a *panga* before they were separated. According to the Report, the accused's wife confirmed that the accused abused alcohol and bhang. Though the community said that he was of good character, he was abusing alcohol and bhang. However the family members interviewed including the accused's mother, brother, elder sisters and wife pleaded with the Court for leniency in sentencing. To the mother, who is elderly and hypertensive, both the deceased and the accused are his sons and she had forgiven the accused and pleaded with the Court to grant the accused a non-custodial sentence and feared losing two sons. She pleaded that the accused be released in order to take care of his family. According to the accused's wife, it has been hard on her educating and feeding the family.

11. According to the report, the community members were not opposed to the release of the accused. According to them the deceased's wife incited her husband, the deceased, on one. To them the deceased was the aggressor. However the former village elder was opposed to the release of the accused.

12. In conclusion, the report stated that the deceased's wife and the said former village elder were opposed to the non-custodial sentence simply for revenge purposes. According to the Report the accused would need to undergo guidance and counselling on conflict resolution and alcohol and substance abuse and would need to be reconciled with his sister in law and be taken through anger management. The Report recommended a probation sentence for the accused.

13. I have considered the victim impact statement, 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 to them, they will meet this punishment.”**

16. In **R vs. 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 and 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 who otherwise would be tempted by the prospect that only light punishment will be imposed.”**

17. Similarly in **S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6** Kwa Zulu Natal High Court held that:

**“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:**

**‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’**

**The judgment continues:**

**‘ . . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’**

18. 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.”**

19. There is no doubt that the loss of life is a very serious matter. In this case however, the evidence on record is that the deceased was, at least on this particular day, the aggressor. The incident involved two siblings. The causing of death of blood relation, a brother in this case, usually places a heavy toll on the offender. There is however evidence on record that the accused was not exactly a saint before his incarceration. This is a matter in which the Court in deciding the appropriate sentence to mete ought to consider the character and record of the offender, remorsefulness of the offender; and the possibility of reform and social re-adaptation of the offender.

20. 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.”**

21. I have taken into account the foregoing factors as well as the fact that the accused has been in custody since 9<sup>th</sup> June, 2015, a period of slightly more than three years. To my mind the accused requires rehabilitation as opposed to denunciation. He therefore ought to be placed on probation in order to monitor whether he has reformed and to enable him reconcile with the family of his deceased brother. During this period the accused is expected to undergo guidance and counselling on conflict resolution and alcohol and substance abuse. He should also undergo anger management therapy.

22. I must point out to the accused that the purpose of placing him on probation is to enable him reflect on his past and reform accordingly. However he must note that if during the probation period he commits an offence or breaches the terms of the probation, he shall be liable to be sentenced for the offence in question.

23. I therefore place the accused on probation for a period of two years.

24. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 18<sup>th</sup> day of October, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Kaluu for the accused person**

**Ms Mogoi for the State**

**CA Geoffrey**