



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL CASE NO. 8 OF 2018

REPUBLICPROSECUTOR

-VERSUS-

JACKSON EKITAL WUYOBAS.....ACCUSED

JUDGMENT

1. The Accused was charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence state that on 11th day of March, 2018 along Naivasha – Nakuru Highway near Marula Concrete Crusher in Gilgil Sub-County within Nakuru County he murdered Nelson Mandela Gitaiga.

2. During the plea taking the accused pleaded not guilty. Subsequently at Pre-Trial, the court was informed that the Accused was willing to enter into a plea-bargaining arrangement for the lesser offence of Manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. Eventually, on 1st October 2018, a Plea Agreement of even date duly signed by the parties was filed through defence counsel.

3. The facts agreed upon in the Plea Agreement is as follows:-

“That on the 11th day of March, 2018 at around 1250 hours the accused Jackson Ekital Woyubas s Security guard at Marula estate on duty patrolling along the fence of the expansive farm together with his colleagues: Simon Chemote Chepkok, Michael Lokadeli and Daniel Losuru Nakwa.

The accused with the colleagues met one Malit Mose who was herding cows at a road reserve next to the Marula Estate, the accused with the other guards attempted to escort the cows into the farm to detain as they were grazing too close to the farm.

That Malit Mose Meibuko, the herder, then made a call to his relatives who then responded among them was the deceased who rushed to the scene in a bid to prevent the guards form detaining the cows at the farm. When the deceased and others including Samuel Nkere, David Nkere and Osoni Olenkere arrived at the scene a confrontation ensued and in the process the accused accidentally shot the deceased Nelson Mandela Gitaiga on the left chest using a short gun who died on the spot.

That after the incident the guards retrieved to the farm as members of the public arrived at the scene and informed police officers from Gilgil Police Station who arrived at the scene and took the deceased’s body to Gilgil Sub County Hospital Mortuary for post mortem.

That on 19th March, 2018 the government pathologist or Titus Ngulungu performed post-mortem on the deceased and concluded the cause of death to be severe chest and abdominal organs injury with massive hemothorax due to a short gun to the left chest. (The post mortem is produced as an exhibit).

That after investigations the accused was then arrested and taken for mental assessment before a Psychiatrist who confirmed the accused fit to stand trial.”

4. As an attachment and in addition to the Plea Agreement the Accused filed a Victim Impact Statement to which was exhibited a Peace Agreement entered into on 14th March, 2018, between the legal representative of the deceased victim, Nelson Mandela Komeiyan and the Accused. It recites and describes the circumstances under which the deceased was fatally, but accidentally, shot and the steps taken between the administrators of the deceased, the Accused and the Accused’s representative therein referred to as the Adherent.

5. The Peace Agreement also identifies and restates the Maasai tradition for settling disputes pursuant to which a person is accidentally killed

or allegedly murdered.

6. The Peace Agreement, prepared with the involvement of advocates for the Administrator, sets out the agreed compensation between the parties including:

1. a) Forty nine heads of cattle;
- b) Purchase of an acre of land in Mbegi area to be registered in the name of the deceased's mother, his only surviving parent;
- c) Four hundred thousand shillings (Kshs 400,000/=);
2. the parties' commitment to the withdrawal of the case; or recommendation of an inquest, or forfeiture of the claim in toto;
3. the modus of payment of the compensation;
4. the completion period of the Peace Agreement;
5. the need for parties to act in good faith and keep each other fully informed of progress on performance.

7. After questioning the Accused, the court was satisfied that he fully understood the content and purport of the Plea Agreement and Peace Agreement and that the Accused person was competent, of sound mind and acted voluntarily.

8. Counsel for the Accused, Mr. Opondo, submitted prior to sentencing as follows:

“The Accused has been in custody since March 2018 and has fully cooperated. For all intents, and purposes he has cooperated with both the prosecution and investigators. Accused is a father of 7 and grandfather of many others and is the main bread winner of the family.

He has also worked as a security guard for about 19 years. The incident was a rare one in the wake of Laikipia raids and the group mentality that went with it as captured in the Plea Agreement. We urge court to consider everything that took place.

Under Article 159 of the Constitution there is reconciliation of the family of deceased.”

9. Counsel also filed several authorities in relation to sentencing, including sentencing pursuant to Plea Agreement.

10. I have considered the documentation placed before me, including the authorities. I was impressed by the steps taken by the parties in pulling together in a reconciliatory effort by drawing a Peace Agreement that took into account a Victim Impact Statement. The Victim Impact Statement, signed by the maternal uncle of the deceased in lieu of the deceased's mother who is sickly, old, and is only surviving parent of the deceased, discloses the effectiveness of the reconciliatory process achieved between the Accused's family and the deceased's family.

11. The result is a win-win situation, with recompense and a community in healthy relationships. Whereas the regular stream of the criminal system results in retribution and punishment, the Peace Agreement and Plea Agreement resolution results in recompense and relational promotion, with less focus on retribution and punishment. It is to be commended.

12. In my view **Article 159 (2) (d)** of the Constitution will be fulfilled in a manner in which the harsh, unfeeling process of legalistic criminal adjudication under penal laws could never achieve. Nothing done by the parties is in any way inconsistent with the Constitution. Indeed, the parties have complied with **Section 137 A – 137 O** of the **Criminal Procedure Code**.

13. Accordingly, the court hereby accepts the Plea Agreement as binding on the prosecutor and on the Accused, and is hereby deemed to be put on the record of the Court under **Section 137 H** of the **Criminal Procedure Code**.

13(a) The court accepted the **Plea of Manslaughter** after the same was put to him and explained to him in Swahili, which language he understood and upon him having confirmed his acceptance of the facts.

13(b) Having said all the foregoing, the law states that where there is a guilty plea for the offence of Manslaughter, the maximum penalty is life imprisonment upon conviction.

14. In light of all the foregoing, the Accused is hereby convicted for Manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. I have perused the authorities provided by counsel on sentencing.

15. In **Republic -Vs- James Kimosop [2017] eKLR** the principles for sentencing were reiterated in a case where a Plea Agreement had been

reached :

“In Republic v. Philip Muthiani Kathiwa, Machakos High Court Criminal Case No. 14 of 2015, the Court considered the issue of appropriate sentence in a case of manslaughter upon a plea of guilty and said:

The Principles

3. The objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.

4. Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. See *Mokwa v. R* (1976-1980) KLR 1337. The accused herein acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked by with a panga. The use of the poisoned arrow on the deceased, in the circumstances if this case, was excessive force, and the accused was guilty of Manslaughter.

5. In considering the appropriate sentence, same offences should attract similar consistent penalties. In *Andrew v. R* (1976-1980) KLR 1688, in a case where the appellant and his co-accused had in a fight started by them the deceased was stabbed, the Court of Appeal found manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In *Orwochi v. R* (1976-1980) KLR 1638, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of eh appellant a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.

6. The decision of the Court of Appeal in *Muoki v. R* (1985) KLR 323 (Madan, Kneller JJA. & Platt, Ag. JA) is relevant. The Court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that:

“Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

16. In **Republic -Vs- Kukat Kitilit [2018] eKLR** the principle stated is that the same offences should attract similar penalties:-

[6] On the principle that same offences should attract similar penalties, this court recalls that it has in previous similar cases of manslaughter passed a sentence of imprisonment for periods ranging between 3 years to 8 years depending on the circumstances of the cases, the moral blame-worthiness of the accused and attendant factors including presence of extreme provocation, use of excessive force and whether the accused was the aggressor or merely acting in self defence. See *Omuse v. R* (2009) KLR 214, *R v. Gilbert Kipkorir Koech, KBT. HCCRC No. 58 of 2017* and *R. v. Margaret Kabon Talaa & 2 Ors. KBT HCCRC No. 18 of 2017.*

[7] The accused has been in custody since 21st March 2013 when he was remanded to await his trial upon the murder charge dated 21st March 2013. He has therefore been in custody for 5 years and 4 months. Section 333 (2) Proviso of the Criminal Procedure Code requires the sentencing court to consider the period of pre-trial detention when passing a sentence of imprisonment, as follows:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

[8] With the period of 64 months (5 years 4 months) that he has already spent in custody, the accused would with 1/3 remission under section 46 of the prisons Act have served a sentence of (64x3/2=96months) 8 years. So that even if the court sentences the accused to serve imprisonment for 8 years, it would have to order that he be released from custody forthwith as he would have served the sentence in full with remission.

[11] For the reasons set out above, having convicted the accused on his own plea of guilty to the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, and having considered the facts of the case, sentence the accused to an imprisonment for a term of 8 years to be reckoned in terms of the Proviso to section 333 of the Criminal Procedure Code, from the date of his remand upon arraignment on 21st March 2013.”

17. Taking all the circumstances into account, I consider that this is a case in which a short custodial sentence followed by a probationary period will enable the Accused to efficaciously fulfil the Peace Agreement.

18. Accordingly it is ordered as follows:-

a. The Accused is hereby sentenced to imprisonment for **one (1) year**. Having already served **eight (8) months** in custody, his remaining period of incarceration shall therefore be the difference between the period spent in custody and the remaining period of the sentence. The Accused thereafter shall be released on probation for a period of **two (2) years**.

b. The probation period shall commence immediately upon the expiry of the sentence period and probation conditions shall include reporting to the nearest police station once monthly.

Dated and Delivered at **Naivasha** this **19th** Day of **November, 2018**.

RICHARD MWONGO

JUDGE

Delivered in the presence of:-

1. Opondo for the Accused

2. Koima for the State

3. Court Clerk – Quinter