



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 17 OF 2015

REPUBLIC.....PROSECUTOR

Versus

ADAN GODANA GALGALO.....ACCUSED

SENTENCING REMARKS AND VERDICT

ADAN GODANA GALGALO you were initially charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code for killing Henry Ndungu. As had pleaded not guilty to the charge, if fell upon the prosecution to establish your guilt for the offence of murder. This court carefully heard the sixteen (16) witnesses presented evidence on what they knew of the circumstances of the case.

At the close of the prosecution case you had a chance to answer the charge as provided for under section 306 (2) of the Penal Code. This court through scrutiny and evaluation of the evidence in totality arrived at a conclusion that the prosecution case more to manslaughter contrary to section 202 as read with section 205 of the Penal Code than the earlier indictment. The court therefore substituted the offence of murder with that of manslaughter as provided for under section 179 of the Criminal Procedure Code.

It now falls on me to sentence you under the provisions of section 205 of the Penal Code. This offence was committed on 14/2/2013 along outbound centre murram road in Loitokitok. The victim herein referred as the deceased was going about his business as a boda boda operator. It is also not disputed that this offence was committed when you were an employee with Kenya Wildlife Services attached to Loitokitok Sub-station. On the material day you were assigned night shift duties with a firearm and magazine containing twenty rounds of ammunition. When you returned the firearm and ammunitions issued to you later on the 14/2/2013 you could not account for one round of ammunition and in which circumstances it was discharged. This became a subject of police investigations which ended up implicating you with the death of the deceased. The explanation you gave in your defence was that the one round of ammunition was discharged in the night of 13/2/2013 and 14/2/2013 when you were in hot pursuit of searching for your stolen motorcycle. In the course of tracing and searching you spotted a motor rider outside your work station which you positively identified. One of the action you took according to the evidence is firing in the air to prompt him to stop but in the explanation before court the suspect could not be deterred. However the evidence establishes that the deceased was shot at the very time and place within the locality where your pursued the recovery of your motorcycle. The web of evidence placed before this court implicated you with the death of the deceased for unlawful acts of commission of discharging the firearm in your possession.

The Victim:

A notice to attend was sent to the family of the deceased but efforts to secure their attendant was not

successful. It is unfortunate that their presence at this stage of the proceedings could have been useful. The court was looking forward to the victim impact statement before making a final order on sentencing.

Mitigation:

Mr. Tamata the defence counsel submitted on your behalf and highlighted the following:

That you are remorseful to the offence and did regret the unfortunate incident. Mr. Tamata further alluded to the fact that you have been in remand custody for about 4 years. Learned counsel invited the court to consider remand period as it considers an order on sentence against you in this case. Mr. Tamata further mitigated that prior to your indictment in the year 2013 you were gainfully employed with KWS which job was lost in the course of this pending trial. Mr. Tamata finally made reference to your family background as the head of the family, married and blessed with six children who all look after you for support and dependency. He submitted that the court do exercise discretion for non-custodial sentence.

Prosecution remarks:

Mr. Akula for state in his submissions on sentence advanced to the court to give due regard to the purpose and objective of criminal law geared towards punishing crime. Mr. Akula further advanced the argument that the offence which you have been convicted is a serious offence attracting a maximum sentence of life imprisonment. Mr. Akula urged the court to consider the aggravating factors of this offence though no previous record relevant to the instant case exist against you.

Pre-sentence report:

The pre-sentence report was called for expeditiously prepared by the Director of Probation Kajiado County Ms Leah Kadali. The report covers well points on your profile and family background. The community through the area chief talked well of you as a law abiding citizen. In this case as of this year you are aged 56 years. You have no previous conviction in respect of any offence or any relevant to the one you have been found guilty and convicted. Your personal antecedent family and community remarks during the interview the mitigations as rendered by you through your counsel have been taken into account. Before this offence you worked with KWS stationed at Loitokitok.

As regards sentence it is clear to me as well illustrated in the Sentencing Policy Guidelines 2016 what a trial court ought to factor in exercising discretion in sentencing. It is not lost on me that the cardinal objective of criminal justice is to ensure that the offender is adequately punished for the offence. In doing so courts should endeavour to incorporate the principle of proportionality. Under this principle a sentence should neither exceed or be less than the gravity of the offence. See *Veen v The Queen [1988] CLR 465*. The other principles are to prevent crime by deterring the offender and sending a message to the would be offenders and other people from committing similar offences. Thirdly the protection of the community from the offender. Fourth, to promote the rehabilitation of the offender. It is also a requirement of criminal law that an offender should be made to account for his or her actions in crime. In addition there is the element of paying attention and recognition to the harm done to the victim of the crime and the community at large. All these principles would not be considered in isolation but adopt a holistic approach to the circumstances of the case in other jurisdictions. Applying these principles requirement a kind of score card before a final order on sentence is made by the sentencing court. Score card is a kind of awarding a score on each category under well established criteria on sentencing. This country does not have a Sentencing Act but a policy on Sentencing Guidelines. It is however a positive step in the right direct law to enact the principles and materials to guide the trial court in exercise of discretion on this area. There is much authority on the subject in sentencing and what courts ought to look for is making a determination on sentence.

I draw guidance from the holding in the case *of Yussuf Dahar Arog v Republic* where the court stated as follows on sentence:

“Such is of course, a maximum sentence and within that constraint, the court has a wide

discretion which it exercises on judicial principles. Such principles would I believe, take into account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become a law-abiding member of the community, the goals of peace and mutual to tendance and accommodation among people – those who are injured and those who have occasioned injury.”

These principles mirror well in the decision I am going to make against you. There is no dispute that your unlawful acts were dangerous which a reasonable man in your circumstances could not have attempted without weighing the risk of discharging a gun on target of a human being. You do not have a previous record, though there has been no victim – offender mediation with an opportunity for you to offer an apology to the family of the victim. I take it that your word remorse in mitigation is a regret of committing this offence. However that is in so far as the mitigation has been factored in this hearing.

This court take judicial notice that your trial has taken almost four years to complete. I will therefore factor the four years in remand custody awaiting conclusion of your case. The four years in remand however do not factor the component of rehabilitation of offenders to be good citizens and amend their ways. There is no evidence that home-based framework rehabilitation and transformation exist in the circumstances of your case. The maximum sentence for manslaughter is life imprisonment. This is not one such case where the maximum sentence is justified weighing one factor after another as illustrated herein. This is one offence where custodial sentence is called for to give you a chance for your rehabilitation.

I will in this case besides rehabilitation punish crime and also send a message to society that whoever commits an offence of this nature the law would be appropriately applied. In all circumstances of this case I do hereby sentence you to six (6) years imprisonment.

14 days right of appeal explained.

Dated, singed and delivered in open court at Kajiado on 23rd day of March, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Tamata for accused present

Accused present

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant