



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.28 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

MERCILINE NYACHIRA MWAMBA.....APPLICANT

JUDGMENT

The accused, **Merciline Nyachira Mwamba** was initially charged with murder contrary to section 203 as read with section 204 of the Penal Code. Before her trial commenced however, she entered into a plea agreement with the office of the Director of Public Prosecution (DPP) wherein the State reduced the charge to one of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The plea agreement between the parties was filed in court on 20th February, 2014 and was accepted by the court after satisfying itself that the mandatory requirements of Section 137 of the Criminal Procedure Code had been complied with. The accused subsequently took plea on the lesser charge on 26th May, 2014.

The brief facts of the case are that the accused and the deceased lived together as husband and wife since 2002 and were blessed with two children. Some times in 2008 the deceased resorted to heavy drinking and became violent towards the accused causing the couple to separate. The accused rented a room in Ngando area within Nairobi County where she was staying with her two children. On 15th December, 2011, the deceased moved in with the accused and the family started staying together again. On the 9th April, 2012 at about 5.00a.m. the two left home for work. The accused came back from work at about 3.00p.m. while the deceased arrived home after midnight in company of his cousin (D6) and was drunk. His cousin left for his house as the deceased knocked at his door. On being let in, the deceased picked a quarrel with the accused. Their minor daughter aged 8 (D1) recounts her mother, (the accused) saying that she will poison the deceased or hire thugs to kill him on the same fateful night. She further states that during the struggle between the two, she saw the deceased place a rope around the neck of the accused and attempted to strangle her but the accused overpowered him, put the rope on deceased's neck and pulled it resulting in the deceased's demise.

A neighbour, (D2) states that he found the deceased lying dead with a white nylon rope tied around the neck. The accused on realizing that the accused was dead went and reported the same at Karen Police Station. D8, D9 and D10 who are police officers visited the scene and found the deceased lying on the bed with injuries on the neck. The rope with which the deceased had been strangled was recovered outside the house. The body of the deceased was taken to city mortuary where the post mortem revealed the cause of death as strangulation.

The medical examination report in respect of the accused also indicates that the accused sustained scratch marks on the neck. The accused was subsequently charged with murder which has now been reduced to manslaughter. The accused person knowingly, voluntarily and truthfully admitted the above facts and was convicted of the offence of manslaughter on her own guilty plea.

In mitigation, **Mr. Masara** for the accused told the court that the accused was a single parent with two children aged 12 and 8; that she was sorry for the offence which she deeply regrets and was desirous of rebuilding her life and raising her children. He further submitted that the accused had been in custody for two years and prayed that the court may temper justice with mercy and give her a non-custodial sentence.

In considering sentence, I took into consideration the mitigation offered by defence counsel as stated above as well as the fact that the accused had suffered a violent marriage and possibly acted in self-defence. However, it is my view that the appropriate action should have been to break away from the abusive marriage and not to kill the spouse. At this juncture, I must pause and take judicial notice of the unfortunate increase in family and spousal homicides and proffer the view that society must urgently address this issue which threatens not just the affected families but the very existence of society as a whole.

Further in considering this case, I called for, received and considered a pre-sentence probation officer's report in respect of the accused. It states that the minor children of the accused are now under the care of the deceased's brother and are both attending school in Kisii. No doubt, they need the mother's care. With regard to the family and community environment, the report does not indicate strong family ties and support between the accused and her family that would be supportive of a community based rehabilitation.

Taking all factors into consideration and considering the circumstances of this case, I do not find this case fit for a non-custodial sentence. The accused is sentenced to serve **Five (5)** years imprisonment.

Judgment delivered, dated and signed at Nairobi this 10th day of July, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Applicant/Accused

.....: For the accused

.....: For the State/respondent