



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 31 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE NDOLO KEROSIO ALIAS BONNY.....1ST ACCUSED

ERICK ONGUTI MANWA.....2ND ACCUSED

JUDGEMENT ON SENTENCE

The 1st accused was convicted of manslaughter on his own plea of guilty on 19/10/2021. Therefore, the issue before me is one of the appropriate sentence to be imposed upon him.

Counsel for the prosecution (Ms Ogwen) informed the court that the accused is a 1st offender. She also informed the court that the accused Has been in custody for two (2) years and not four years. She further informed the court that the 1st accused was not a victim of circumstances.

Furthermore, she informed the court that the family of the deceased lost their loved one. She also urged the court to impose a custodial sentence; which should run from the date this court will pronounce itself on sentence. She therefore urged the court to ignore the period that the accused was in pre-trial custody.

Mr Kangimu for the accused mitigated on behalf of the 1st accused. He urged the court to take into account the following matters.

He urged the court to take into account that his client wrongly joined to defend the lady who had been attacked. The accused has a young family with infants who solely depend upon him as the sole bread winner. He further informed the court the accused has been in remand since 2019, which translates to a period of about four years; which he submits is sufficient punishment.

Furthermore, counsel also urged the court to impose a non-custodial sentence. He also informed the court the accused is remorseful. The accused is a staunch Muslim and this will assist him in keeping himself from bad company. Accused is sorry for the pain inflicted upon the family of the deceased; who lost a pillar of their family.

I find that the 1st accused is a first offender. He is a young man with a family consisting of infants. I also find that he has been in custody for about four years. I have also taken into account that he has pleaded guilty; which has saved judicial time.

Furthermore, I find that he is remorseful and now he is a staunch Muslim which will assist to keep him away from bad company.

All of the foregoing are mitigating factors.

Based on the probation's officers report I find the death of the deceased impacted his family adversely. They are bitter that the family of the accused have not to date apologized and have not compensated them.

I find that the call by the prosecutor to the court to impose a custodial sentence merits attention. It is not the function of the prosecutor to inform the court that a custodial sentence is called for. It is also not the function of the prosecutor to inform the court about her views. The prosecutor may only point out the circumstances of the offence and whether the accused is a first offender. This court (Sir James Wicks, C.J and Trevelyan, J) in *Shiani v Republic* [1972] E.A 557 pronounced itself as follows:

“The prosecutor told the magistrate that the offence was serious though whether he was referring to it generally or to the facts of the case, he did not make it clear. Either way, the comment should not have been made. It is not the function of a prosecutor, as this court has more than once said, to tell the court his views. He is required simply to put the facts before the court. The court must decide how it views the case.”

And it is for the foregoing reasons that I hereby ignore the submissions of the prosecutor that I should impose a custodial sentence.

Furthermore, I have also ignored the submission of the prosecution that I should ignore part of the pre-trial remand period in sentencing the accused. I have also ignored the prosecution submission that the court should only take into account that period from the time the court will pronounce itself on sentence. The prosecution urged the court to ignore the previous pre-trial remand period. According to section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya the court is mandatorily required to take into account the entire period the accused has been in remand. If part of that period was to be ignored, the result will be that the accused will be punished twice for the same offence; which is constitutionally impermissible. As it were this will offend the rule against double jeopardy.

After taking into account both the mitigating and aggravating circumstances including the entire period the accused has been in custody, I hereby sentence the accused to three years imprisonment.

Judgement signed, dated and delivered in open court at Nairobi through video conference this **21st day of March 2022.**

J M BWONWONG'A


JUDGE

In the presence of-

Mr. Kinyua court assistant

Ms Ogwen for the Republic

Mr Kangima for the 1st accused/Respondent

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