

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.68 OF 2013

(FROM ORIGINAL CONVICTION IN CRIMINAL CASE NO.196 OF 2012 OF THE PM'S COURT AT KILIFI)

SHUKRAN HASSAN NYALE..... APPELLANT

VRS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of manslaughter contrary to section 202 of the Penal Code. The particulars are that the appellant on the 28/1/2012 at Kadzinuni village in Kilifi County unlawfully killed Jimmy Nicholas Mwangemi. He was convicted and sentenced to serve 20 years imprisonment.

The grounds of appeal are that the prosecution evidence was contradictory, that there was no eye witness, that the investigating officer did not testify, that the sentence is harsh and that the alleged weapon (knife) used to kill the deceased was not produced. The appellant filed written submissions. I have carefully read the submissions and the main issue raised is the harshness of the sentence. The appellant cited the Case of **Thomas Gilbert Cholmondeley v R H/C at Nairobi Cr. Case No.55 of 2006 KLR**. In that case, the accused was sentenced to 8 months imprisonment for manslaughter. The appellant contends that he had no intention to kill the deceased and the 20 year sentence is quite harsh.

Ms Mathangani, Prosecution Counsel opposed the appeal. Counsel submitted that the deceased was 15 years old. There was no rift between the deceased and the appellant. The sentence is proper and the appellant stabbed the deceased. The appellant is violent and he had been restrained before the incident.

The record of the trial court shows that 7 witnesses testified for the prosecution. **PW1, Omar Ali** was the Assistant Chief of Mukomani area in Kilifi. On 28/1/2012, at about 10.00 a.m one of the village elders called him indicating that some people wanted to burn the house of one Hassan. He rushed to the scene and met about 100 youths who alleged that some of them had been stabbed with a knife. He calmed the youth and they stopped burning the house. Shortly, they found the deceased body in the bush and the youth became angry. They went back and burnt the house which belonged to the appellant's father. He called the OCS Kijipwa Police Station and the police went to the scene and took the body. The body had stab wound on the chest. He later learnt that there was a funeral ceremony the previous night and the appellant had been detained at the ceremony and was later released to go home.

PW2, P. C. Peter Otieno was based at the Kijipwa Police Station. Together with other officers, he went to the scene on 28/1/2012 and collected the deceased's body. The deceased was 15 years old and they saw a burnt house. It is his evidence that they were told that the deceased was stabbed by his friend with whom they had attended a disco. **PW3, Japheth Tembo Tunje** who was a form 1 student at St. Georges Secondary School. On 27/1/2012 he attended a memorial ceremony. At about 3.00 a.m he was heading home with his colleagues when they met the appellant about 1 km from the venue of the ceremony. The appellant stopped them and started interrogating them. He told them **"leo mtajua mimi ni Shukran Hassan."** The appellant pulled a knife and stabbed Killan (PW5). They started running away into different directions. The deceased was young and could not run faster. The appellant stabbed him. They knew the appellant and they had no problem with him. The appellant had been tied up with a

rope at the memorial ceremony. The deceased's body was found the following day. **PW4, Raphel Salim Mwasiria** was 14 years old and a class 7 pupil. He was with PW3 and PW5 when the appellant attacked them on their way home. He was also stabbed on the right lower arm and he ran away. The deceased was stabbed by the appellant and his body was found the following day. The appellant shouted at them saying that they will know who he is. They knew him as he had dropped out of school. They had seen him at the disco where his hands and legs had been tied.

The evidence of **PW5, Killan Njanji** is similar to that of PW3 and 4. He was also stabbed on his back and he was taken to hospital. He knew the appellant as he used to attend the same school with him. **PW6, Dr. Busra Ahmed** was based at the Kilifi district Hospital. She produced a post mortem report conducted by her colleague, Dr. Hashl Suleiman on 12/2/2012. the deceased had a stab wound at the back measuring 3 cm long and another stab wound on the left side of the head measuring 8 cm. The deceased died of cardiac pulmonary arrest due to loss of blood caused by the stab wounds. **PW7, Chief Inspector of Police David Kipsagat** was based at the Kijipwa Police Station. He investigated the case. The appellant was taken to the police station by his father on 31/1/2012. The incident occurred on the night of 27/28th January, 2012. He caused the appellant to be charged with the offence.

In his unsworn defence, the appellant testified that he is a mason. He went to work in January 2012 and his father called him informing him that their house had been burnt. He went home and was detained pending investigations. He was later charged with the offence which he knew nothing about. The appellant's written submissions are mainly on the issue of the sentence. However, the grounds of appeal challenge the conviction. The evidence of PW3, PW4 and PW5 is to the effect that they saw the appellant while on their way back from the memorial ceremony. The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. PW3, PW4 and PW5 had seen the appellant at the ceremony that night. They all knew the appellant and they had no grudge or problem with him. The prosecution evidence does establish that indeed PW3, PW4 and PW5 were confronted by the appellant who was armed with a knife. The defence evidence simply denied the allegations that it was the appellant who committed the offence. The prosecution evidence shows that the appellant was at the ceremony and he had been tied with ropes most probably for causing problems. It appears he was on a revenge mission after he had been released to go home.

Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. PW3, PW4 and PW5 recognised the appellant. They talked to him and the appellant shouted that they will know that he was Shukran Hassan Nyale. I do find that the appeal on conviction lacks merit and is disallowed.

On the issue on sentence, it is clear that a young life was lost. There was no reason to attack the deceased. The appellant ought to learn how to restrain himself. Each case of manslaughter has to be treated separately. The maximum sentence for manslaughter under section 205 of the Penal code is life imprisonment. It is apparent that the appellant is hot tempered and needs time to mature in prison. Although he was a first offender, that did not warrant a non-custodial sentence. Given the circumstances of the case, I do find that 20 years imprisonment is quite excessive. I will allow the appeal on sentence. The 20 years imprisonment is hereby set aside. The appellant is sentenced to serve seven (7) years imprisonment from the date of conviction.

In the end, the appeal on conviction fails. The sentence is set aside and replaced with a seven (7) years imprisonment.

Dated, signed and delivered at Malindi this 22nd day of July, 2015.

SAID J. CHITEMBWE

JUDGE