



208/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 34 OF 2007

JOSEPH MUTUA MUSILI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 132 of 2007 by Hon Richard Odenyo, SRM on 9/2/2007)

JUDGMENT

1. The Appellant with another (*now deceased*) were charged with the offence of accessory after the fact to murder contrary to **Section 222** of the **Penal Code**. Particulars of the offence being that on the **16th** day of **March 2006**, at **Kambiti Village** of **Kyathani Location** in **Mwingi District** within Eastern Province knowing that **Maithya Mulae** had murdered **John Kilonzo Matiti** did assist the said **Maithya Mulae** to bury the said **John Kilonzo Matiti** in order to enable him escape punishment.
2. They pleaded guilty to the charge. Accordingly they were sentenced to serve life imprisonment.
3. The appellant now appeals on grounds that he was a first offender; his mitigation was not considered; the language used by the court controverted **Section 198** of the **Criminal Procedure Code** and **Section 77 (2)** of the **Constitution** which led to miscarriage of justice; he was intoxicated; the sentence meted out was excessively harsh in the circumstances of the offence; he has now reformed and fully rehabilitated having undergone various courses.
4. This being the first appellate court my duty is to re-evaluate and analyse circumstances that culminated into the sentence that was imposed. (see ***Okeno versus Republic*[1972] E.A. 32**).
5. A reconsideration of the Lower Court record shows that the Appellant pleaded guilty to the charge. According to **Section 348** of the **Criminal Procedure Code**, a person has no right of appeal against a conviction resulting from his or her plea of guilty. What I therefore must consider is the legality of the sentence.
6. A person who becomes an accessory after the fact to murder on being convicted is liable to imprisonment for life.
7. The trial magistrate meted out a sentence of life imprisonment. This was within the law. However, the magistrate had the discretion to consider mitigating factors and the circumstances under which the offence was committed. The appellant states that he was intoxicated at the time of commission of the offence.
8. The facts presented are that the appellant's co accused having drunk alcohol on the **3/11/2006** threatened to have one **Mbusi Musyimi** buried as they had buried the deceased. He reported to the authority. The appellant and another led the police to the recovery of the deceased's body which had been interred on his farm.

9. In his mitigation in the Lower Court the appellant sought leniency and added that he was a first offender. He did not raise the issue of intoxication. His co-accused is the one who pleaded for mercy stating that he was intoxicated. It is therefore at the appellate stage that he has introduced the issue of intoxication. It is important to point out that intoxication through drinks would not be a defence unless it is proved that the intoxication made the party not able to form *mens rea*. Being an aggravating factor, it cannot be a mitigating factor.
10. In the case of *Sayeka versus Republic [1989] KLR 306 the C.A* held thus:-

“The appellate court will not ordinarily interfere with the discretion exercised by the Lower Court unless it is evident that the lower court acted upon some wrong principles, or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case...”

11. No evidence of how the deceased met his death was adduced. In the premises the fact that the appellant was a first offender should have been considered. The court could also have inquired into his social status. In the circumstances, I have reason to interfere with the sentence passed which I find excessive. I therefore set aside the sentence passed and substitute it with that of **7 years imprisonment.**

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of FEBRUARY 2014

L.N. MUTENDE

JUDGE