REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 28 OF 2008

(Appeal from the judgment of Hon. G. Oyugi – Senior Resident Magistrate in Tigania Senior resident Magistrate's

Criminal Case No. 185 of 2007 date 21st February, 2008)

FRANCIS MBURUKU MUCHENA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Criminal Practice and Procedure – Court has made discretion to increase sentence

– on appeal – section 3 Criminal Procedure Code (Cap 75, Laws of Kenya)

JUDGMENT

The Appellant was charged and convicted of the offence of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code (Cap. 63 Laws of Kenya). He was sentenced to serve a term of 20 years. He has appealed to this court on eight grounds but Mr. Anampiu learned counsel for the Appellant argued only 3 of them, and even the three (3) may be summarized as only two, that there was insufficient evidence to convict the Appellant, and secondly that the sentence of 20 years was harsh.

It is the duty of this first appellate court to evaluate the evidence of the prosecution as well as the defence of the accused, the appellant.

The evidence of both PW1 and PW2, the companions of the deceased, is that three of them (PW1,PW2 and the deceased) were sitted on a bench outside the canteen of PW3, at about 7.00p.m when the Appellant came along, unzipped his trouser, and urinated in front of the three of them. The deceased took offence, and slapped the Appellant for behaving in a disrespectful manner before his peers. The Appellant in retaliation whipped out some sharp object which later turned out be a panga, and cut the deceased on the neck. The Appellant thereafter ran away, leaving PW1 and PW2 administering first aid to the deceased.

By a strange act of fate, the Appellant went to Miathene Police Post and reported to PW VI that he was slapped by the deceased, and in retaliation "he had cut him on the neck". While the Appellant was making his report the deceased too arrived at the same Police Post and reported to the same Police Office, PW VI, that it was the Appellant who had cut the deceased on the neck. PW VI therefore arrested the appellant.

It was also the evidence of PW VII, that the weapon used to cut the deceased was recovered from the mother of the deceased and it was blood stained.

With this type of primary evidence, I am unable to subscribe to the submissions of Mr. Anampiu, Counsel for the Appellant that there was insufficient evidence to convict the Appellant. I would say that the

evidence was overwhelming and none of it was contradictory as counsel suggested.
Counsel for the Appellant also played a pun with the question of identification. The time is about 7.00p.m two men are sitted in a couch outside a canteen passing away the early evening air. A third man *(the appellant)* appears in their midst, he ignores their presence, unzips his trouser, and proceeds to urinate in front of them. One of the two men protests, and slaps, the urinating man, who responds quite disproportionately by inflicting a deep cut on the neck of the protesting man. The same ill mannered intruder has the courage, I would say, effrontery, to go and report to the Police, that he had cut on the neck, the man who slapped him. The cutter and the cut man again meet at the Police Station. What identification is required? Absolutely none in my respectful opinion. Having placed himself in the midst of the incident, the Appellant cannot be heard to suggest that he was not identified. Why would he himself say, to the Police (PW VI), that he had cut the deceased? The question of identification is clearly not tenable, and I reject it.
Ground 5 of the Petition of Appeal charges that the trail court shifted the burden of proof from the prosecution to the defence or the accused. This is not so at all. The trial court found as a fact that the murder weapon was in the Appellant's possession, within the terms of the definition of the word *"possession"* in Section 4 of the Penal Code-
"Possession –
(a) " be in possession" or " have in possession" includes not only having in one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, o having anything in any place (whether the belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person".
The evidence of PW VIII No. 48214 Sgt. Jonah Wangila is clear that he interviewed the Appellant as to who had taken away the exhibit – a panga and that he told the Appellant to send for the person who had taken away the panga. "*The mother of the accused person the panga which had blood stains. I took possession of the same"*…It is he panga that was used to cut the complainant *(the deceased).*
There is no hint of any shift of the burden of proof to the Appellant. This was purely investigation by PW VII, whose role was to recover the weapon used to cut the deceased. It was produced as an exhibit. In the circumstances of the Appellant's own report, that he had cut the deceased on the neck with a panga, there was no necessity to send the panga for analysis of the blood.
Dr. Isaac Macharia was PW VIII. He carried out a postmortem of the deceased. The deceased had suffered a deep cut on the left side of the face, involving the skin muscles and the bone, and internally the arteries were severed, also severed were superficial neck joint – there was also a compound fracture on the left side of the lower jaw. The Doctor formed the opinion that the deceased died as result of heavy hemorrhage *(bleeding).*
The Appellant was found guilty of manslaughter and was sentenced to twenty (20) years imprisonment, and he is currently on bail pending appeal. He contends in ground 5 of the Petition that the sentence was harsh in the circumstances. I do not think so. The punishment prescribed for the offence of manslaughter under Section 205 is life imprisonment. In the circumstances of this case the sentence of 20 years was in fact very lenient. Even if the native used to run half – dressed in times of yore, he had the decency not to urinate or defecate in the presence of his peers. A child might do that, but not an adult. A child of understanding will be subjected to spanking in much the same way the deceased felt offended and slapped the Appellant as a show of extreme disapproval of the Appellant's behavior.
The reaction of the Appellant was almost premeditated, and was totally disproportionate to the mere slap by the deceased. The Appellant was lucky that he was charged with the offence of manslaughter. Murder should have been the proper charge. In the circumstances, I find the sentence of 20 years imprisonment was too lenient for the Appellant. Section 354 (3) (a) (ii) of the Criminal Procedure Code gives this court wide discretion where there is sufficient ground for interfering on appeal from a conviction to alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence.
In this case, the court properly convicted the Appellant, and on the evidence, the sentence as observed above, was lenient. In exercise of the discretion conferred upon this court by Section 354 (3) (a) (ii) of the Criminal Procedure Code, alter the sentence of twenty years to one of life imprisonment.
In the result therefore the appeal herein in dismissed, and the sentence of life imprisonment is substituted for that of 20 years. For avoidance of doubt, the bail granted herein is hereby cancelled, and the Appellant is committed to commence his life sentence forthwith. It is so ordered.
Dated and signed at Nakuru this…….day of……2010

M.J ANYARA EMUKULE
JUDGE

Delivered at Meru this 29th day of July, 2010.