



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL 139 OF 2008**

**MICHAEL NGUNGA MBINDYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Michael Ngunga Mbindyo was charged in Machakos CM's Court Criminal Case No. 4143/2003 with the offence of manslaughter contrary to section 202 and 205 of the Penal Code. It was alleged that on 19.6.2003 at Kithayoni village, Kamboo sub location in Makueni District he unlawfully killed Mulwa Mwanzui. On 10.11.2006 after 7 witnesses testified and he had been put on his defense, he was convicted and sentenced to serve 8 years in prison.
2. Although he initially appealed against both conviction and sentence, at the hearing of the Appeal, he elected to pursue the appeal on sentence only. He pleaded that he was sickly, had committed the offence while drunk and had since become a "***saved***" person and his grandfather died while he was incarcerated.
3. Mr. Omirera, learned Senior Principal State Counsel in response stated that the offence was serious and carried the life sentence as the maximum possible sentence. That the Appellant attacked the deceased with a concealed weapon and without any provocation whatsoever and therefore the sentence given was quite lenient.
4. In Dismas vs Republic [1984] KLR 634 the Court of Appeal set out the Principles an appellate court should apply when considering whether to reduce a sentence meted by the trial court. They are-
  - i. whether the sentence is manifestly harsh or excessive.
  - ii. whether the trial court acted on wrong principles in exercise of the discretion to impose sentence.
5. In this case, the maximum sentence for the offence of manslaughter is life in prison. The Appellant was sentenced to serve only 8 years and since he concedes that the conviction was lawful, I cannot find that the said sentence, to that extent, either too harsh or excessive. However, from the evidence of PW4, Mbusia Makau and PW5, Mutave Mbusia, the deceased Mulwa Mwanzui on the material date, confronted the Appellant on three occasions and slapped him three times. The Appellant on the last occasion then "***reached for a knife from his long trouser and stabbed the deceased on his left chest.***" That was the

evidence of PW5 and both witnesses added that the deceased was very drunk and the Appellant was drunk too. PW7, IP Herbert Lwigado also confirmed that in his investigations, it was clear that the Appellant was provoked by the deceased and that he also acted in self defence when the deceased returned to slap him on the third occasion.

6. My view is that although in other circumstances the sentence of 8 years would have been sufficient, in this case it is clear that although the Appellant acted with excess force, he was more the victim of the deceased's unprovoked attack, three times, and acted in anger and stabbed his attacker. I also note that in his mitigation before the trial court, he indicated that he was sickly and all these circumstances should have affected the discretion in sentencing him.

7. In the event, I am convinced that as an Appellate Court, I am entitled to reduce the sentence herein and so I shall allow the appeal on sentence and reduce it to 3 years from the date of conviction i.e **10.11.2006**.

8. Orders accordingly.

Dated and delivered at **Machakos** this **13<sup>th</sup>** day of **May 2009**.

**Isaac Lenaola**

**Judge**

In the presence of: Mr. Omirera for Republic

Appellant present

**Isaac Lenaola**

**Judge**