



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Criminal Appeal 7 of 2008**

**(From original conviction and sentence in the Senior Resident Magistrate's**

**Court at Homa Bay Criminal Case No.1276 of 2007 – E. K. MWAITA ESQ.,**

**AG.S.R.M)**

**DENNIS GAD NGUKA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The Appellant was convicted of the offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code** and sentenced to 10 years imprisonment. He pleaded guilty to the charge. His appeal is against sentence.

The admitted facts were that on 25<sup>th</sup> October, 2007 at about 3.00 p.m. he was at home with his mother when the deceased came carrying a panga and a spear. The deceased asked the mother of the Appellant to ask the Appellant to refund his Kshs.100/=. After some exchange between the deceased and the lady, the latter shouted the deceased wanted to kill her. The Appellant was at the time in his house. He came out with a panga and with it cut the deceased severally. The deceased fell down bleeding. The mother of the Appellant shouted for help and when neighbours came they found the deceased lying on the ground. The Appellant was standing near with the panga and begun to chase those who had come to respond. The first wife of the Appellant ran to the nearest A.P. camp to report. The Assistant Chief of the area was also informed as was the District Officer of the area and Police officers at Ndhiwa Police Station. When they all came the Appellant had run away. The body was eventually taken to the mortuary and the Appellant found the following day while sitting under a tree with the panga. The Appellant was taken to Ndhiwa Police Station where he was eventually charged. Post mortem revealed that the deceased had multiple stab wounds all over the body and compound fracture of both the right tibia and fibula bones distally above the right ankle joint. He died from severe bleeding.

The Appellant has appealed against the sentence. He submitted that the trial court did not take into consideration that he was a first offender, was aged 64 and was in poor health. He further submitted that the court had relied on the probation report without allowing him to give his side of the story. Lastly, he stated that he was the sole breadwinner of his large family and that some of his children were in secondary school and were likely to suffer owing to his imprisonment.

The state was presented by **Mr. Kemo** who left the matter to court.

The record shows that the Appellant mitigated and informed court that he was 64 and had served the government as a teacher for 21 years. He had retired six years earlier. He told court he had young children to take care of and sought pardon saying he was sorry for what happened. The court called for the Appellant's probation report and when it came the Appellant was informed by the court that he was not suitable for non-custodial sentence. The appellant was not informed of the contents of the report or what there was in the report that made him unsuitable for consideration for non-custodial sentence. The court has looked at the report which shows that the dispute was over Kshs.100/-. It also shows that the deceased was Appellant's step brother. The Appellant did not have any previous antecedents. The report does not show anything that would have led the probation officer to recommend custodial sentence. The critical issue, however, was that the Appellant was not asked to say something about the recommendation.

Further the record does not show the court took into consideration the Appellant's mitigation or the fact that he was a first offender.

It is noted that when the Appellant came out of the house following his mother's shouts he did not find her being attacked by the deceased or in any danger of being attacked. The deceased may have been armed but he did not use or threaten to use his weapons. The Appellant viciously used his panga severally to attack the deceased.

I have considered these circumstances. The Appellant is advanced in age and has a large and dependent family. The deceased was his step-brother. I consider that the sentence imposed by the court was manifestly excessive. It is hereby set aside and in its place a sentence of 5 years is ordered. To that extent, therefore, the appeal is allowed.

**Dated, signed and delivered at Kisii this 24<sup>th</sup> day of June, 2009.**

**A. O. MUCHELULE**

**JUDGE**

24/6/09

Before A. O. Muchelule Judge

Mongare c/c,

Nyangaga (Luo)

Mr. Mutai for State.

Appellant present

**Court:** Judgment in open court.

**A. O. MUCHELULE**

**JUDGE**