REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 55 of 2005

BERNARD MWIKYA MWINZI........................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from a Judgment of the Chief Magistrates Court at Machakos

(Hon. T.O Okello SRM) dated 23rd June 2005)

in

(CM'S CR.C. No. 4372 of 2003)

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JUDGMENT

1. The Appellant was charged with the offence of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code. It was alleged that on 12/3/2003 at Masaani Village in Machakos District he unlawfully killed Mumo Mwanzia. He was convicted after trial and sentenced to serve twelve years in prison.

2. In this Appeal, it is his case that the case in the subordinate court had not been proved beyond reasonable doubt; that his defence was not considered and that the sentence in any event is manifestly harsh in the circumstances.

3. I have perused the record and the evidence tendered by PW1, Katuku Mwanzia and PW2, Daniel Matata Mutuku and PW3, Daudi Ndetu Mutuku, on the material day, PW1 had brought the Appellant to her home to treat her son, Mumo Mwanzia who was mentally ill. Apparently and by his own admission

in his defence, the Appellant was/is a witchdoctor. In any event, he sought the help of PW2 and PW3 to dig a hole in the ground where he wanted to place the deceased. When the hole was ready, he declared that since the deceased was possessed by evil spirits, he should be tied up and covered into the hole which he covered with soil and left a little space for the deceased to breathe. He then allegedly covered the hole with iron sheets and other paraphernalia which he said that he uses in his craft and told PW2 and PW3 to go away for him to do his work. According to PW1, the Appellant also went away, returned at 10.00 p.m and removed the deceased, placed him near the home and the next day PW1 realized that her son was dead. A report was made at Masii Police Station and according to PW4, Cpl. Abdi Noor, he visited the scene, saw the hole, collected the deceased's body and paraphernalia used by the Appellant, re-arrested him and charged him with the offence of manslaughter.

4. According to the postmortem report, the deceased had died of suffocation consistent with the evidence of the eye-witnesses.

5. The Appellant's defence was that indeed PW1 contracted him to treat her son but he only got to her home at 7 p.m. on the material date. He asked her to get rice, cigarettes, traditional brew and seven handkerchiefs of different colours for him to begin the treatment of the deceased (who was possessed) the next day. That he then went away to drink traditional liquor and the next day when he went to the home, PW1 informed that the deceased had died and she reported to the chief. He denied the offence but on Appeal he stated thus;

"**I had no intention of committing the offence".**

6. From the above evidence and without belabouring the same, the Appellant set out to release the deceased from whichever spirits allegedly possessed him. The evidence of PW1, PW2 and PW3 as how he went about his craft is believable and cannot be doubted. In the bizarre manner that he proceeded to do so, each of them was consistent and his helpers, PW2 and PW3, were clear that they were acting on the Appellant's instructions. When he had done with them, he sent them away and only PW1, mother of the deceased and who had called for the Appellant's help, was at hand later to see the result of the Appellant's alleged supernatural powers. Tragically the result was not the healing but the death of her son. Again, her evidence of the last minutes cannot be but be seen as credible.

7. Like the trial magistrate I find that the evidence tendered was soundly and credibly presented and it was sufficient to prove the case beyond reasonable doubt. The Appellant's defence that the deceased just died is an afterthought and escapist. The postmortem report confirmed that the cause of death was suffocation which evidence was consistent with the evidence of PW1, PW2 and PW3 that the deceased died after being placed in a hole and covered in soil. The defence is not credible and in fact confirms the Appellant's presence at the scene and so he had the opportunity to commit the offence.

8. Having therefore held that the Appellant was guilty as charged, was the sentence manifestly harsh in the circumstances and to call for this court's interference? - See **Griffin vs R (1981) KLR 121.**

9. In this case, the Appellant in his unlawful craft set out in the most bizarre manner to masquerade as a healer but he in fact turned out to be an agent of death. The result was that a mentally ill young man lost his life. The maximum sentence for manslaughter is life in prison and therefore twelve years cannot be said to be a sentence that is manifestly excessive and I see no reason to interfere with it.

10. In the end, the Appeal before me has no merit and is best dismissed as I hereby do.

11. Orders accordingly.

Dated and delivered at Machakos this 18th day of September 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr O'Mirera for Republic

Appellant: present

ISAAC LENAOLA

JUDGE