



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL APPEAL NO. 544 OF 2003**

**(From Original Conviction and Sentence in Criminal Case No. 1483 of 2002 of  
the Chief Magistrate's Court at Nakuru – G. A. NDEDA (MRS) – C. M.)**

**JESSY WAINAINA MUGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Jessy Wainaina Mugo was charged with the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence were that on the 5th of March 2002 at Likia farm within Nakuru District the Appellant unlawfully killed Elizabeth Tome Momanyi. The Appellant pleaded not guilty to the charge. After full trial the Appellant was found guilty and convicted as charged. He was sentenced to serve a term of five years imprisonment. The Appellant was aggrieved by the said conviction and sentence and has appealed to this Court.

In his Petition of Appeal, the Appellant has raised five grounds of Appeal, namely that the trial Magistrate erred in law in finding that the Prosecution had proved the charge of manslaughter beyond reasonable doubt; that the trial Magistrate erred in disregarding the Appellant's defence; that the findings of the trial Magistrate were against the weight of evidence; that the evidence adduced by the Prosecution was contradictory and inconsistent and finally that the trial Magistrate erred in law in not appreciating circumstances surrounding the commission of the offence it at all.

At the hearing of the Appeal, Miss Nancy Njoroge Learned Counsel for the Appellant abandoned the Appeal against conviction but urged the Court to allow the Appeal against sentence. It was her Submission that the Appellant has been sentenced to a too harsh a custodial sentence considering the circumstances of the case. The Appellant was of the view that the sentence of five years imprisonment imposed should be reviewed to a lesser sentence. Mr. Koech, Learned State Counsel urged the Court not to disturb the sentence imposed. He submitted that the sentence imposed was fair in the circumstances of the case where an innocent life had been lost. He further submitted that putting into consideration that the maximum sentence that can be imposed for manslaughter is life imprisonment, the sentence of five years imposed was lenient in the circumstances.

The facts of this case are that on the 5th of March 2002 at about 4.00 p.m. the deceased, Elizabeth Tome Momanyi left her homestead at Likia Farm to go to the nearby shopping centre to purchase sugar. She did not reach there. On her way to the shopping centre she was shot by the Appellant. According to the evidence of PW 1 Samuel Njanji Mutindi, the husband of the deceased and PW 2 Ann Nyaboke Makundi the mother of the deceased, they testified that they heard a loud bang and on investigating, saw the deceased lying on the ground. She was bleeding from the chest. The Appellant was standing next to her armed with a rifle. PW 1 took the deceased to hospital where she was admitted but passed away the following day. The cause of death of the deceased was found by Dr. Kahiga to be pulmonary arrest due to internal injuries. The said Post Mortem report was produced by PW 10 Dr. Peter Andrew. PW 3 Thomas Ondieki Momanyi and PW 4 Stephen Waweru Karuru both testified that they heard a loud bang and on investigating saw the deceased had fallen down. She was bleeding from the chest. PW 4 testified that he saw the deceased running towards her home. He was able to talk to her. She said she had been shot by a Policeman. She fell down. PW 4 informed PW 2 who was able to seek assistance for the deceased to be taken to hospital. After the shooting incident the Appellant told PW 4 to show him the roads towards the forest. PW 4 testified that the Appellant then took off. PW 4 Joseph Ngige Mwangi testified that he was walking with the Appellant and PW 6 towards Likia Trading Centre. The Appellant and PW 6 were

talking about shooting somebody at the back. PW 5 was scared. He left them as they were walking towards the deceased's homestead. He later learnt that one of the Policemen had shot the deceased. PW 6 APC Richard Nyanjoke testified that on the material day he was assigned duty with the Appellant to escort cattle which had been stolen from the Mache area to Likia area. PW 6 and the Appellant were both armed with rifles. They escorted the cattle to Likia Farm where they handed over the cattle to the Chief of Olkurto and the owner of the cattle. They then returned back to their camp. On their way back they decided to stop at Likia Trading Centre to have lunch. It was raining. The Appellant and PW 6 took shelter at the trading centre. PW 6 testified that the Appellant started a conversation in Kikuyu language with two boys who were sheltering with them. Although PW 6 could not understand the Kikuyu language, he saw the Appellant visibly getting annoyed. When PW 6 asked the Appellant what the problem was, the Appellant told PW 6 that the boys could be Mungiki. Later they started walking back to their camp. At a junction on the route to their camp PW 6 proposed that they take a short cut to the camp. The Appellant declined to take the shortcut. He opted to take the longer route because he said his leg could not allow him to walk downhill. They agreed that they were to meet at the tarmac road. PW 6 took the shortcut whilst the Appellant took the longer route. PW 6 on reaching the tarmac road, waited for the Appellant in vain. Later he retraced back the route that the Appellant might have followed only to learn that the Appellant had shot somebody. PW 6 later found the Appellant at the camp. When he checked his gun he found one bullet missing. PW 8 Lindsey Kipkemboi a firearm examiner testified that he examined the gun that was used by the Appellant. He also examined the cartridge which was found at the scene where the deceased was shot. He formed an opinion that the said firearm fired the shot which killed the deceased. When the Appellant was put on his defence he testified that when he was returning with PW 6 after escorting the cattle, they took a shelter from the rain at Likia Trading Centre. He testified that he saw some boys who were armed with pangas. They were talking in Kikuyu language which the Appellant understood. They said that they were members of the Mungiki Sect. He further testified that when they left Likia Trading Centre and started walking towards their camp, he saw the boys following them. When he had decided to take the longer route alone, he saw the boys still following him. The boys expressed dissatisfaction with the government. They indicated that they had a gun. The Appellant testified that he decided to shoot in the air to scare the boys away. Later he learnt that the bullet fired from his gun and injured a woman who later died in hospital. The Appellant testified that he fired the shot to scare away the boys whom he felt were threatening his life. The Appellant further stated that he did not recover anything from the boys, who ran away after he had shot in the air.

The High Court as the first Appellate Court is mandated to look at the evidence adduced before the trial Magistrate afresh, re-evaluate and re-assess it and reach its own independent conclusion. In reaching its decision, the High Court had to put into consideration the fact that it did not have an opportunity of seeing the witnesses as they testified before the trial Court and therefore could not make any finding as to the demeanour of the witnesses. The High Court also has to put into consideration the grounds of Appeal filed by the Appellant in reaching its decision. In the instant case, it is not disputed that indeed the Appellant fired the bullet from the rifle that was in his possession that killed the deceased. From the evidence on record, it is not clear why the Appellant fired the shot that killed the deceased. The evidence of PW 1, PW 2, PW 3 and PW 4 do not indicate that there was any threat to security at Likia Farm on the material day that could have caused the Appellant to fire the shot that killed the deceased. The Appellant testified in his defence that he fired the shot in the air to scare away the boys whom he thought were Mungiki and therefore were likely to cause him harm. There is no evidence that the Mungiki were at Likia farm on the material day. Apart from PW 6 was a fellow Police Officer who testified that the Appellant appeared to have had an altercation with two boys at Likia trading centre when they were sheltering from the rain, none of the witnesses testified seeing boys who could be described as Mungiki. It was PW 6's evidence that after he and the Appellant had left Likia Trading Centre they walked towards the camp. They had left the boys at the said trading centre. At the point when PW 6 and the Appellant parted company, there was no threat to their lives. Neither did PW 6 see any boys who could be said to be armed and therefore a danger to peace. The story that the Appellant narrated in his defence does not tally with the evidence that was adduced by the Prosecution witnesses. What can be inferred from the evidence of PW 5 and the evidence of PW 6 is that the Appellant appeared to have been annoyed by something. The Appellant appeared agitated. The reason for his agitation was not apparent even to his colleague, PW 6. The only conclusion that I can reach on my re-evaluation of the evidence is that the Appellant shot the deceased for no apparent reason. His explanation that he fired in the air to scare away the boys whom he

concluded to be Mungiki is not supported by any evidence. It is further inconceivable that the Appellant could have fired in the air and have the bullet hit the deceased, fatally injuring her. It was the Appellant's evidence that the effective range of the rifle that was in his possession on the material day was two hundred metres. It was also the evidence of PW 2, PW 3 and PW 4 that the Appellant came to the scene where the deceased was lying down after she had been shot by the Appellant. The Appellant did not offer any assistance, but left when he had confirmed that the deceased had been injured. There was no reasonable explanation as to why the deceased was shot by the Appellant. The evidence on record clearly shows that this is one instance where a Policeman was trigger-happy with the resultant fatal consequences. The Appellant was therefore well-advised not to contest his conviction by the trial Magistrate.

The Appellant has urged this Court to consider reducing the imprisonment term of five years imposed by the trial Court. From the facts of this case, there are no mitigating circumstances that would enable me disturb the finding of the trial Magistrate. The Appellant as a custodian of law and order, and having been supplied with a firearm to enable him fulfil the said mandate, decided to misuse the same. His action was inexcusable. He used an instrument of the enforcement of law and order to harm the very people that he was supposed to protect. An innocent life was needlessly lost for no apparent reason. I would agree that with the Submission of Learned State Counsel that the sentence of five years imprisonment imposed by the trial Magistrate was too lenient in the circumstances of this case. I will not interfere with it. This Appeal lacks merit. The same is therefore dismissed. The conviction and sentence imposed by the trial Magistrate is hereby confirmed.

**DATED at NAKURU this 24th day of May 2004.**

**L. KIMARU**

**AG. JUDGE**