REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 8 OF 2019

MELTAL LESURMAT LENJORI......................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

Appeal from original Conviction and Sentence in

Maralal PM Criminal Case No 881 of 2017 – R Koech, PM)

J U D G M E N T

1. The Appellant herein, **MELTAL LESURMAT LENJORI**, was convicted after trial of ***manslaughter*** contrary to **sections 202 and 205** of the ***Penal Code***. It was alleged in the particulars of the offence that on 20/10/2017 at about 8.00 pm at Tamiyoi area in Maralal Township in Samburu–Central Sub-county of Samburu County, by an unlawful act, he caused the death of one GUIRNAL LOPOO LODOS. On 31/07/2018 he was sentenced to serve six (6) years imprisonment. He has appealed against both conviction and sentence.

2. In his petition of appeal however, the Appellant seems to be complaining only against the sentence. He says that since his arrest he has been diagnosed with a disease that needs medical care; that he has 12 sons and a daughter who all depend on him; and that he should have another chance at life since he had been a law-abiding citizen. At the hearing of the appeal he stated only that he did not commit the offence; as for sentence he asked to be forgiven. He did not present any written submissions as is the practice with most unrepresented appellants.

3. Learned counsel for the Respondent supported the conviction, submitting that the charge was proved beyond reasonable doubt. As for the sentence, counsel submitted that the same was not only lawful but grossly lenient in the circumstances of the case.

4. I have read through the record of the trial court in order to evaluate the evidence tendered and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

5. PW1 was the Deceased's mother. She testified that on the date in the charge at about 5 pm, the Appellant went to her home and demanded to have sex with her. He was well-known to her as a neighbour. She declined as she was a married woman (the husband was away at work), and in any case she could not have sex with an old man of the Appellant's age. The Appellant, upon this rejection, started to beat up PW1 and attempted to strangle her. She screamed and fortunately PW2 and PW3 came to her aid and pulled the Appellant off of her. He went away.

6. Later at about 8.00 pm the Appellant returned to PW1's house and made the same demand to have sex with her. She again declined. The Appellant then started to seriously assault PW1 with a walking stick. She screamed but no one came to her aid this time. As the Appellant was raining blows on her with the walking stick, PW1 picked up her youngest child (the Deceased) who was only 2 months old in order to escape with her. One of the blows that the Appellant aimed at her struck the child on the head. From the testimony of the doctor who performed the post-mortem examination of the body of the Deceased, this blow fractured the Deceased head at two points, thereby causing the brain to swell and some bleeding, ultimately leading to death.

7. There is no issue at all regarding the identity of the person who assaulted PW1 on two occasions that evening in an attempt to force her to have sex with him. He was well-known to her; the Appellant himself did not raise any issue on identity.

8. The first assault had been witnessed by PW2 and PW3; nobody responded to PW1's screams during the second assault, probably because it was at night. Nevertheless the testimony of PW1 was candid and clear, and was not shaken at all in cross-examination.

9. The Deceased was injured and ultimately killed in the process of the Appellant unlawfully assaulting PW1 in order to force her to have sex with him. It was a classic case of transferred malice. The Appellant could easily have been charged with, tried for and most likely convicted of, murder. He was lucky that he was charged with manslaughter.

10. Upon my own evaluation of the evidence placed before the trial court, the Appellant was convicted upon good and sound evidence. The conviction is safe. In his unsworn statement in defence he did not address the offence charged; he merely referred to his arrest. I find no merit in the appeal against conviction.

11. Regarding sentence, the circumstances in which the offence was committed were quite aggravated, in that the Appellant was unlawfully assaulting PW1 when she refused to have sex with him. It was the second assault, coming only a few hours after the first assault at which PW1 was rescued. This time round there was nobody to rescue her, and had the Deceased not been struck by the blow aimed at her mother, the Appellant would probably have succeeded in raping PW1. I agree with learned counsel for the Respondent that six (6) years imprisonment was quite lenient in the circumstances.

12. In the result, I find no merit in the Appellant's appeal in its entirety. It is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 16TH DAY OF SEPTEMBER 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 14TH DAY OF OCTOBER 2021