



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: GICHERU, LAKHA & OWUOR, J.J.A.

CRIMINAL APPEAL NO. 41 OF 1999

BETWEEN

SADIKI GEORGE NYAMBU

KARISA KASENA KADENGEAPPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Waki, J.) dated 11th February, 1999

in

H.C.CR.C. NO. 5 OF 1997)

JUDGMENT OF THE COURT

Sadiki George Nyambu and ***Karisa Kasena Kadenge*** , the first and second appellants respectively in this appeal, pleaded guilty to the offence of manslaughter contrary to ***section 205 of the Penal Code*** in the superior court on 11th February, 1999. They were each convicted of that offence and sentenced to 5 years imprisonment. Against that sentence they have each appealed to this Court contending that the said sentence was manifestly excessive considering that they had been in custody for a period of about 9 years.

After the plea of guilty to the offence of manslaughter had been taken and a conviction for that offence entered by the superior court, counsel for the appellants told that court that the appellants had been in custody for 9 years and that due to the longevity of their incarceration, they had suffered enough. When the first appellant was arrested he was 25 years old while the second appellant was 12 years old when he was arrested and was in Standard 6. Submitting that the two appellants were remorseful, counsel pleaded for their noncustodial sentence.

The appellants had on 1st November, 1990 mercilessly assaulted to death the deceased, ***Kibanda Mutarurasi*** , with sticks accusing him of being a useless old man who had resorted to witchcraft. They thereafter dragged him to a nearby bush from the scene of crime where they buried him. No doubt their dastardly assault on the deceased could not excite any leniency for them from the superior court. However, from the facts before that court, the second appellant appears to have been 12 years old when he committed the offence for which he was jointly charged with the first appellant.

Section 2 of the Children and Young Persons Act, Chapter 141 of the Laws of Kenya defines a **child** as "a person under the age of fourteen years"; a **juvenile** as "a person who is of the age of fourteen years or more and is under the age of sixteen years"; and a **young person** as "a person who is of the age of sixteen years or more and is under the age of eighteen years". Section 3(6) of the same Act provides that:

"3. (6) While any conviction or sentence made or passed by a court other than a juvenile court is appealed against or is brought before the High Court for confirmation or revision and it appears that the person convicted was at the time of the commission of the offence under eighteen years of age, the latter court shall have power to substitute for the conviction a finding of guilty in accordance with section 15, and to substitute for the sentence an order under section 17, of this Act."

Section 16 (1) and (2) of the said Act stipulates that:

"16. (1) No child shall be ordered to imprisonment nor to detention in a detention camp. (2) No child under the age of ten years shall be ordered by a juvenile court to be sent to an approved school unless there is no fit person or approved voluntary institution who is willing to take care of him, or unless for some other good reason the court considers that he cannot suitably be dealt with otherwise."

and **section 17** of the above mentioned Act where pertinent provides that:

"17. Notwithstanding the provisions of any other law and subject to the provisions of this Act, where a person under eighteen years of age is tried for an offence, and the court is satisfied of his guilt, the court may deal with the case in one or more of the following ways -

(e) if the offender is under sixteen years of age, by ordering him to be sent to an approved school suitable to his needs and attainments;

(f) subject to section 27 of the Penal Code, by ordering the offender in accordance with that section to undergo corporal punishment;

(g) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(h) by ordering the parent or guardian of the offender to pay a fine, compensation or costs as hereinafter provided; (i) by ordering the parent or guardian of the offender to give security for his good behaviour as hereinafter provided; (j) where the offender is a juvenile or young person, by ordering him to be imprisoned; (k) in the case of a person who has attained the age of fifteen years, to deal with him in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(l) in any other lawful manner:

Provided that a court committing an offender to an approved school shall not order him to undergo corporal punishment as well"

From the foregoing, it is plainly obvious that the superior court was in error in sentencing the second appellant, **Karisa Kasena Kadenge**, to 5 years imprisonment when the proceedings before that court indicated that he was 12 years of age when he committed the offence in respect of which he pleaded guilty and was convicted. That sentence is clearly insupportable and in view of the second appellant's inordinately long incarceration pending his trial in the superior court, we allow his appeal, set aside his sentence of 5 years imprisonment and order that he be set at liberty forthwith unless held in custody for any other lawful cause. As regards the first appellant, **Sadiki George Nyambu**, who was about 25 years of age when he jointly with the second appellant committed the offence of manslaughter in respect of which he pleaded guilty and was convicted by the superior court as is mentioned at the beginning of this judgment, it does not seem to us that in the circumstances of the case before the superior court judge, the

sentence of 5 years imprisonment was harsh or manifestly excessive, his equally inordinately long incarceration pending trial notwithstanding. Consequently, his appeal against sentence is dismissed.

Dated and delivered at Mombasa this 23rd day of July, 1999.

J. E. GICHERU

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR