



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

(Coram: Gicheru, Tunoi & Lakha, JJ.A.)
CRIMINAL APPEAL NO. 44 OF 1996

BETWEEN

SAMWEL KIPSANG ARAP RONO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the High
Court of Kenya at Kericho (Mr. Justice B.K. Tanui) dated
31st January, 1991,

in

H.C.CR.C. NO. 2 OF THE 1991)

JUDGMENT OF THE COURT

In his final address at the trial of the appellant in the superior court, Mr. Mitey who represented him in that court had this to say:

"I urge the court to believe the accused's story. The death of the deceased was caused by the cut of the panga over which they struggled. The accused did not possess the necessary mens rea to cause the death of the deceased."

The appellant's unsworn statement at his trial where relevant was as follows:

"The deceased came to where I was with a panga. When she arrived she asked me why I refused to permit her to sell the land. She came near me intending to hit me with a panga. I got hold of it and we struggled over it. We fell down and she was cut by the panga at the neck. There was no dispute between us and she did not live with us and she had gone away. I cared for her children and we lived happily. She wanted to sell the land when she came and I had refused and the Chief had agreed with me. It was me who had taken care of it. It was only me who used to look after it after the death of my father. I wish to inform the court that it was the deceased who came to me with a panga when I had taken care of her children when she was absent."

When on 18th September, 1989, he was charged and cautioned for the murder of the deceased, Grace Chepkorir alias Tapsabey Chemtai w/o Kenduywa, the appellant said:

"It is true, I Samuel Kipsang Arap Rono killed the said mama Grace Chepkorir by cutting her at the neck with a panga. After that I went to Bomet Police Station where I reported."

The appellant was the deceased's step-son. After the death of the deceased's husband there arose a dispute over his land between the appellant and the deceased. This culminated in the deceased evincing her intention to sell that land so that she could buy some other land. The appellant insisted that if the deceased wanted to sell her husband's land, he would buy it. This dispute reached their local Chief who stopped the deceased from selling the land in question following which the said land was sub-divided equally between the deceased and the appellant by their local elders. On the morning of 14th September, 1989 the deceased went to her portion of the land where she was growing beans. According to his son, Paul Cheruiyot Sang (P.W.7), the appellant was then cutting thatching grass on the deceased's portion of land. As he passed by on his way to a local shopping centre to buy cigarettes, he heard the sound of a slap and when he turned round he saw the appellant strike the deceased on the neck with the panga he was using to cut grass. He saw the appellant strike the deceased three times with that panga. Before hearing the sound of a slap, he had not heard the deceased and the appellant speak to each other. P.W.7 thereafter went to report what he had seen at Bomet Police Station and as he did so, the appellant arrived at the said Police Station and was arrested. Subsequently, the appellant took the police to a thicket where he had hidden the panga that he had used in assaulting the deceased and about one kilometre away from there he took the police to the scene where the deceased was lying dead with two severe cut wounds on the neck and on the forehead. Having recovered the panga from where the appellant had hidden it, the police then collected the body of the deceased and took it to Kericho District Hospital Mortuary where on 15th September, 1989 postmortem examination was carried out on it which revealed a deep cut wound on the left triangle of the deceased's neck which had severed the jugular vein and the internal carotid vessels. Her occipital cranium was also fractured. Her cause of death was severe asphyxia due to severe haemorrhage. The appellant was then charged with the murder of the deceased contrary to section 204 of the Penal Code.

At the close of the appellant's trial in the superior court, the learned trial judge in his judgment rejected the appellant's version in his unsworn statement as is set out above as to how the deceased sustained the injuries that led to her death and held that the panga used to assault the deceased was that which the appellant had been using to cut thatching grass at the scene of the incident. He disbelieved the appellant's story that the deceased sustained the injuries that led to her death when she fell on the panga over which he and her were struggling and believed the prosecution as to how the deceased met her death as postulated by P.W.7. The learned trial judge then proceeded to find the appellant guilty of the murder of the deceased, convicted him and sentenced him to suffer death in the manner authorized by law. Against that conviction and sentence, the appellant has appealed to this Court.

At the hearing of this appeal on 25th September, 1996 Mr. Konosi for the appellant submitted that the case against the appellant in the superior court was basically one of manslaughter other than murder and that the learned trial judge was in error in not coming to that conclusion. Mr. Onyango for the respondent while supporting the appellant's conviction and sentence was of the view that the case against the appellant could have been one of murder or manslaughter.

From the judgment of the learned trial judge, it does not appear to us that in the circumstances of the case against the appellant the possibility of the offence of manslaughter having been disclosed against him was ever considered. Indeed had this been considered and in view of the simmering land dispute with feelings running high between the deceased and the appellant over the same, we are not sure what conclusion the learned trial judge would have come to. Giving the appellant the benefit of doubt, we allow his appeal, quash his conviction of murder contrary to section 204 of the Penal Code, set aside his sentence of death and instead find him guilty of manslaughter contrary to section 205 of the Penal Code, convict him of the same and in view of the severity of the injuries he inflicted on the deceased, sentence him to 9 years imprisonment from the date of judgment of the superior court - 31st January, 1992. To this extent, the appellant's appeal succeeds.

Dated and delivered at Nakuru this 27th day of September, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL
