IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Masime & Cockar JJ A)

CRIMINAL APPEAL NO 13 OF 1990

ALFRED MBUVI MUNYU .....APPELLANT

IGNATIUS NYAGA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Mr Justice P N Tank) dated 22nd October 1989,

in

Criminal Case No 22 of 1988)

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JUDGMENT

Alfred Mbuvi Munyu and Ignatius Nyaga (the first and second appellants respectively) were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code but were after trial acquitted of that charge. The learned trial Judge (Tank, J) was however satisfied beyond reasonable doubt that the appellants had unlawfully assaulted the deceased and so he convicted them of the offence of common assault contrary to section 251 of the Penal Code. After appropriate mitigation and consideration of all the circumstances the learned Judge sentenced each of the appellants to a fine of Shs 10,000/- in default six months imprisonment.

This appeal is against the conviction. A notice of cross appeal and a petition of cross appeal were filed but these were struck out by the Court on 14th November, 1991. One week later the Attorney General filed a certificate under section 379 (5A) of the Criminal Procedure Code seeking a review of the sentence by this Court. Learned counsel for the appellant responded by filing a notice of preliminary objection to the said certificate which was canvassed in the appeal.

The petition of appeal contains in all six grounds of appeal. During argument however, two main submissions were made: first that the conviction was not supported on the evidence, and, secondly, that the learned trial Judge failed to consider the case for the defence and consequently the judgment was fatally flawed. In view of the Attorney General's certificate under section 379(5A) submissions were also made in regard to it.

We deal first with the conviction of the appellants. The deceased John Luvundwa lived in a block of flats in Jericho Estate, Nairobi and his room was next to that in which Peter Mwangangi Mwamuli (PWI) and his father Mwangangi Mwamuli (PW2), lived. Veronica Wanjiku Kinyanjui (PW3) also lived in the block. John Kirechi (PW 6), Damaris Wanjiku (PW10), Joel Ngovu Munyungu, Margaret Mwangi (PW13) and David Kyule Mutula (PW30) were other neighbours of the deceased. The evidence of all these witnesses was that the deceased was on the material date severely beaten by the two appellants. That evidence was believed by the learned trial Judge who was satisfied beyond reasonable doubt about it. We have ourselves analysed and evaluated that evidence and taken into account the sworn testimony of the appellants and the submissions of counsel on it.

Under section 18 of the Penal Code, the Court is enjoined to consider various factors to determine whether reasonable force was used in effecting arrest. The section provides:

> "18. Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the Court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person''.

The prosecution evidence was that the appellants having failed to trace the lost bicycle reported the matter to Buru Buru Police Station. That evening they then took it upon themselves to investigate the deceased and went to his room. Evidence was given to the effect that the deceased's room was locked from inside when a struggle and commotion commenced and went on for sometime attracting the attention of neighbours who called uniformed policemen to intervene. Thereafter the appellants led the weak and injured deceased from his room. The appellant's assertion that they only used reasonable and necessary force to arrest the deceased was in the circumstances not believed by the trial Court. We have for ourselves examined, analysed and evaluated that evidence and having done so are like the learned trial Judge satisfied beyond doubt that the appellants used excessive and unlawful force on the deceased. We have further considered the submission of counsel that there was opportunity for persons other than the appellants to have inflicted injuries upon the deceased but find that this was a ploy by the appellants to exculpate themselves from their unlawful assault on the deceased. We accordingly reject this effort of the appellants like the trial Court did. We are therefore satisfied that the appellants were convicted on overwhelming evidence of the assault on the deceased and reject the appeal against conviction.

We have also examined the judgment of the learned trial Judge and find no merit in the complaint that the learned Judge failed to consider the defence case. In our view the judgment in this appeal is nowhere near that in *Joseph Njaramba Karura vs Republic* [1982 –88] 1 KAR 1165 where this Court found that the trial Judge did not consider the case for the defence, that the detailed statement of the appellant was not considered and that no reference was made to that statement in the judgment. The learned trial Judge having set out the particulars of the charge states:

> "Neither of the accused had the defence of *alibi.*" Then at p 110 of the record he states:
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> " There is no eye witness to the scuffle, that was going on in the room of the deceased. Both the accused say in their sworn evidence that they had used force only necessary to arrest and hand out the deceased. The first to enter the room in which the deceased and the two accused were struggling are PW4 and PW5 the two police officers……..."

The learned Judge then analyses the evidence of the neighbours as to what they heard: the commotion, the screams, and what they saw, when the police officers who were called by the neighbours and the appellants emerged from the deceased's room with the half naked, handcuffed and weak looking deceased. At the conclusion of his analysis and evaluation of the evidence the Judge concludes:

> " It is argued that the force used by the accuseds was only that much necessary to arrest and handcuff the suspect……

There was no necessity to use any force on the suspect."

It is for these reasons that we reject the complaint that the case for defence was never considered.

Finally, we turn to the certificate under section 379 (5A) of the Criminal Procedure Code. That section was enacted by the Statue Law (Repeal and Miscellaneous Amendments) Act 1990 (Act No 7 of 1990) and provides:

> "5A Where the Attorney General certifies that a sentence passed by the High Court in the exercise of its original jurisdiction should be reviewed by the Court of Appeal, the Court of Appeal may after giving the accused person or his advocate an opportunity of being heard, make such order by way of enhancement of sentence passed as is consistent with the ends of justice."

The Act was assented to on 18th June, 1990, and commenced on 22nd June, 1990; and neither this provision nor indeed any of the amendments were expressed to have any retrospective effect. Consequently we hold that as the offence of which the appellants were convicted occurred on 23rd January, 1986, and sentence was passed on 25th October, 1989, this provision cannot be applied to it. We accordingly hold that the certificate of the Attorney General does not, in this case, empower this Court to review the sentence.

As this is a first appeal, however, and in view of the apparent concern of the Attorney General about the sentence passed we have considered the sentence. Section 251 of the Penal Code provides a maximum sentence of five years imprisonment with or without corporal punishment on conviction of assault causing actual bodily harm. And under section 26(3) of the Code

> " A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment."

The proviso to this subsection excludes two situations which are not relevant to this appeal. In view of these provisions the Superior Court was vested with an unfettered discretion what sentence to impose on the appellants. In *Mita v Rep* [1969] EA 598 Madan J, (as he then was) sitting in the Superior Court, held that it is not wrong to impose a fine for an assault causing actual bodily harm unless the circumstances of the case irresistibly preclude this mode of punishment. We respectively agree! In mitigation on behalf of these appellants were the facts that they were aged 28 and 31 respectively, that they had been in remand for two years as at the date of conviction, that they would lose their jobs as a result of their conviction, that they had family responsibilities and were first offenders.

The learned Judge having considered all these factors imposed a fine of Sh 10,000/=.

We do not with respect, find any error of principle in the learned judge's exercise of discretion. We therefore find no basis for complaint about the sentence which in our view met the interests of justice.

In the light of all that we have said we find no merit in this appeal and order it to be dismissed. We accordingly order that the appellants be released from custody to which we committed them pending this judgment.

Dated and delivered at Nairobi this 17th day of July, 1992

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR