

REPUBLIC OF KENYA

Mwaura v Republic

Court of Appeal, at Nyeri February 27, 1985

Madan, Nyarangi JJA & Platt Ag JJA

Criminal Appeal No 104 of 84

(Appeal from the High Court at Nyeri, Cockar J)

February 27, 1985, Madan, Nyarangi JJA & Platt Ag JJA delivered the following Judgment.

Kabuki Mwaura, sometimes called Mwangi Mwaura, the appellant, was sentenced by the High Court at Nyeri (Cockar J) to 14 years imprisonment on March 28, 1978 when he pleaded guilty to manslaughter contrary to section 205 of the Penal Code (cap 63). He was twenty-two years old.

About two years later (April 8, 1980) he thumb printed his notice of appeal against this sentence.

The delay, he swears in his affidavit of March 29, 1980, is due to his relatives being unable to raise the fees for an advocate to represent him in this court and to prepare and file his grounds of appeal.

His application for leave to urge his appeal was not opposed by the learned state counsel for the republic, and we exercise the discretion of this court in favour of the appellant.

Before we consider them and the reply of the state counsel we wish the learned judge wrote in his notes on sentence that he thought the republic rightly reduced the charge from murder to manslaughter because the appellant had been drinking alcohol before he killed the victim he should have written on the record somewhere before this substitution occurred that he had considered the matter and deemed it appropriate for it is the discretion of the court which has to be exercised in the matter and the fact that the appellant had been indulging in alcohol before hand is not necessarily a factor that justifies such a course being taken. Secondly, the learned judge ought not to have convicted the appellant until he had heard an outline of the facts of the case for the republic and the appellant's acceptance of them (and his part in the event) as being a true account of what happened and until he was satisfied that they proved beyond reasonable doubt the appellant was guilty of the offence charged, there has been no complaint about these errors and we are satisfied they occasioned no miscarriage of justice.

The appellant's mother died on June 26, 1977 and for some unravelled reason he believed Kimaru Gachongo was responsible. They met in a bar on August 14 the same year at Kambara Trading Centre and drank liquor together until about 8.00 pm when they prepared to depart. Just before they did so, they had words which turned into a fight during which the appellant floored Kimaru Gachongo. While he lay there Kimaru Gachongo was hit by the appellant all over his body and in particular the chest saying he would kill him because Kimaru Gachongo had killed his mother. The appellant took a torch from Kimaru Gachongo and hit him on the head several times. The appellant left Kimaru Gachongo when he was almost dead. Friends of Kimaru Gachongo took him to Kiriani hospital where he died when he was admitted. He was forty years old and died of shock and haemorrhage due to the injuries the appellant inflicted on his head and chest.

The appellant expressed his regret for all this through his advocate who told Mr Justice Cockar the appellant who was married with one child had to shoulder the task of looking after others in his family when his mother died. He had, by then, spent about eight months in remand.

Mr Justice Cockar described the death of Kimaru Gachongo as an extremely brutal killing. He thought the appellant was fortunate to have the charge reduced to manslaughter from murder. Kimaru Gachongo was

in the prime of his life and innocent of any act or word that could have led to his death in this way. He took into account the appellant's comparatively young age and the period he had spent in remand but he could find no other redeeming feature in his favour.

The appellant advances these matters now in his attempt to persuade this court to reduce the sentence passed upon him. His father lost his sight in early 1969 and his mother died in June 1977. He then had to work to support his father, his wife, their two children and three brothers and or sisters. He had pleaded guilty outright and in a drunken bout of temper had unlawfully killed Kimaru Gachongo, his friend. The sentence was manifestly excessive.

It seems as if the republic felt it could not prove the appellant guilty of the murder of Kimaru Gachongo because of their earlier consumption of alcohol and, perhaps, some provocation by Kimaru Gachongo so the references to the appellant's good fortune in having the charge reduced were unwarranted.

It was a manifestly excessive sentence for this offence and this appellant. He took on a man twice his age in first of all a hand fight and in the end used a torch on his head. It is very much out of step with sentences for nearly parallel cases. If it were appropriate for the facts of this case the mind boggles at what would be seemingly in a case in which the accused wielded a knife, cutlass or axe.

So we set aside the sentence of 14 years and substitute one of 7 years imprisonment with effect from March 28, 1978 and to that extent only allow this appeal.

Orders accordingly.