

REPUBLIC OF KENYA

Mburu v Republic

Court of Appeal, at Nairobi December 13, 1985

Kneller, Hancox JJA & Platt Ag JA

Criminal Appeal No 143 of 1983

(Appeal from the High Court at Nairobi, Todd J)

December 13, 1985, Kneller, Hancox JJA & Platt Ag JA delivered the following Judgment.

Joseph Ndung'u Mburu, the appellant, was convicted of manslaughter contrary to section 205 of the Penal Code and sentenced to 7 years imprisonment by Mr Justice Todd on August 26, 1983 in the High Court at Nairobi.

The appellant asks this court to reduce this sentence now to such a period that will result in his release today so that he can rejoin his family because his absence has caused its members great suffering. He lists them as his mother and two sisters. He mentions that he committed this offence when he was 22 and he did not know at that time what he was doing. We presume by that he means he did not realize fully the enormity of what he did.

He slashed his father about the head with a cutlass until he died. This was on 27, July 1982 and near a river at Gatitu in the Murang'a District as they went home together from the shop his father had in Gatitu. His father was 55 years old. The post-mortem revealed that the cause of death was deep cut wounds into the brain due to injuries with a sharp object.

His advocate at the trial explained that the appellant had been provoked at the shop by his father's refusal to allot him a part of his land saying he had no right to any of it when his other brothers and sisters had been given a portion beforehand.

The appellant was originally charged with his father's murder but at the trial the charge had been reduced to manslaughter and his plea of guilty to it accepted by the Republic and (most reluctantly) by the learned judge. His plea, lack of relevant previous convictions and year in remand were taken into account before the sentence was passed. The father's remark that the appellant had no right to any of his land (in contrast to his siblings who already had theirs honoured) and his father's refusal to give him his portion were treated as provocation by the learned judge but only just.

We would treat it as provocation in all the circumstances but agree with the judge's view that it did not justify the repeated attacks on his unarmed father who was twice his age and unprepared for such an event.

The sentence was, in our view, legal, appropriate and not manifestly excessive.

The record of the High Court was certified as a true copy of all the judge wrote by one of the High Court deputy registrars but it was not a true copy. We were given copies which suggested the appellant's reply to the reduced charge when translated into English included the phrase.

".....I do not agree that the act I committed upon the deceased Ndung'u Muti was an unlawful act and that it caused his death and upon what I have just told the court I am offering a plea of guilty to manslaughter in the place of murder."

The word 'not' is not to be found in the handwriting of the judge. Had we acted upon the certified copy

and not checked it with the original manuscript we would have quashed the conviction, set aside the sentence and ordered a retrial which would have been a mistake and an expensive one. We draw the attention of the registrar to the fallibility of these certificates and suggest he should devise some system of checking and double checking these records before they reach us.

The appeal is dismissed.