REPUBLIC OF KENYA

Ndaa v Republic

Court of Appeal, at Nairobi September 19, 1985

Kneller, Nyarangi JJA & Platt Ag JA

Criminal Appeal No 1 of 1985

(Appeal form the High Court at Nairobi, Torgbor J)

September 19, 1985, Kneller, Nyarangi JJA & Platt Ag JA delivered the following Judgment.

James Kioko Ndaa, the appellant, was sentenced by Mr Justice Torgbor to ten years imprisonment for manslaughter on November 27, 1984 in Nairobi.

The appellant begs this court to set aside this sentence and substitute one that will enable him and his family “to have a hope in life”.

He bases this appeal on his age, which is 29, his remorse, his lack of previous relevant convictions, his remand for nearly one and half years before he was arraigned, his plea of guilty when charged, the needs of his wife and five children and the circumstances of the offence.

They began, he claims, with the arrival of some clan elders on his land at Kevete in Makindu Location of Machakos District on May 8, 1983. They professed to be investigating a boundary dispute he had with a neighbour, David Kilonzo Mwathi, who had called for their help. The appellant was there and armed with his bow and arrows which he alleges he had with him as usual to protect his cattle and goats from their predators.

His neighbour asked him to point out to the elders the boundary sisal plants he had uprooted which the appellant refused to do because the assistant chieftain was dealing with their dispute or had dealt with it and the elders were bent on depriving him of his land which was the main source of his livelihood.

He lost his temper and threatened to discharge an arrow at one elder called Mwandau.

Another elder called Julius Kilatu Ndivo, interceded with the appellant while the others retreated but the appellant loosened off two arrows at Mwandau which fortunately fell wide of the mark. The appellant turned on Ndivo and shot him with an arrow through the chest into his heart and Ndivo was taken to hospital where he died the same day from shock and loss of blood due to this injury. He was about 75 and lost his life because he had intervened to save Mwandau and his colleagues and because at his age he could not leg it from the scene fast enough. The appellant went to the Administration Police and reported what he had done. He was then detained until May 12 that year when he was taken before a Machakos second class district magistrate and remanded. Ten months passed before he was committed for trial.

The learned judge convicted the appellant on his plea of guilty and adjourned for a day to decide on an appropriate sentence.

His notes on it include these observations:

> "……. This was a deliberate and wanton killing, totally needless as the elders including the deceased were in the process of taking their leave of the accused. The accused could have confined himself to warning shots merely to frighten off the visitors. Instead he demonstrated extreme callousness and killed a man too old to run or constitute any kind of threat or danger to the accused.
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> I have considered the matters urged in mitigation of sentence and in particular that the accused is the sole supporter of his wife and five children. I give him credit for reporting himself to the police and having no previous convictions. He has been in custody since May 8, 1983.
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> But manslaughter is a grave offence and could carry life imprisonment. The accused's treatment of the elders and of the deceased in particular was deplorable bearing in mind the nature of his mission as mediator and peacemaker, a man who served his community by resolving disputes amongst villagers.
>
> It is in all a shameful and needless killing……"

The sentence and the remand period amount to eleven and a half years in durance vile.

Parliament provided a maximum sentence of life imprisonment for this offence. The victim was a man of years and unarmed and yet suffered this slow painful death.

The learned judge declared he had considered the matters the appellant's advocate urged in mitigation of sentence and he has indeed set out nearly all of them again. One was not adumbrated and it was that the assistant chief had settled the land dispute or at any rate was seized of it. It is against that background that we view this sentence for this appellant and this offence. It is legitimate for a herdsman to carry his bow and arrows to protect himself and his flocks from wild animals and wrong to turn on clan elders with them it is true but when the latter loom up bent on reopening or resolving a bitter land row between neighbours a violent reaction by one or both claimants is not rare (deplorable though it is).

And so, in our respectful view, the sentence of ten years imprisonment is manifestly excessive and we now set it aside and replace it with one of seven years imprisonment to run from November 27, 1984. Those are the orders kef the court in this appeal.