

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

(CORAM: HANCOX, J A CHESONI & PLATT, AG. JJA

CRIMINAL APPEAL NO 108 OF 1983

BETWEEN

ALFAYO MARIO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Kisii (Mr E Cotran) dated 16th October, 1978 in Criminal Case No 85 of 1978

JUDGMENT OF THE COURT

Alfayo Mario s/o Mayaka, the appellant, was originally charged with the murder on 13th August, 1978, of a woman named Moraa w/o Mayaka, who was either his step mother or aunt, but he was convicted on his own plea of guilty of manslaughter and sentenced by Cotran, J. to 10 years' imprisonment. He has appealed against the sentence only and he says this is because the unlawful killing was accidental as it was due to the quantity of the alcohol he had consumed; he pleaded guilty; the offence arose out of a family dispute and he was a first offender.

The appellant and the deceased were drinking traditional liquor at the house of the appellant's mother (Rebecca). The deceased asked Rebecca for her bottle and when the latter told her to wait the deceased insisted on having the bottle. The appellant picked up an axe and hit the deceased on the head with it and she died instantly. The appellant ran away and was not apprehended till some months later. In mitigation his counsel said that the appellant's intention was to frighten off the deceased and he thought the axe was a stick. That cannot be so because in his charge and caution statement made to Chief Inspector Joseph Shiundu of Kisii Police Station on 23rd August, 1978, he said that he heard his mother and the deceased making noise as if they were about to fight and that after asking the deceased why she was making noise for the visitors he hit her on the head with an axe.

The doctor who performed post mortem on the deceased's body reported that she had a wound cut going down to the brain vertex and in his opinion the cause of death was a fractured skull and extensive brain damage. The deceased's age was estimated to have been 70 years at the time of her death whereas that of the appellant was then 26 years. Apart from blaming the incident on drunkenness there were no strong mitigating circumstances or factors to this vicious attack on the dead old woman by a young man of the appellant's age. The learned judge had had before him all the facts and circumstances presented to us when he fixed the sentence. However, the parties were drinking busaa together and in view of the fact that there were no specially aggravating circumstances the sentence was on the facts that were before the court, manifestly excessive. We allow the appeal and reduce the sentence from ten to seven years' imprisonment.

Dated at Kisumu this 6th day of December, 1983.

A R W HANCOX

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

H G PLATT

AG JUDGE OF APPEAL