



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN, KNELLER JJA & CHESONI Ag JA)

CRIMINAL APPEAL NO 50 OF 1983

JULIUS LOPEYOK WERO APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Julius Lopeyok Wero, the appellant, was convicted of manslaughter and sentenced to eight years' imprisonment on December 9, 1981 by the High Court at Nakuru (Mead J) and he appeals against this conviction and sentence.

So far as the conviction is concerned, he admits in his memorandum of appeal that he pleaded guilty to the charge but he then claims the evidence for the Republic at the trial was fabricated. Today he has again admitted he pleaded guilty.

The truth is that he was advised by his advocate to offer this plea which the state counsel said the Republic would accept and which the learned trial judge must have thought was appropriate for he reduced the charge from murder to manslaughter and then with some care had it explained to the appellant and when satisfied he was pleading guilty to all its elements proceeded to convict him of it so the conviction is safe.

The facts which the appellant admitted in full were these. The appellant quarrelled with Lebei Wero Tongokwang at 6 pm on October 1, 1980 at Komolion Centre which is in Korosi Location in Baringo District and hit him with a walking stick. The local chieftain intervened and Lebei went home. About an hour later the appellant and his co-accused, Angolol Baring Wero Lukwao, arrived outside Lebei's house and asked him to come out and see them but he refused so they marched in and hauled him out.

The appellant said to Lebei:

"The quarrel between you and me has grown worse" and Lukwao said:

"You have been disturbing us for a long time. It is time you went into the lake."

And then they dragged Lebei away and he was not seen alive again. This was before the eyes of his young daughter Kitilit and son Kapieki.

The next morning the appellant and Lukwao were overheard in the market by Pastor Lode of the Pentecostal Assemblies of God saying they had taken the old man the night before and thrown him in the water because he had troubled them a great deal by casting spells on their children and those of many others.

Lebei's children told the chief about this when they met him at the trading center at 7.00 am the next day and they took him to the shores of Lake Baringo where their father's corpse was floating.

A post-mortem revealed Lebei died of injury to his brain caused by a fracture to his frontal and left temple bones in his head.

The appellant and Lukwao were examined by a doctor and they were found to be injured, aged about twenty eight and twenty five.

When they were charged with the murder of Lebei and cautioned they elected to reply and the appellant denied killing Lebei adding that Lukwao did and Lukwao denied he was responsible and said the appellant killed him.

The appellant and Lukwao were first offenders and in remand for fourteen months before trial. The state counsel in his outline of the facts informed the court that the appellants were Pokot and their belief that Lebei had occult powers and used them to harm their children, a provocation in law.

Their advocates pleaded for leniency from the court adding that the appellant thought it right for him to kill a wizard and Lukwao believed he was protecting his children.

The judge declared a severe custodial sentence was merited because it was on the border line between murder and manslaughter. He took into account their pleas of guilty.

It is a question of facts whether an accused in all the circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation when he killed someone and the plea is that the victim performed an act of witch craft against him or another person under his immediate care in his presence so that he was angered to such an extent as to be deprived of his power of self-control and induced to assault the person doing the act of witchcraft. *R v Fabiano Kinene s/o Mukye and Others* (1941) 8 EACA 96. Here, the appellant had no such act performed in his presence so he was fortunate that his plea was not rejected.

The allegation that the appellant was merely following a Pokot custom in doing to death someone believed to possess and practice such powers was rightly disregarded for it is a barbarous custom and, if it exists, a heavy sentence for such acts is all the more necessary. *R v Atma Singh* (1964) 9 EACA (CA-K).

The sentence for this appellant in the circumstances was legal, appropriate and not manifestly excessive.

Accordingly, the appeal is dismissed.

Dated and Delivered at Nakuru this 7th October, 1983

C.B. MADAN

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JUDGE OF APPEAL

A.A. KNELLER

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JUDGE OF APPEAL

Z.R. CHESONI

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Ag JUDGE OF APPEAL