



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 48 OF 1980

BETWEEN

WAWERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the murder of one Thomas Kanyoro at Wajir on the night of July 2, 1979. He was convicted of manslaughter and sentenced to eleven months' imprisonment. He now appeals against conviction and sentence. The prosecution case was that the appellant, who at the material time was an Inspector of Police at Wajir, visited Wajir Township at about 8 pm on July 2, 1979, in the course of his duties as duty officer. He entered a house in which he found two men, one was police constable Paul Omari (PW 10) and the other a soldier, private Bernard Kasina who was not called at the trial. Both were in plain clothes.

There was also a woman called Wangari (PW 2) who owned the shop and who was probably supplying the men with liquor, although she denied this. A quarrel arose between Kasina and the appellant, who left the shop and went back to the police station to fetch reinforcements. The appellant came back to the house in a Landrover, accompanied by his driver constable Mwangi (PW 12), Sgt Ole Musia (PW 13) and constable Obara (PW 6) who was armed with a rifle. They found Kasina inside, and the appellant slapped him, and hit him with the butt of Obara's rifle which he snatched from Obara. The appellant was calling Kasina a *shifta* bandit.

Wangari came into the room and was also struck by the appellant, who ordered Kasina and Wangari to be arrested and put in the Landrover. While this was being done, the deceased Kanyoro who lives in the house next door to Wangari's, arrived on the scene. His wife Margaret watched through the window. According to Wangari, Sgt Musia and Margaret, the appellant struck the deceased on the chest with Obara's rifle, knocked him to the ground on his back and proceeded to step on his body and trample him with his feet. Sgt Musia deposed that the appellant was wearing boots.

The deceased had to be lifted into the Landrover and he, Kasina and Wangari were placed in cells. During the night, the deceased complained of being ill, and asked for water. He was not given any. Next morning he was found dead. The following day Dr Muturo (PW 1) performed a postmortem examination of the body and found bruises on the forehead and scrotum and swollen testicles. On internal examination, he found that the sixth, seventh and eighth ribs had been fractured and the stomach wall was bruised. The injuries had been caused by a blunt object and the cause of death was massive internal haemorrhage due

to the fractured ribs and stomach injury.

The appellant gave evidence on oath at some length. He denied beating anyone or even touching the deceased, although he admitted arresting him and the other two. He suggested that the deceased was beaten up in his cell, and that two other prisoners who were in the cell at the time could have given relevant evidence but were intentionally not called by the prosecution. The learned judge chose to treat the police witnesses PW 6 and PW 13 as accomplices, but we see no justification for this. They were taken to the scene by their senior officer, the appellant, to assist him in arresting persons suspected of illicit drinking. There is no evidence that either of these policemen used any violence when the deceased and the other two suspects were arrested. The appellant does not suggest that either policeman used violence at the time of the arrests. He deposed that no violence was used at all by anyone at that time. We do not in these circumstances see how PW 6 and PW 13 can be said to have been accomplices in the violent assault which occasioned the death of Thomas Kanyoro, which violence we are satisfied was inflicted at the time of the arrest by the appellant and by the appellant alone. Furthermore, both Wangari (PW 2) and PW 6 deposed that Sgt Ole Musia (PW 13) tried to prevent the appellant from hitting the deceased and the other two suspects with the rifle butt. We can see no reason for treating the two policemen as accomplices.

The assessors, after a full and careful summing-up, advised that the appellant should be acquitted of murder but convicted of manslaughter, and the learned judge was of the same view. The appellant has submitted before us that the evidence of identification implicating him was unsatisfactory, as the events occurred at night, and there was much confusion. A vital witness, Kasina, was not called as a witness. This man was a serving soldier, and the prosecution tried repeatedly but unsuccessfully to secure his attendance. On our own evaluation of the evidence, we are satisfied that the appellant was properly identified, especially as two of the identifying witnesses were members of his own police party and we have no doubt that the deceased died as a result of the violence inflicted on his body by the appellant, using a rifle butt and his feet. The deceased had offered no violence or provocation. At the most, he may have sat down to express his objection to being arrested, which would not have been unreasonable, as he asked why he was being arrested but was given no reason. The violence used by the appellant represented a grossly excessive use of force in effecting an arrest, and we have no doubt that he was properly convicted of manslaughter. The sentence cannot by any stretch of imagination be described as excessive.

We see no merit in this appeal which we order to be dismissed, both as regards conviction and sentence.

Dated and delivered at Nairobi this 11th day of January, 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR