



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: A A Kneller, E E J E Law, C B Madan)

CRIMINAL APPEAL NO. 101 OF 1981

PETER MULWAAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Criminal law -murder -provocation -self defence -pre-meditation -sentencing Criminal law -murder -accused attacked after argument -accused kicked once on attacker -no weapons used -attacker complained of pain on following day -attacker died later after surgery -whether accused provoked -whether accused acting in self defence -whether accused retaliated excessively -whether prosecution proper Criminal law -sentencing -charge of murder -conviction for manslaughter -accused provoked and acted in self defence —accused a first offender -accused in remand for 21 months -sentence of 2½ years imprisonment - whether sentence excessive

The appellant was followed and attacked by the deceased after the two of them had had an argument at a bar. In the ensuing struggle, the appellant kicked once on the deceased and no weapon was used by any of them. They then went to their respective homes after the confrontation. On the next day, the deceased complained of pain and later died in hospital of what was termed as general septic peritonitis following a surgery. The appellant was charged with murder. The learned judge, after finding that the appellant had retaliated excessively in kicking the deceased in the manner that he did, convicted him of manslaughter on his own plea of guilty and sentenced him to 2½ years imprisonment. The appellant had by this time been in remand for 21 months. He appealed against the sentence to the Court of Appeal. Held:

(i) the appellant had received a grave and sudden provocation and had only kicked once on the deceased during a struggle in which no weapons were used;

(ii) the appellant was not the aggressor and there was no premeditation on his part; having been attacked, it would appear that he was acting out of self defence;

(iii) as malice aforethought could not have been established, there was doubt that the appellants prosecution for murder was proper; (iv) as the time the appellant had spent in remand was sufficient punishment and as he was a first offender, the sentence was manifestly excessive. Appeal allowed.

Sentence set aside.

Appellant to be released from custody immediately. Statutes referred to:

None

Cases referred to:

None

Advocates:

Not stated.

Dated and delivered at Nairobi this 6th April 1982.

A A KNELLER

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JUDGE OF APPEAL

E J E LAW

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JUDGE OF APPEAL

C B MADAN

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JUDGE OF APPEAL