



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 71 OF 1981

BETWEEN

F.N.....APPELLANT

AND

REPUBLIC.....RESPONDNT

JUDGMENT

Potter JA The appellant was charged with murder in the High Court at Kisii. His plea of guilty to the offence of manslaughter was accepted, and he was sentenced to 3 years imprisonment, having spent 7 months in custody awaiting trial and sentence. He now appeals against that sentence.

The facts as laid before the court by the prosecutor were as follows:-

“14.10.80 7.30 Deceased a friend. PW 10 were seated in deceased mother’s house about to have supper. Suddenly Accused drinking outside threw spear which struck the Deceased in the throat. ... Deceased died instantly... cause of death shock and bleeding due to trauma to lung caused by a sharp weapon.

29.10.1980 PW 1 examined Accused. Mentally normal. No physical injury. 16 years of age. In cautionary statement Accused had referred to earlier quarrel related to snatching stick.”

To this the appellant’s advocate said “Facts accepted”. In mitigation, as to the incident itself, the defence advocate said:

“Accused had asked for his stick from Deceased. Deceased chased Accused away. Caught him beat him and kicked. Accused went to his house in the same time. Deceased went to the mother’s house. Accused angered by this went home and grabbed the weapon so he threw it at Deceased.”

On that accepted statement of the facts and mitigation by the defence the learned judge was entitled, as he did, to regard the attack on the deceased as a deliberate one made after the appellant had had time to cool off after the initial quarrel. The appellant, in paragraph 4 of his grounds of appeal, is now trying to justify his actions as being in self defence. Firstly, he says that when he ran to his house and took up the spear, that he saw the deceased still determined to charge him, so that he chased him with the spear to scare him away. Secondly, the appellant says that when the deceased reached near the door of “their house” (presumably his mother’s house), the deceased took up a club which he wanted to throw at the appellant, so that it was “in fear” that the appellant threw the spear.

This story must be an afterthought. It does not appear in the charge and caution statement or in the plea in mitigation.

Advocates for the defence assume a grave responsibility when they agree to the facts as stated by the prosecution after a conviction, and when they make a plea in mitigation. This is not a matter to be dealt with lightly or in haste. The circumstances of an unlawful killing may lengthen or shorten sentence by many years. However, we have no reason to doubt that in this case the learned judge was given an accurate summary of the relevant facts before sentencing the appellant, and on those facts the learned judge was fully entitled to treat the case as one of a serious and deliberate attack on the deceased.

But the accused was no more than 16 years old at the time of the offence. There is no indication in the record that the attention of the learned judge was drawn, either by the prosecutor or by the advocate for the defence, to the provisions of the Children and Young Persons Act. While it is the case that the judge's note on sentence includes the sentences "Take into account age", and "No other sentence except imprisonment can possibly suffice", we cannot be sure from the record that the learned judge did consider the provisions of that Act, or that if he had done he would have awarded the sentence that he did. The appellant has now been in custody since October 15, 1980, the date of his arrest.

We consider that the interests of justice will be best served in this case by allowing the appeal to the extent of substituting for the sentence imposed such sentence as will secure the appellant's immediate release.

As **Madan & Miller JJA** agree, it is so ordered.

Dated and Delivered at Kisumu this 30th day of November 1981.

C.B.MADAN

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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