



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Law & Potter JJ A)

CRIMINAL APPEAL NO. 16 OF 1980

BETWEEN

WALTER MARANDOAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Judgment by Cotran J in the High Court, Kisii, on 20th March 1980 in a Criminal Case No 52 of 1979)

JUDGMENT OF THE COURT

The appellant and another man were charged with the murder of Narkiso Deya. They were acquitted of murder, but convicted of manslaughter, in the High Court at Kisii (Cotran J). The appellant was sentenced to four years' imprisonment, and the other man to one day. The appellant now appeals from his conviction and sentence.

The facts of the case are as follows. On 20th January 1979, the deceased was at Homa Bay. He was carrying a hand-bag containing personal property. For some unknown reason he was accused of being a thief. He dropped the bag and ran away. He was chased by a number of people, who caught up with him and beat him to death with sticks. The cause of death was multiple bruises and lacerations all over the body, and a ruptured spleen.

On the following day the appellant went to Homa Bay police station and made a report concerning the events leading to the death of the deceased. As a result of what he said, he was cautioned by Ins Kamau. The appellant then made a statement in which he said that he was a bus conductor, that he had met the deceased in the street carrying a bag which, he suspected, contained stolen property. He asked the deceased for his identity card, whereupon the deceased dropped the bag and ran away. The appellant shouted "Thief! Thief!", picked up the bag, and together with many other people chased the deceased. After a long chase he found the deceased lying unconscious, being beaten by people with sticks. He picked up a stick and struck the deceased once.

Having made this report, the appellant was then arrested. Two days later he was formally charged with murder and cautioned. In reply, he said "I did not murder Narkiso Deya. That is all". He repeated this denial in an unsworn statement in his defence at the trial.

The only evidence against the appellant, at the trial was his first report, made under caution, in which he admitted striking the deceased one blow with a stick as he lay unconscious. Objection was taken to the

production of this statement at the trial; but it was admitted as voluntary after a trial within a trial. We have no doubt that the statement was made voluntarily. In fact it was volunteered, the appellant having gone to the police station of his own accord for the very purpose of making a report. It follows that in our view the appellant, having confessed to striking one blow out of the many blows which caused the death of the deceased, was properly convicted of manslaughter, the assessors and judge being satisfied that the retracted confession was true. The appellant's appeal against conviction must accordingly be dismissed, and we so order.

The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one man may have a bad record, but that is not the case here. The appellant is a first offender. The judge gave no reason for sentencing the appellant to four years, and his co-accused to one day's, imprisonment. The only difference we can see between the two cases is that it was the appellant who raised the hue and cry against the deceased. We do not think that he did so maliciously, but rather out of misplaced and misguided zeal. It was a foolish and unnecessary act on his part, but probably well-intentioned, as he freely went to report what had happened to the police. In the words of Hilbery J in *R v Ball* (1951) 35 Cr App Rep 164, 166:

The differentiation in treatment is justified if the Court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.

We see no justification for the disparity in the sentences in this case. If the sentence passed on the appellant is allowed to stand, he will suffer a justifiable feeling that he has been a victim of injustice. He was in custody for fourteen months awaiting trial. We allow the appeal against sentence, quash the sentence of four years' imprisonment passed on the appellant, and substitute a sentence of three months' imprisonment, effective from the date of conviction (20th March 1980), which will ensure his early release. In so doing, we do not want to be understood as condoning the practice of beating suspected thieves, a practice which is far too prevalent in Kenya. In this case an innocent man lost his life. We feel obliged to act as we have done in order to correct the unfortunate discrimination in sentencing which has occurred in this case.

Appeal against conviction dismissed.

Appeal against sentence allowed.

Dated and delivered at Kisumu 12th June 1980.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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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