



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWERA & OUKO- JJA

CRIMINAL APPEAL NO. 533 OF 2010

BETWEEN

JOSHUA MUTHUI BETH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Machakos (Lenaola J) dated 29th July, 2009

in

HCCRC NO. 14 OF 2009)

JUDGMENT OF THE COURT

The appellant herein Joshua Muthui Beth was initially arraigned jointly with others in the High Court at Machakos in Criminal Case No. 14 of 2009 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

This offence was subsequently reduced to one of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence state that Joshua Muthui Beth and 2 others between the night of 5th day of February, 2009 and 6th day of February, 2009 at Kithoni village, Kitundu sub-location, Kitundu location of Mbooni District within the Eastern Province jointly unlawfully killed Muli Maundu.

The substituted charge was read to the appellant on the 27th day of May, 2009. The appellant pleaded guilty to the charge. The facts were outlined. The appellant accepted the facts as outlined. He was then convicted on his own plea of guilty. It is noted on the record that the appellant was a first offender. A probation officer's report was called for. It was found not to be favourable. The appellant was sentenced to serve fifteen (15) years imprisonment.

The appellant has come to this Court and filed what has been titled as:-“PLEA FOR LENIENCY. IT READS:-

1. *That I am a first offender.*
2. *That I am remorseful on all that transpired during the incidents.*
3. *That I plead with the honourable Court to reduce the sentence of 15 years imposed upon me for had intention of committing the crime. For I committed it when rescuing my uncle who was attacked by the deceased diabetic patient and I am getting sick day after day due to improper diet and lack of proper medication in prison.*
4. *That I am a bread winner of my family and a care taker of my parents who are old.*
5. *That the sentence imposed is too harsh and excessive for a mere just offender hence need for leniency.*
6. *That I swear that I will be of help to the public and be loyal to the people of Kenya.*

At the hearing of the appeal the appellant appeared in person, while **Mr. V.S. Monda** (senior principal prosecuting counsel appeared for the state.

In his oral submission to Court, the appellant repeated his mitigation factors to the trial Judge, namely, that he committed the offence unknowingly; that the deceased was the aggressor; that the deceased died on the way to hospital; that he is the first born of his family; that he has acquired some skill in the course of his incarceration which he intends to use to earn a living to support himself and his family. He therefore pleads for leniency to enable him be integrated back into the society.

In opposition, **Mr. Monda** for the State drew our attention to the content of Section 361 of the Criminal Procedure Code and submitted that since the appellant is complaining about the severity of sentence, this is a matter of fact. As such this Court has no jurisdiction to deal with the appellant’s complaint.

Reliance has been placed on the provisions of Section 361 (1) (a) of the Criminal Procedure Code. Cap 75 laws of Kenya. Which prohibits this Court from entertaining an appeal on the severity of sentence in an appeal which emanates from a decision of the subordinate court. Our attention has also been drawn to the provision of Section 348 of the same Criminal Procedure Code (Supra) which prohibits appeals against convictions arising from a plea of guilty, save on issues of extent or legality of sentence.

The appellant herein was arraigned before the High Court. He pleaded guilty to the charge as laid. The facts narrated to him were also admitted, hence the conviction. He has no complaint against the conviction.

Section 361 (1) (a) prohibits this Court from interrogating issues of sentence only on appeals arising from decisions of the subordinate court. The decision subject of this appeal on sentence emanates from the High Court. We therefore find that we have jurisdiction. We are properly seised of this matter and are competent to pronounce on its merits.

We are in agreement that Section 248 of the Criminal Procedure Code (Supra) prohibits appeals against conviction based on own plea of guilty, save for sentence limited to the extent and or legality of the sentence. Herein the appellants’ complaint is against the extent of the sentence. We are therefore properly zeised of his appeal and we have the mandate to interrogate the extent of the sentence complained against by the appelalnt.

From the scanty facts outlined on the record for purposes of the plea as well as those contained in the probation officer’s report, the deceased was the aggressor. The deceased was warned to desist from what he was doing but he persisted. When finally repulsed by the appellant and others he was left on the road, presumably under the belief that the deceased would probably take himself back to his home but

unfortunately he was unable to. He was discovered the next day lying helpless on the road and rushed to hospital but unfortunately he passed on.

A probation officer's report was called for by the learned trial Judge. When submitted, it was not acted upon because the relatives of the deceased who are also relatives of the appellant had objected to the appellant being released on probation. There was no mention that the appellant was a habitual criminal offender or that he was otherwise unfit to be released back to the society, the considerations we think the learned trial Judge should have taken into regard when considering as to whether to admit the appellant to probation or otherwise. Objection by the relatives of the deceased who are also relatives of the appellant should not have weighed heavily on the mind of the learned trial judge in exercising his judicial discretion as to whether to admit or not to admit the appellant to probation.

The appellant faced a charge of manslaughter. In other words, he and others unlawfully caused the death of the deceased. It has not been disputed that the appellant was the aggressor. He did not die on the spot. The incident took place on the night of the 5th and 6th day of February, 2009. The appellant was arrested shortly thereafter. He appeared in court for plea on the 18th day of February, 2009. The appellant has therefore been incarcerated for close to five years now.

Considering that the deceased was the aggressor; that the deceased defied warning from the appellant and others to desist the aggression but just continued; that the appellant and others only came out of their house to repel the deceased's aggression; that a confrontation ensued; that the deceased did not die on the spot, but upon being repulsed, he was left on the road, presumably to find his way back to his home, but unfortunately he was overcome by the injuries until he was discovered the next morning lying on the road, rushed to hospital but unfortunately passed on shortly thereafter.

It is clear from the above that had the aggression not occurred, death would not have occurred. There were therefore mitigating factors.

A sentence of fifteen (15) years is on the high side. We are inclined to interfere with it.

We set aside the sentence of fifteen (15) years imprisonment and substitute it with a sentence already served. The appellant is ordered to be set at liberty forthwith, unless otherwise lawfully held.

Dated and Delivered at Nairobi this 20th day of December, 2013

R.N.NAMBUYE

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

**I certify that this is a true
copy of the original.**

DEPUTY REGISTRAR

D/O