



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, GITHINJI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 377 OF 2009

BETWEEN

PAUL MUTUKU KATHANZU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

***(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Lenaola, J) dated
1st October, 2009***

in

H. C. CR. C. No. 37 of 2009)

JUDGMENT OF THE COURT

The appellant, ***Paul Mutuku Kathanzu***, was convicted by the superior court (Lenaola, J) of the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code on his own plea of guilty.

The facts as outlined by Mr. Omirera, learned State Counsel, before the superior court show that the appellant and the deceased, who were neighbours, had a long standing land dispute relating to a road reserve that cut through their respective parcels of land.

At about 3.00 pm on 26th April, 2009 the deceased's employees were tilling the disputed land. The deceased was not present, and had apparently gone to fetch seeds for planting. Meanwhile, the appellant arrived, and asked the workers why they were encroaching on the reserve land. Just then, the deceased returned and an argument developed, leading to a quarrel. The deceased removed a panga from a gunny bag that he was carrying. The appellant snatched it off him, and slashed the deceased across the chest, causing him to fall and bleed profusely. He was rushed to the hospital, and died the same night. A post-mortem conducted on 15th May, 2009 showed the cause of death as bronchi-pneumonia arising from fractures of the right rib. The appellant was promptly arrested and charged with the offence of murder, contrary to ***section 203*** and ***204*** of the Penal Code.

When he appeared before the superior court on 6th July, 2009 for the purpose of taking the plea, he

offered to plead guilty to the reduced charge of manslaughter, contrary to **section 202** and **205** of the Penal Code. He was represented by counsel, Mr. Konya.

The learned Judge of the superior court read out the charge of manslaughter and recorded the appellant's response as follows:

“Plea on manslaughter

The offence of manslaughter contrary to section 202 and 205 of the Penal Code duly read out to the accused person in the Kiswahili language which the accused person appears to understand and in response he states as follows:

“It is true”.

The State Counsel then read out the facts of the case, as we have summarized hereinbefore, and the appellant responded by stating that “the facts were correct.” Thereafter, the learned Judge convicted him of the offence of manslaughter on his own plea of guilty, and directed that the probation officer's report be filed. Eventually, the appellant was sentenced to ten years imprisonment.

He is now before us on appeal against both conviction and sentence, and has outlined several grounds of appeal. However, **section 379 (3)** of the Criminal Procedure Code clearly bars this appeal as against conviction. Here is what the section says:

“379 (3) No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by the High Court, except as to the extent or legality of his sentence.”

When this was pointed out to his counsel, Mr. E. Ondieki, counsel sought leave to argue only one ground of appeal, namely **section 77 (2) (b)** of the old Constitution, which touched upon the appellant's constitutional rights. Mr. Ondieki argued that the appellant's right to a fair trial in a language that he understood had been breached. He submitted that the record, as we have reproduced before in this judgment, did not show unequivocally that the appellant “understood” the language of the Court – in this case Kiswahili and the English language. According to him, the record states that “the accused person **“appears”** to understand (the language) not that he actually understands the same. He submitted, therefore, that a fresh trial be ordered.

Mr. Monda, learned Senior State Counsel, in response, submitted that the appellant at no time ever complained that he was unable to understand the language, nor request that the proceedings be translated in any other language; and that all along he was represented by counsel who, also, did not raise this issue at any time.

We are in complete agreement with the submissions made by Mr. Monda, and find no merit in this appeal. It is very clear from the record that the appellant understood every word stated in the proceedings and he responded firstly by saying that “It is true” to the charge that was read out, and later by saying “the facts are correct” to the outline of the facts presented by the State Counsel before the superior court. In addition, we have noted from the probation report that the appellant had completed Form 4 at Machakos Central High School; has had training as a telephone operator and security guard; and has also attempted his hand in politics in the last general elections. He does not appear to us a person who neither understands Kiswahili nor English. We reject this argument as being wholly untenable, and without any merit at all.

Accordingly, we dismiss this appeal. It is so ordered.

Dated and delivered at Nairobi this 4th day of February, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR