



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & VISRAM)

CRIMINAL APPEAL NO. 61 OF 2008

BETWEEN

MAITHYA MULAE APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a sentence and conviction of the High Court of Kenya at Machakos (Lenaola, J) dated 7th May, 2008

In

H. C. Cr. C. No. 6 of 2007)

JUDGMENT OF THE COURT

Maithya Mulae, the appellant before us, was originally charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, the particulars of that charge being that on the 15th day of March, 2006 at Kambiti Village in Ikuusya Sub-location, in Kyathiani Location, Mwingi District within the Eastern Province, the appellant murdered John Kilonzo Matiti, hereinafter “**the deceased.**” On the 2nd March, 2007, the appellant appeared before Sitati, J and pleaded not guilty to the charge of murder. The matter thereafter dragged on until 4th March, 2008, some two years from the date of the offence, when the appellant, who was represented by Mr. Makau Mutua offered to plead guilty to the lesser offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The offer to plead guilty to the lesser charge was accepted by the Republic and thereafter when Lenaola, J read out the charge to the appellant, he readily pleaded guilty to it. The learned Judge was then told by Mr. Omirera, the counsel representing the Republic, that on 5th March, 2006 at 3.00 p.m., both the appellant and the deceased were in the house of one Kilonzi Maluki where they were drinking some liquor. The appellant left and went to his house and by 7.30 p.m. the deceased followed the appellant, knocked on the door and demanded that he (deceased) be let in so that he could take a bunch of keys which could open the appellant’s mother’s house. The appellant refused to open and the deceased insisted that the door be opened. The appellant came out of the house, picked a piece of wood and struck the deceased on the right side of the head. The deceased fell down unconscious and the appellant went back to sleep.

At midnight the appellant came out again and found the deceased had passed on. The appellant informed his brother Mulwa Mulea and other relatives who came to the scene and they decided to hide

the body of the deceased. The next day the appellant and his brothers buried the deceased secretly and they then took an oath of secrecy regarding the incident. In November, 2006, one Mutua Musili who knew about the matter reported to the village elder who in turn made a report at Mwingi CID Office. The body was thereafter exhumed and taken to Mwingi District Hospital. The cause of death could not, however, be determined since the body had decomposed. The appellant was arrested on 3rd January, 2007 and charged in the manner already stated herein. The prosecution said they accepted the lesser charge of manslaughter because the deceased appeared to them to have provoked the appellant by his persistent banging on the door. The prosecutor should have in fact added that the appellant and the deceased had also consumed some illicit liquor just before the incident. The appellant admitted these facts and the Judge duly convicted him of the charge of manslaughter.

In mitigation, Mr. Makau told the Judge that the appellant was twenty-one years old at the time of the offence, that he had been provoked by the deceased who had, on several occasions, harassed the appellant's mother. Mr. Makau pleaded that the appellant be given a non-custodial sentence. The appellant was treated as a first offender. Having heard the matters raised in mitigation, the Judge ordered that a probation report be made available to the court. The report was eventually made available to the Judge on 7th May, 2008 and in the report, the probation officer recommended that:-

“----- the offender before court is aged 21 years. He comes from a family with criminal record. He is not a straight-forward person and tried to hide most of the family information. The community members are opposed to his release, even after his family's willingness to compensate the deceased family. All his family members including the mother are said to be drunkards and therefore home environment is not conducive for rehabilitation. In view of the afore-going, I do request the court to deal with this case in any other way it deems fit.”

The learned Judge did not give the appellant or his counsel an opportunity to comment on the probation officer's report which the Judge treated as being unfavourable to the appellant. In his *“Ruling on Sentence,”* the learned Judge proceeded as follows:-

“The accused person's report is not favourable. He comes from a family which is disjointed and the community is fearful. He admits the present offence and yet he must be punished. The circumstances under which he committed it, and his conduct of burying the deceased secretly, means that there should be no leniency given to him. He will be sentenced to serve 30 years in prison. Orders accordingly.”

“The circumstances under which he committed the offence” were known to the learned Judge long before he received the probation report. The killing of the deceased and the secret interment of his body were disclosed to the court on the day the appellant pleaded guilty. He had earlier on been drinking with the deceased and the prosecution had agreed that the deceased had provoked the appellant by his persistent knocking on the door. The appellant was only twenty-one years old at the time he committed the offence. We have just dealt with the case of **MULU MUNYALO VS. REPUBLIC**, *Criminal Appeal No. 237 of 2010* (unreported) which was decided by the same Judge and in which the Judge had called for a probation report but ended up sentencing the accused person in that case to 30 years imprisonment. The remarks which we made in MUNYALO's Case must apply *mutatis mutandis* to the present case. The sentence of 30 years imprisonment was harsh and excessive and that gives this Court the right to interfere with it as the appeal we are dealing with is a first appeal to the Court. We accordingly allow the appellant's appeal against the sentence, set aside the sentence of thirty years imprisonment and substitute therefor a sentence of fifteen (15) years imprisonment to run from 7th May, 2008 when the appellant was sentenced by the learned Judge. Those shall be the Court's orders on the appeal.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.