



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 237 OF 2010

BETWEEN

MULU MUNYALO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

In

H. C. Cr. C. No. 106 of 2008)

JUDGMENT OF THE COURT

Mulu Munyalo, the appellant herein, was originally charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the information were that on the **12th November, 2008** at about **2.00 a.m.** at Eloi Village, Kyanguithya West Location, Kitui District of Eastern Province, the appellant murdered Kalusi Masila, “*the deceased*” hereinafter.

On the 11th of December, 2008, Mrs. Mutua, the appellant’s advocate in the superior court, told Lenaola, J. that the appellant was offering to plead guilty to the lesser offence of manslaughter. Apparently that offer was accepted by the State and the hearing was adjourned to the 16th December, 2008. On that date, Mr. Omirera, the Principal State Counsel, produced a charge of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and when that charge was read out to the appellant, he pleaded guilty to it. Lenaola, J was thereafter told that the appellant’s father had died and the mother was staying in Mombasa. The mother had taken the appellant to live with his paternal grandmother at home. The grand-mother wanted the appellant to go away and there was always constant friction between them.

On 10th November, 2008, the appellant went home and found all the houses locked. At 7.00 p.m. he went to the house of the deceased and found her cooking. After cooking, the deceased refused to give the appellant any food and the appellant was hurt. They quarreled and thereafter the appellant went to bed hungry. When the deceased was sleeping, the appellant strangled her and killed her. The next day the appellant went and reported the matter to the police who went and took the body to Kitui Police

Station. A post-mortem was conducted on the body on 20th November, 2008 and the cause of death was found to be asphyxia secondary to strangulation. The appellant was also examined as to his state of mental health and was found to be normal. He was then charged as has been narrated above.

The appellant admitted these facts as being correct and the learned Judge duly convicted him of the lesser offence of manslaughter. In mitigation, the learned Judge was told that the appellant was a first offender and that he was aged 22 years. It was said that all the appellant's siblings depended on the appellant and yet the appellant had been "*rejected by his family.*" The Judge was asked to give the appellant a non-custodial sentence. Having heard the matters raised in mitigation on behalf of the appellant the learned Judge ordered:-

"Probation officer's report be filed for sentencing on 17/2/2009. Accused Remanded in custody."

The probation report was eventually produced before the Judge as directed. The report was unfavourable to the appellant, with the probation officer concluding that:-

"Mulu is aged 22 years. He is a first offender. He expressed guilt and feels that he could have committed the offence due to confusion. His father is deceased and the mother lives in Mombasa. He is a product of inadequate parenting. Together with his siblings they are under the care of their old grandmother. Those interviewed strongly feel the stroke he suffered in 2008 affected him mentally. However, assessment report in the court file shows that he is mentally stable. Despite his family's willingness to accept him back, the community is not comfortable with his return home. No negotiation has been made on reconciliation and compensation.

Your lordship, in view of the foregoing I find the offender unsuitable for probation sentence. Given the circumstances of the offence and his subsequent strange behavior, chances of re-offending are very high . May the court deal with his case in any other appropriate way."

Having read the report the learned Judge ordered that the appellant be once again examined by a psychiatrist at Machakos General Hospital as to his mental condition. Apparently, that examination once again confirmed that there was nothing wrong with the appellant's mental condition.

So on 1st April, 2009, without having given the appellant or his advocate a chance to comment on the probation officer's report, the Judge ruled as follows:-

"Ruling on Sentence:

Having read the Probation Officer's Report which I find unfavourable to the accused report (sic) and since his mental status is said to be normal, his act of strangling his grandmother was callous and without provocation. He is 22 years old but deserves a stiff sentence. I will sentence him to serve 30 years in prison. Orders accordingly."

The appellant appeals against that sentence and told us it is harsh and excessive. This is a first appeal to us, so our hands are not tied as regards the sentence. First, we draw the attention of the learned Judge to the fact that since the probation report was unfavourable to the appellant, it was the court's duty to afford the appellant or his advocate the right to challenge the report – see **WAMBUE MUE VS. REPUBLIC**, Criminal Appeal No. 18 of 2009 (unreported) wherein the Court considered authorities such as **Nilson vs. Republic [1970] EA 599** and **Ogalo son of Owuora vs. Reg [1954] 21 EACA 270**.

Before he called for the probation report, the learned Judge knew that the strangling of the grandmother was "*callous and unprovoked.*" If the crime was such a terrible one, we are at a loss to understand why the probation report was being called for in the first place. The appellant was only twenty two years old and he was a first offender. He was sentenced to thirty years imprisonment. We wonder what sort of sentence would have been imposed on him if he had been a repeat offender. A sentence of thirty years imprisonment, even if the offender is only twenty-two years old, is virtually a sentence for

life imprisonment – see for example the case of **FRED MICHAEL BWAYO VS. REPUBLIC**, *Criminal Appeal No. 130 of 2007* (unreported) where this Court attempted to set out what would amount to a sentence of life imprisonment in Kenya. In our view, the sentence of thirty years imprisonment imposed on the appellant was harsh and excessive and that factor entitles us to interfere. Accordingly we set aside the said sentence and substitute it with one of fifteen (15) years to run from the date when the Judge sentenced the appellant , i.e. from 1st April, 2009. To that extent the appellant’s appeal against sentence is allowed.

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

R. S. C. OMOLO
.....
JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.