IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 190 OF 2009

BETWEEN

DAVID MBANE MASILA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Being an appeal against the decision and the judgment of the High Court of Kenya at Machakos (Lenaola, J) dated 20th May, 2008*

In

H.C. Cr. C. No. 72 of 2007)

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JUDGMENT OF THE COURT

When **David Mbane Masila**, "the appellant" hereinafter, first appeared before the High Court on 30th November, 2007; he was 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 filed against him by the Attorney-General were that on the 16th November, 2007, at around 2.00 a.m. at Katyethoka Village, Kaveta Sub-Location in Kitui District of the Eastern Province, the appellant had murdered Kavengi Mbane. For one reason or the other, the appellant's plea to the charge was not taken until the 18th February, 2008, when the appellant appeared before Lenaola, J; the appellant pleaded not guilty to the charge of murder. Eventually on the 16th June, 2008, the Republic reduced the charge of murder to one of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code and when the lesser charge was read to the appellant, he pleaded guilty to it. The proceedings were being interpreted to the appellant in Kikamba language, his mother-tongue and he was represented by counsel, Miss Musila. The prosecutor then outlined the facts in support of the charge. They were that on the 16th November , 2007 at about 2.00 a.m. the appellant who was the husband to the deceased Kavengi Mbane, returned home. He had been involved in election campaigns. He picked up a quarrel with the deceased and the quarrel developed into a fight. He hit the deceased on the head with a piece of wood. The deceased was subsequently admitted at Kitui hospital but succumbed to her injuries on 19th November, 2007. The matter was reported to the police on 26th November, 2007 by which time the appellant had removed the body from the hospital even before a post-mortem could be conducted. It was specifically stated in the facts that the appellant had not intended to kill his wife and hence the reduction of the charge to one of manslaughter. The learned Judge asked the appellant whether he accepted the facts as stated by the prosecutor. The appellant told the Judge:-

"The facts are correct."

This was followed by a conviction and the prosecuting counsel told the Judge that he did not have the appellant's previous record. Miss Musila then mitigated on behalf of the appellant and at the end of it all the learned Judge ordered for a probation officer's report. Such a report was eventually made available on 22nd July, 2008 and the report showed that the appellant had two relevant previous convictions; one of assault occasioning actual bodily harm for which he was placed on probation and a second one of robbery for which he served seven years imprisonment. It was the probation officer's report which showed that when the appellant took the deceased to the hospital, he lied there that the deceased was suffering from malaria, instead of telling the medical staff what had actually happened between him and his wife. It was further stated in the report that he had even threatened those who had disclosed that it was him who had assaulted the deceased.

Upon considering all these circumstances, the learned trial Judge sentenced the appellant to twenty (20) years imprisonment. The appellant now appeals to the Court and in his "*Written Grounds and Submissions*" he appears even to challenge his conviction on the basis that since no post-mortem was carried out on the body of his deceased wife, it was not proved that he had killed her. The appellant admitted before the learned Judge that he hit his deceased wife on the head; it was him who took her to Kitui Hospital and it was him who removed her body from the hospital before the cause of death could be established. Having admitted that it was him who killed his wife, it is now idle for him to purport to challenge his conviction on the charge of manslaughter. He agreed that he killed his wife without his having intended to do so. Even in his mitigation before the trial Judge, no question was raised with regard to who or what had caused the death of the woman. We reject the appeal as regards the conviction.

On sentence, what the appellant stressed both in this Court and in the trial court was that the children of the marriage have nobody to care for them, their mother having died and he being in prison. The learned trial Judge took that factor into account and he must have also taken into account the appellant's previous record of violence. Taking into account the appellant's previous record of violence, we do not think that the sentence of twenty (20) years imprisonment is so harsh and excessive and thus warrants our intervention. In our view, the sentence was eminently deserved particularly in view of the assertion in the probation report that the appellant did not disclose to the medical staff the true nature of his deceased wife's ailment. We thus see no reason to interfere with the sentence. The appeal wholly fails and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 10th day of June, 2011.

R.S.C. OMOLO
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JUDGE OF APPEAL

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.