



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & ONYANGO OTIENO, J.J.A.)

CRIMINAL APPEAL NO. 305 OF 2009

BETWEEN

HARUN KAMAU MWANIKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Ouko, J.) dated 9th October, 2009

in

H.C.CR.C. NO. 59 OF 2009)

JUDGMENT OF THE COURT

On the basis of an information dated 14th July 2009, filed into the Court on the same date, the appellant, **Harun Kamau Mwaniki**, was arraigned before the High Court at Nakuru with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars were that on the 5th day of July 2009 at Seria village, in Laikipia West District within the Rift Valley Province he murdered Zipporah Njeri Kamau. He pleaded not guilty to that charge and a plea of not guilty was entered against him. That was on 15th July 2009. The case was thereafter fixed for hearing on 13th October 2009. On that date, Mr. Maragia, the learned counsel representing the appellant informed the court that the appellant would offer a plea to a lesser charge of manslaughter and Mr. Njogu, the learned State Counsel sought time to consider that offer. Apparently, Mr Njogu acceded the request and on 19th October 2009, the appellant was charged with the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The particulars were:-

“On the 5th day of July, 2009 at Seria village in Laikipia West District within the Rift Valley Province, unlawfully killed Zipporah Njeri Kamau.”

He pleaded guilty to that charge and accepted the facts giving rise to the charge, which facts were that the appellant and the deceased were husband and wife. It would appear that they had some misunderstandings and were at the relevant times living separately. The appellant visited the deceased with the intention of promoting reconciliation between them so that they would resume cohabitation. In the course of their talk, the appellant showed the deceased a mobile phone text message from the deceased indicating that the deceased had another lover. He asked the deceased to delete the message but she refused. A quarrel then ensued. The deceased aimed a piece of metal at the appellant and hit him on the right leg. She hit him

again on the right hand. The appellant grabbed the metal from the deceased but the deceased took a stool and hit the appellant with it again. The appellant then hit the deceased with a metal pipe and she fell down. The appellant then hit the deceased three more times. The deceased died at the scene. The appellant then reported the incident at the police base in the area and presented himself to the police. He was arrested. The post mortem was done on the body of the deceased and the doctor who performed the post mortem formed the opinion that the cause of death was cardio pulmonary arrest due to severe head injury due to trauma.

As we have stated, the appellant accepted the above facts. The learned Judge, after considering the facts and his plea, convicted him on his own plea of guilty. He asked the court to treat him as a first offender. Maragia offered mitigation on behalf of the appellant inter alia, that he had no intention to harm the deceased; that the deceased started it all; that the appellant acted in self defence and that he presented himself to the police.

The learned Judge (W. Ouko J.) considered the facts, the offence, the mitigating circumstances and sentenced the appellant to six (6) years imprisonment. In coming to that conclusion, the learned Judge stated:-

“.....but from the facts it is clear that the deceased was the aggressor. She attacked the accused twice with a metal bar before picking a stool intending to hit him again. The accused acted in self defence and was provoked. He however used excessive force in the circumstances hereby causing the deceased her life. For that reason the accused is sentenced to six (6) years imprisonment.”

That is the decision that did not satisfy the appellant and hence this appeal which is against the sentence only. In his home-made grounds of appeal, all the appellant is seeking is that as he was a first offender, was remorseful and was attacked by the deceased who was the aggressor, and thus acted in self defence and killed his wife who was so dear to him, a more lenient sentence should have been meted out to him. Before us, he conducted his appeal in person. He pleaded with us to reduce the sentence. Mr. Kivihya, the learned State Counsel opposed the appeal submitting that the sentence of six years imposed by the trial court was neither illegal nor manifestly excessive in the circumstances of the case and so he asked us not to interfere with it.

We have considered the charge that was before the superior court, the plea of guilty by the appellant, the facts giving rise to the offence, the submissions by the appellant and Mr. Kivihya together with the law. It is not in doubt that the deceased was the aggressor in the entire episode that resulted into her untimely and unhappy demise at the hands of the appellant. However, the appellant, in hitting the deceased three times with a metal pipe, clearly used excessive force. He had disarmed her when she had hit him with a piece of metal and could have disarmed her of the stool and/or any other object she might have wanted to use and thus death would not have ensued. The maximum penalty for the offence of manslaughter is life imprisonment. In the circumstances, six years imprisonment was neither illegal nor manifestly excessive to warrant our intervention. Thus, we see no reasons to interfere with the learned Judge’s decision. It will stand. The appeal is dismissed.

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

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

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR