



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Criminal Appeal 354 of 2009

BETWEEN

KASYOKI MUSYA APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a sentence and conviction of the High Court of Kenya at Machakos (Sitati, J) dated 30th March, 2007

In

H.C. Cr. C. No. 40 of 2005)

JUDGMENT OF THE COURT

KASYOKA MUSYA, the appellant, was on 31st September, 2007 convicted by the High Court of Kenya at Machakos (Sitati, J) on his own plea of guilty to manslaughter contrary to *section 202* as read with section *205* of the Penal Code and sentenced to 20 years imprisonment.

The facts which were unequivocally admitted by the appellant were that on 19th July, 2005 there arose a quarrel between him and Mutinda Kimuli, the deceased, his paternal uncle, in the course of which the appellant pushed deceased who fell backwards. When the deceased got up a struggle ensued between the two. During the scuffle the appellant took a panga that was nearby and cut the deceased on the head causing him a fatal injury.

A postmortem performed on the body of the deceased showed that the cause of death was a head brain injury and haemorrhage.

The prosecution gave the cause of the quarrel between the appellant and the deceased as a long standing unresolved land dispute. After entering conviction, the learned Judge called for a Probation Officer's Report on the appellant. This was duly filed and presented to the learned Judge on 28th March, 2007. The Report, which was quite favourable to the appellant showed that the appellant was 34 years old and married with four young children. His father died long ago when he was young. When he died, his paternal uncle, the deceased herein, sold his own land and moved to the appellant's father's land and attempted to dispose the appellant's family land by selling portions of it despite strong objection by the appellant, his mother and brothers.

The community members who were interrogated by the Probation Officer gave positive report on the appellant and blamed the deceased for greed and frequent attempts to sell the land that belonged to the family of the appellant. However, the learned Judge disregarded the Probation Report as not being appropriate and sentenced the appellant as stated herein above.

The appellant submits that the sentence imposed upon him by the learned Judge is manifestly excessive in the particular circumstances of the case. He asks this Court to re-consider it and reduce it accordingly.

This Court will not interfere with the discretion of a trial judge in the matter of sentence unless it appears that in assessing if he acted on some wrong principle or did not act on some correct one or has imposed one which is manifestly excessive - **Muoki vs. Republic [1985] KLR 323.**

In our view, the learned Judge, for no apparent reason, failed to consider the Probation Officer's Report which was a material factor and of which she had called for. Had she done so, no doubt, she would not have imposed the sentence that she did. The failure to do so, we think, amounted to the learned Judge acting on wrong principle or overlooking a material factor .

Further, on the basis of the said Report, we are inclined to hold; and we so hold, that the sentence of 20 years imprisonment was manifestly excessive in the particular circumstances of this case so as to call for our interference.

In the result, we allow this appeal, set aside the sentence of imprisonment of 20 years and substitute therefor a sentence of five (5) years imprisonment with effect from 30th March, 2007, the date upon which the appellant was sentenced by the learned Judge.

Dated and delivered at Nairobi this 23rd day of April, 2010

P.K. TUNOI

.....
JUDGE OF APPEAL

E.O. O'KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.