



IN THE COURT OF APPEAL OF KENYA
CRIMINAL APPEAL 379 OF 2009

AT NYERI

BETWEEN

DAVID IRUNGU MURIITHIAPPELLANT
AND
REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Makhandia, J.) dated 29th September, 2009

in

H.C.C.R.C. NO. 2 OF 2008)

JUDGMENT OF THE COURT

The appellant was charged before the High Court at Nyeri with murder contrary to **section 203** as read **section 204** of the Penal Code. The particulars of the offence alleged that on 5th December 2007 he murdered John Kimau Maina. He pleaded not guilty to the charge. The appellant engaged a counsel and thereafter raised a preliminary objection to the charge contending that he was entitled to an acquittal as he was brought to court over 14 days after his arrest in breach of **section 72 (3) (b)** of the 1963 Constitution now repealed by the Constitution of Kenya 2010. The preliminary objection was subsequently dismissed on 30th October, 2008.

On 8th July 2009 the appellant entered into a plea agreement pursuant to **section 137A (1)** of the Criminal Procedure Code whereby the State agreed to reduce the charge to manslaughter and the appellant on his part agreed to plead guilty to the manslaughter. The trial court accepted the plea agreement pursuant to **section 137H** whereupon the court entered the factual basis of the plea on record and proceeded to convict the appellant. In compliance with **section 137 I (1)** of Criminal Procedure Code (CPC) the court invited the parties to address it on the issue of sentencing in accordance with **section 216** of CPC and upon considering the respective submissions sentenced the appellant to 10 years imprisonment.

The material factual basis of the plea was as follows:-

“On 5th December 2007 at 6 p.m. the accused and the deceased disagreed over payment of wages in respect of a pit latrine they had been digging. They fought and members of the public separated them. They parted way and each went his way. At around 7.30 p.m. the accused went to the deceased’s home armed with a knife. He threatened to kill him. The accused advanced towards the deceased and stabbed him on the stomach. The deceased fell on the ground bleeding profusely with intestines protruding out. He lost consciousness. The deceased’s relatives raised an alarm. Neighbours came to their assistance and called the area Chief and police. They rushed him to Murang’a District Hospital where he was pronounced dead on arrival.....”

The appellant, who is not represented by a counsel, appeals against the sentence on the ground that; his mitigation that he is a father of two children who solely depend on him was not considered; that the court erred in law in convicting and sentencing him without considering that his rights under **section 72 (3) (b)** of the 1963 Constitution had been violated; that the court failed to consider that he had pleaded guilty and saved the court’s time and, lastly, that the sentence is harsh and excessive considering that he was drunk.

Mr. Kaigai, learned Principal State Counsel submitted that the sentence was well merited; that the trial Judge took into account all factors; that life was lost over a minor dispute and that the sentence was very lenient.

At the hearing of the appeal, the appellant emphasized the ground relating to the breach of his constitutional right under **section 72 (3) (b)** of the repealed Constitution. That ground with respect has no merit because the appellant raised that ground as preliminary objection to the charge (i.e. as a bar to the charge) and the trial court made a finding that the constitutional rights of the appellant had not been violated and hence dismissed the preliminary objection.

Furthermore, upon the court convicting and sentencing him pursuant to a plea agreement **section 137L** prohibits any appeal except as to the extent or legality of the sentence imposed. An appeal against conviction is thus incompetent.

In this case the trial Judge strictly and cautiously complied with the procedure relating to plea agreements contained in **section 137A – 137 I** of CPC including taking into account the stipulated factors before passing the sentence. Contrary to what the appellant has said the trial Judge considered all the matters raised by appellant in mitigation. This case is distinguishable from the case of **Jacob Kirimu Kabiru vs. Republic, Criminal Appeal No. 363 of 2009**, Nyeri in which judgment has just been delivered where the trial court had failed to follow the prescribed procedure relating to plea agreements.

In the final analysis, we are satisfied that the trial Judge applied the correct principles and exercised its discretion properly. We have no good reasons to interfere with the exercise of discretion.

Consequently the appeal is dismissed.

Dated and delivered at Nyeri this 4th day of November, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL