IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 24 of 2007

DAVID KARANJA GICHERU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(*Appeal from a sentence and conviction of the High Court of Kenya at Nakuru (Kimaru, J)*

dated 3rd October, 2006

In

H.C. Cr. C. No. 16 of 2006)

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JUDGMENT OF THE COURT

On 12th February, 2006, David Karanja Gicheru, the appellant herein, walked into a bar in Shabab Estate in Nakuru town known as Pentag Beer Bar. There he found Peter Njoroge Koigi (the deceased) seated with one Mary Waithera Teresia, taking beer. It was about 8.30 p.m. The appellant then went to the table where the deceased was seated, took his beer, and threw it on the ground. The deceased slapped him and they engaged in a scuffle which was quelled by other patrons. The deceased and Mary left the bar.
As they walked away, the appellant followed them shouting "*thieves*". He got hold of the deceased and started beating him. Members of the public joined in and started beating the deceased. He collapsed and died. The police later collected the body and took it to the mortuary where a postmortem report revealed the cause of death as brain oedema due to blunt head injuries which were severe. The appellant was thereafter arrested and charged before the superior court with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. Subsequently, the appellant offered to plead to a lesser charge of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code, and the state accepted the offer. He readily pleaded guilty to that charge and unequivocably accepted as truthful all the facts stated above.

The superior court (Kimaru, J) then proceeded to sentence him to serve five (5) years in prison after considering the circumstances of the offence and the mitigating factors advanced on behalf of the appellant . His advocate at the time informed the court that the appellant was remorseful; that the death of the appellant was largely caused by members of the public who beat him up; that the deceased started the fight and the appellant merely reacted in self defence; that he was a family man with a young child and was the sole bread winner. The learned Judge stated as follows**:-**

"***It is obvious that the accused intended to cause serious injury to the deceased, if not cause his death, as eventually happened when he raised alarm that the deceased was a thief. It is obvious that the accused was aware of the consequences of his actions. By raising the false alarm, the accused acted recklessly without due regard to the personal safety of the deceased. The death of the deceased was therefore a natural consequence of the accused's action in seeking to have the deceased physically harmed. The accused shall serve a custodial sentence.***"

The appellant now comes before us on this first and last appeal pleading for reduction of the sentence, in his own words "*even by one year*". He said this was his first offence and he was apologetic about it. Once again he appeared to blame the deceased for provoking the fight that led to his death, suggesting that the deceased had taken his property.

We cannot obviously accept as mitigation, information which is contrary to the facts freely accepted by the appellant which formed the basis of his conviction. There is nothing to show that the appellant was provoked by the deceased. As correctly stated by the learned Judge, the appellant was reckless in his actions and must take full consequences thereof. The learned Judge had a discretion to exercise in sentencing the appellant and that discretion cannot lightly be interfered with unless it is evident that it was not exercised judicially, that is to say, the court overlooked some material factors, took into account immaterial ones, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case. At the end of the day a sentence must depend on the facts and circumstances of each case. See **Griffin v. Republic** **[1974] KLR 121**. An innocent life was needlessly lost through the reckless actions of the appellant in this case. The trial court was alive to the principles of sentencing and we find no error of law. Furthermore a court must not only consider the mitigating circumstances but also the consequences of the appellant's action on the victim and his immediate family. The appellant was fortunate that the sentence was only five (5) years. It cannot be said to be manifestly excessive. We have no reason to interfere with it.

The appeal is dismissed.

Dated and delivered at Nakuru this 2nd day of October, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.