



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

The accused fled but was later traced at Ihuni area. He was arrested on 18.2.2005. He was examined by the doctor and found to be mentally fit to stand trial. Post mortem report and P3 produced as prosecution Exhibit No. 1 and 2 respectively.”

Upon those facts the appellant was convicted and sentenced to serve 10 years imprisonment. In meting out the sentence, the learned trial Judge (Kimaru, J) considered the mitigating factors adduced by the appellant, who said he was aged 28 years and was remorseful; had a wife and two children, and had been in custody for 1 ½ years.

The matter now comes before us on a plea for reduction of the sentence which the appellant contends was harsh and excessive. He blamed his shocking action on drunkenness and pleaded for leniency stating that he had children and a mother who were dependent on him; that he was a reformed person and had qualified as a painter in prison and all he wanted was a reduction of the sentence by one year so that he can go home and practice the trade. The appellant then made a revelation which is not apparent on the face of the record. He said, despite the reference in the record to the “deceased’s girlfriend” known as “Shiro”, the said Shiro was the appellant’s wife over whom he had a quarrel with the deceased before he struck the fatal blow. The appellant had two children with Shiro who did not love him any more and had deserted him.

It is not clear to us that the superior court appreciated that the center of the quarrel between the appellant and the deceased was Shiro whom the appellant regarded as his wife. That, however, is of no moment since the learned Judge correctly surmised that “*the accused killed the deceased in a fit of jealousy*”. It was inexcusable whatever provocation the appellant may plead. If all jilted lovers and husbands had the license to eliminate their supplanters, it would make a mockery of civilized society and the law. Nor do we think drunkenness, deliberately induced to provide “dutch courage” for commission of an offence is a mitigating factor. It would only become a relevant factor if it fell under **section 13** of the Penal Code.

In this case the appellant blames drunkenness for his action. It does not avail him. As correctly observed by the learned trial Judge, the “*attack on the deceased appears to have been premeditated*” and for our part we think the appellant was fortunate that he was convicted for a lesser offence. An innocent life was needlessly lost and in considering the sentence, the court has to pay regard to the consequences of the crime on the victim or his immediate family – see **Act No. 5 of 2003, Part IX**. In all the circumstances, the sentence of 10 years was not excessive and we do not propose to interfere with it. The appeal is dismissed.

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

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR