



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Criminal Appeal 295 of 2006**

**JOHN GACHUI SAMWEL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

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

***dated 17<sup>th</sup> October, 2006***

**In**

**H.C. Cr. C. No. 45 of 2005)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

John Gachui Samwel, the appellant herein, was originally charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The appellant pleaded not guilty to the charge of murder. Subsequently that charge was reduced to one of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The appellant pleaded guilty to the lesser charge the particulars of which were that on the 7<sup>th</sup> day of May, 2005 at Kayole Estate in Nyandarua District within Central Province unlawfully “killed” James Nyagah Mwangi. The correct terminology used in **section 202** of the Penal Code which defines “manslaughter” is the unlawful causing of death by an act or omission but nothing turns on the use of the word “kill” as set out in the charge sheet and in this appeal we shall not concern ourselves with the use of the expression “unlawfully killed” rather than “unlawfully causing death.” In this case the expression occasioned no injustice to the appellant.

The facts in support of the charge were that on the material day the appellant went to the house of his estranged wife, Regina Wanjiru Macharia (Regina). She lived alone. On reaching the house he saw the deceased standing outside. He had suspected the deceased of having an affair with his separated wife. Apparently, the deceased had gone there to request Regina to convey a message to his (the deceased’s) girlfriend. However, without any inquiry or provocation, he attacked the deceased viciously with a panga. He died on the spot, and his mutilated body was taken away by the police. The post mortem conducted on 13<sup>th</sup> May, 2005 by Dr. Jim Mburu, showed the cause of death to be multiple injuries.

Meanwhile, on the day following the vicious attack of the deceased, the police arrested the appellant at his house and recovered the murder weapon – a newly acquired and sharpened panga which had blood stains on it, together with a trouser and a jacket, also with blood stains.

The appellant unequivocally admitted these facts and even before us he did not seek to challenge any of them. Upon admission of the facts, Kimaru, J convicted him on the charge of manslaughter and in passing the sentence of twelve years imprisonment, the learned Judge took into account the mitigating factors set out on behalf of the appellant by his counsel, Mr. Ombati. Those mitigating circumstances were that the appellant was remorseful; that he had been in custody for over a year as at that time; and that he was married with three children. As against these factors, the Judge considered the fact that the appellant had killed the deceased in a fit of jealousy; that the assault was deliberate; and that

the injuries inflicted upon the deceased were meant to either maim him or cause his death. The learned Judge went on to observe that the appellant was lucky that the State had accepted his plea for the lesser charge of manslaughter. The learned Judge then imposed a sentence of twelve years imprisonment.

Now, the appellant is before us in this first and last appeal to ask us to reduce the sentence, which he says is harsh and excessive.

The appropriate sentence to be meted out in any particular case is generally an exercise in discretion by a trial court. An appellate court would interfere with the exercise of such discretion only where it is shown that in deciding on the sentence, the trial Judge took into account an irrelevant factor or failed to take into account a relevant factor or failed to appreciate the nature of the evidence or that the sentence is harsh and excessive, as the appellant says in this appeal.

For our part, we are satisfied that the learned Judge took into account all the relevant factors; that he understood the nature and hearing of the evidence, and given the fact that this was a totally unprovoked, and vicious attack over a completely defenceless person, we are wholly unable to say that the sentence of twelve years is harsh and excessive.

In our view the sentence imposed by the Judge is neither harsh nor excessive, taking into account all the circumstances. This appeal against sentence accordingly fails and we order that it be and is hereby dismissed.

Dated at Nakuru this 2<sup>nd</sup> day of October, 2009

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**