



IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 28 of 2007

JOSEPH NJOROGE LEMISO..... APPELLANT

AND

REPUBLIC RESPONDENT

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

dated 22nd January, 2007

in

H. C. CR. C. NO. 55 OF 2006)

JUDGMENT OF THE COURT

This is a first appeal against sentence and therefore this Court as the first appellate court is entitled to consider not only the legality of the sentence but also the severity of it.

The appellant was on the 8th day of August, 2006 charged with the offence of murder contrary to **section 203** as read with section **204** of the **Penal Code**. He denied that charge when he first appeared for plea before the trial Judge in Nakuru on 25th September, 2006 and was remanded in custody to await his trial. Subsequently, he offered to plead to a lesser charge of manslaughter and the offer was accepted by the State. The charge was substituted to one of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and the appellant unequivocally pleaded guilty to that charge on 17th January, 2007. He also accepted as true, the facts put forward in relation to the offence as follows: -

“On 17/7/2006 at about 3.15 p.m. the deceased who was a waiter at workers’s (sic) centre was at his place of work. The accused went to his place of work and ordered for tea. He was served by the deceased. When the deceased requested the accused to pay for the tea, the accused claimed that he had already paid for it. An argument ensued between the accused and the deceased and accused stood up and left the hotel. The deceased followed him outside. The accused drew a knife from his pocket and stabbed the deceased twice on the stomach. The deceased fell down bleeding profusely. The accused stamped on the body of the deceased with his feet. The accused then ran away. The members of the public attempted to take the deceased to hospital. He was pronounced dead on arrival. The accused was arrested the following day. Post mortem was performed on 24/7/2006 by Dr. Kamau who found the cause of death was excessive haemorrhage due to the state (sic) injury. The mental status of the accused was not established. I wish to produce the postmortem report as prosecution exhibit No. 1.”

His conviction followed and the advocate on record for the appellant made a good attempt at mitigation. We may reproduce the record:

“On mitigation, the accused is remorseful. The (sic) was unintentional, he did it under the influence of alcohol.

He is the father of one child – 9 months old. He has three siblings – all the three aged 10 years and below. He had supported them through his boda boda business. He has a father who depends on him for sustenance. He pleads for the leniency of the court. So that he may take care of his dependants. He has learnt a lesson while in custody. He has acknowledged that drunkenness is both deterrent (sic) economically and socially he has reformed. He has seen the problems that his family has faced. He is grieved and sorrowful for the deceased’s family. He will make peace with the family of the deceased.”

Upon consideration of the facts of the case and the antecedents of the appellant, the learned Judge imposed a sentence of 7 years imprisonment.

In his Memorandum of appeal which he drew up in person, he prayed for reduction of the sentence which in his view was excessive since he was “*a first offender; sorry and remorseful for the offence; the breadwinner of four young brothers in school*”. He prayed for the exercise of “*prerogative mercy*” (sic) of the court in reducing the sentence. In his submissions before us, the appellant, who was unrepresented was brief. He simply asked the court to read **Luke Chapter 17 verses 1 – 5**. We may perhaps reproduce the short verses from the **New King James Version** of the Bible:

“17. (1) Then He said to the disciples, “It is impossible that no offenses should come, but woe to him through whom they do come! (2). “It would be better for him if a millstone were hung around his neck, and he were thrown into the sea, than that he should offend one of these little ones. (3). “Take heed to yourselves. If your brother sins against you, rebuke him; and if he repents, forgive him. (4). “And if he sins against you seven times in a day, and seven times in a day returns to you, saying, “I repent, ‘you shall forgive him.” (5). And the apostles said to the Lord, “Increase our faith.”

This Court has no intention, nor the competence, to embark on a theological discourse on what the Lord Jesus Christ advised his disciples and in what context. We think, however, that the appellant was simply emphasizing his plea in the Memorandum of appeal that he was remorseful about his wrong doing and was therefore deserving of forgiveness. We have no doubt that the appellant will find solace and absolution, at the theological and spiritual level, if he is faithful to the teachings in the verses he cited.

At the temporal level, the courts are enjoined to enforce the law of the land and to do justice in accordance therewith. The offence which the appellant freely admitted carries with it a maximum punishment of life imprisonment. All the mitigating factors now put forward by the appellant were considered by the trial court. The aggravating factor was that the appellant used a weapon to lethal effect on an unarmed deceased in a situation provoked by the appellant himself. He added insult to injury by stamping on the body of the deceased before disappearing from the scene. The deceased, hitherto healthy and gainfully employed, needlessly lost his life at the young age of 23 years. It is instructive that Parliament, by an amendmend made in **Act No. 5 of 2003**, inserted **PART IXA** in the **Criminal Procedure Code** which focuses attention on victims of crimes. Courts can no longer therefore consider sentences without any regard to the consequences of that crime on the victim or his immediate family.

In all the circumstances of this case, the sentence of 7 years which was imposed by the learned trial Judge was lawfull and not excessive. We do no intend to interfere with it.

In the result the appeal is dismissed.

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

S.E.O. BOSIRE

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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.