IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 71 OF 2005

SAMSON KIRUMBI M'IKAMATI ………...................................... ……………………..APPELLANT

AND

REPUBLIC……………………………….......................………………………..RESPONDENT

(An appeal from a sentence of the High Court of Kenya at Meru (Sitati, Ag. J.) dated 2nd March, 2005

in

H.C.CR.CASE NO. 82 OF 2004)

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JUDGMENT OF THE COURT

The only issue raised in this appeal is on sentence. The appellant was charged with the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the ***Penal Code***, in that on the 3rd of September, 2004 at Mutuma sub-location Ruiri location in Meru Central District within Eastern Province, he unlawfully killed ***Simon Nanga M'Ikamati***. He pleaded guilty to that charge and was convicted on the plea. He also accepted unequivocally the facts put forward by the prosecution which are brief and may be reproduced in full: -

"On 2.9.2004 the deceased in this case was arrested by AP officers from Nchoroiboro AP camp; following a report made by the accused who is brother of deceased that deceased had interfered with land boundaries. The deceased was in custody until 3.9.2004 at about 9.00 a.m. when he was released without charge. The deceased then went home to Mutuma sub-location of Meru Central District and armed himself with a spear and a panga and proceeded to the accused's home where he found accused with their father Gedeon M'Kamathi. Without uttering any word, the deceased threw the spear aiming at the accused, but the accused managed to dodge it. When the deceased realized that he had missed his target he threw the panga at the accused but again missed the target. The deceased then attempted to run away but before he could do so, the accused reached for the spear which he threw back at the deceased, piercing the deceased's back and killing the deceased on the spot. The accused was advised by his father to make a report which he did to Nchoroiboro AP camp who in turn, informed Kiirua police station, scene visited and body removed to Meru District hospital for postmortem on 30.9.2004. Cause of death due to cardio pulmonary arrest secondary to hypovolaemic shock resulting from the injury sustained by deceased. The accused was taken for age assessment and mental examination on 27.10.2004 and found mentally sound to stand trial."

Before meting out the sentence, the superior court **(Sitati, Ag. Judge**, as she then was) called for a probation officer's report which was submitted and favourably spoke about the appellant. The probation officer recommended that the appellant be given a chance on probation during which he and his family would be counselled and guided. Learned counsel for the appellant, Mrs. Ntarangwi, submitted in mitigation before the superior court, as she did before us, that the deceased was the aggressor and he attempted to kill the appellant using lethal weapons; a spear and a panga. The appellant was therefore acting in self-defence in the face of sudden provocation and had readily pleaded guilty thus saving the court's time from a lengthy trial. He was aged 48 years at the time and was remorseful that his elder brother had lost his life. Despite such pleas however, the learned Judge imposed a custodial sentence of 5 years imprisonment. She stated: -

"**The accused herein speared the deceased to death over what appears to have been a land dispute between the two who are brothers. It is evident that the deceased was the aggressor. The accused who was said to be a first offender has shown remorse for the killing.**

From the Probation Officers report, the accused and the deceased and other members of the family have had serious disputes over the family land. I have taken all the circumstances of this case into account. I am not convinced that this is a case for a non-custodial sentence. Accordingly, I sentence the accused to serve five (5) years imprisonment."

We are now asked to interfere with that sentence and we have the power to do so as this is the first appeal. We think however that our interference would only be necessary if there was a clear breach of the law or principle since it was within the discretion of the trial court to assess the appropriate sentence in all the circumstances of the case.

We do not, with respect, agree with Mrs. Ntarangwi that the probation officer's report was not considered. It is on record that it was, but it was not binding on the learned Judge. Manslaughter is a serious offence that carries with it life imprisonment. It is as important for the court to consider all mitigating factors in favour of the appellant as it is to consider the effect of the crime on the victim including the family of the deceased. That there was a family land dispute is not a mitigating factor since there are lawful channels for resolving such disputes. On the evidence, although the deceased was the aggressor, he had disarmed himself after throwing the two weapons he had and was retreating when the appellant hurled the killer spear at his back. We cannot in all the circumstances take the view we are asked to take that the sentence of five years was excessive in the circumstances.

We reject this appeal and hold that the sentence imposed by the superior court was well merited, if not lenient.

The appeal is dismissed.

Dated at Nyeri this 4th day of August, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>