REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OMOLO, GITHINJI & WAKI, JJ.A.)

Criminal Appeal 148 of 2004

BETWEEN

FRANCIS KIMANZI MBAYA ……...……..…… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nakuru (Justice Visram) dated 26th July, 2004 in H.C.CR.C. NO. 68 OF 2001)

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JUDGMENT OF THE COURT

After a full trial before Mr. Justice Visram sitting with assessors, on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, the appellant, **Francis Kimanzi Mbaya** was in the end convicted on the lesser charge of manslaughter contrary to section 202 as read with **section 205** of the Code. He was, upon conviction on the lesser charge, sentenced to ten (10) years imprisonment. The charge of murder had stated in its particulars that on 22nd January, 1997 at St. Francis Secondary School, Lare, in Nakuru District the appellant had murdered Brother Larry Timmons, "the deceased" hereinafter.

The deceased, *Patrick B. Smith* (P.W.2.) and *Joseph Mbaru Thumbi* (P.W.3.) were all teachers at St. Francis Secondary School, *Lare. Mathu Kama*u, (P.W.4.) was a watchman at the school while *Dr. Antony Delan (*P.W.1.) was the Principal of Baraka Agricultural College, Molo. On the date in issue, Dr. Delan had gone to visit the Brothers at their school. The appellant was himself an Administration Police Officer attached to a Chief's camp near the secondary school. Around 1 a.m. on the 22nd *January, 1997*, a gang of robbers attacked the school and according to the witnesses such as P.W.1., and P.W.2., the gang numbered between fifteen and twenty people and they were only armed with crude weapons like pangas, axes and so on. None of the witnesses who were the subject of the attack saw any guns and it is clear from the record that before the appellant arrived at the scene, no form of shooting or firing had taken place. P.W.3. heard the attack on the deceased and his group. He ran to the watchman (P.W.4.), who in turn ran to the local Chief's camp and found the appellant. The appellant was armed with a rifle and the two ran to the school. The robbers, assisted by the deceased, were then loading their loot on a pick-up and the

evidence before the learned trial Judge and the assessors was that as soon as the appellant arrived at the school, the appellant opened fire. He apparently had twenty rounds of ammunition in his magazine and it is clear to us from the evidence that the appellant only stopped firing when he ran out of ammunition.Witnesses at the scene said that when the firing started, the deceased and his colleagues asked whoever was firing to stop.It was the evidence of the witnesses that the deceased was shot in the process and he died of his injuries. The appellant told the trial Judge and the assessors that he only fired in the air to scare away the attackers. His learned counsel, Mr. Ombati, who conducted his defence in the High Court and who argued his appeal before us, told us, as he did in the High Court, that the bullet which hit the deceased was never found and that it was never proved that the bullet had been fired from the appellant's gun. Mr. Ombati contended that the robbers being more than fifteen people and it being at night, the witnesses at the scene could not have seen each and every robber and, therefore, could not swear that none of the robbers had a gun. The inference to be drawn from Mr. Ombati's argument is that the deceased could have been shot by the robbers. This argument must have been rejected by the trial Judge and the assessors. We think that on the evidence placed before them, they were entitled to reject the contention. P.W.1. and P.W.2. swore that they saw the robbers and that the robbers were only armed with crude weapons. It is very unlikely that gentlemen who are in the business of robbing others would carry guns with them and yet conceal the guns from their victims.The purpose of the guns is to scare the victims into submission, they cannot obtain submission by concealing the presence of the guns. That would defeat the purpose of carrying a gun during a robbery. None was seen by P.W.1. and P.W.2. Again, before the appellant arrived at the scene, no firing of any sort had taken place and it is to be noted that as soon as the shooting started, the deceased and his company shouted that it be stopped.

The appellant, as we have seen, only stopped firing when he ran out of ammunition. He said he was only firing in the air to scare the robbers but the truth is that whatever might have been his intention, the continuous firing of bullets without any concern as to where they might land resulted in the shooting of the deceased and the appellant cannot and could not possibly say that his shooting of the deceased was lawful. It was unlawful and the Judge and the assessors were satisfied that none of the robbers had a gun and that it was the appellant who fired the bullet that killed the deceased. On our own assessment of the recorded word, we are fully satisfied that the trial Judge and the assessors came to the correct decision on that aspect of the matter. It was the appellant who unlawfully shot and killed the deceased and it matters not that he was firing at the robbers. That he fired about twenty bullets without the least concern as to where they would land fully justified the learned Judge's conclusion that he was reckless. He was correctly convicted on the charge of manslaughter and we dismiss his appeal against the conviction.

On sentence, the offence took place on 22nd January, 1997, but the appellant was not convicted until 26th July, 2004, some seven or so years from the date of the offence. We were told that in between that period, the appellant had been in custody for some four years. He went to the scene to help; he was actually summoned there by P.W.4. He was reckless in the manner in which he handled his weapon but we bear in mind that he did not really intend to harm the victims of the robbery; if anything, he must have thought he was helping them by chasing away the robbers. The method he adopted in doing so was reckless and resulted in the death of the deceased but in all the circumstances of the case and taking into account the fact that he had spent four years in custody before the sentence, we are satisfied that the sentence of ten years imprisonment was manifestly harsh and excessive and we ought to interfere with it. We accordingly reduce that sentence to one of five years imprisonment to run from the date when it was imposed by the trial Judge. The appeal against sentence succeeds to that extent.

DATED and DELIVERED at NAKURU this 30th day of September, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR