IN THE COURT OF APPEAL

AT NAKURU

(Coram: Kwach, Shah & Owuor JJ A)

CRIMINAL APPEAL NO 32 OF 2002

JOSEPH GITAU MACHARIA…….. APPELLANT

VERSUS

REPUBLIC…….....….....…RESPONDENT

(Appeal from a conviction and sentence of the High Court at Nakuru

(Ondeyo J) dated 5th October, 2001 in H C CR C No 23 of 2001)

JUDGMENT

The appellant Joseph Gitau Macharia was arraigned in the Superior Court at Nakuru on a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence as laid in the charge were that on the night of 30th April and 1st May, 2000 at Karati sub location in Nyandarua District within Central Province, murdered Milka Gathoni Mburu.

On 5th October, 2001 he appeared before the Superior Court (Ondeyo J) and offered a plea of guilty to the lesser charge of manslaughter contrary to section 202 (1) as read with 205 of the Penal Code, which the State accepted. The trial judge then framed the charge and put the same to him.

He pleaded guilty to it. He was then sentenced to ten (10) years imprisonment.

His appeal to us is predicated on two grounds namely:

"(1) That the trial judge erred in law in not taking into consideration my mitigation in which I indicated that I was remorseful and that at my tender age of twenty five (25) years with a wife and children to look after apart from my aged parents who depend on me wholly.

Thus I deserved some leniency.

(2) That the sentence is manifestly harsh and that I pray this court to use its powers to institute (sic) me to join my family in the nearest future possible so that I may salvage what otherwise is a family tragedy as a result of my long absence."

The facts put to the learned judge of the Superior Court in this matter were as follows: The appellant a young man aged 24 years was a neighbor of the deceased an old lady aged 70 years. On 30th April, 2000

he set off at 4.00 pm for a drink at a village bar known as K K bar. He drank some potent alcohol known as "*Miti ni dawa*" mixed with "*Kairasi*" until the close of the bar at 11.00 pm. He decided on his way to his house to visit one J K, who happened to be the son of the deceased and lived in the same compound with her albeit in different houses. He did not find J but saw the old lady standing outside her house. He decided that he wanted to have carnal knowledge of her, so he knocked her down. She screamed and her husband M N, who also lived in the same compound but in another house heard the screams and came to the scene.

The appellant retreated to a nearby bush and hid. M found his wife groaning on the ground, he was not properly dressed so he went back to his house to put on some clothes as well as call his son John to come and help. The appellant still determined to accomplish his mission, went ahead pulled the old lady to a bush a distance of about 500 metres from her house, held her mouth to stop her from screaming, tied her neck with a belt and in the process of raping her strangled her to death. Thereafter he merely relaxed and fell asleep next to the deceased's body.

When M did not find his wife he summoned the neighbours. A search party was organized and the deceased's body discovered at the bush with the appellant completely asleep next to it. He was eventually awoken by the sub-chief, arrested and taken to Njambini Police Station. The police visited the scene the following morning and found pair of pants belonging to the deceased, the appellant's belt and a Nation newspaper. The deceased's body was taken to Naivasha Hospital Mortuary.

Dr Odhiambo performed a postmortem examination on the body and in his opinion the cause of death was cardiopulmonary arrest due to asphyxia resulting from strangulation. He also examined the appellant on the same day and assessed his age at 24 years and mentally fit to stand trial.

Upon pleading guilty to the offence of manslaughter and in the absence of a certificate of any previous convictions, the Court treated the appellant as a first offender. The substance of the appellant's mitigation is exactly as alluded to by us in his grounds of appeal, save that he sought to assure the learned judge that if released he would not repeat the offence.

Before sentencing the appellant the learned judge took into consideration all the factors that the appellant had told her and came to the conclusion that the offence was serious, although drunk the appellant must take responsibility for his beastly action and sentenced him to 10 years imprisonment. This is the sentence that we are now asked to interfere with by shortening it so that the appellant can go back to his young wife, children and old parents.

The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of *Ogalo s/o Owuor* (1954) EACA at page 270 wherein the predecessor of this Court stated:

"The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v R*, (1950) 18 EACA 147 "it is evident that the judge has acted upon some wrong principle or overlooked some material factors' To this we would also add third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewsky* (1912) C C A 28 TLR 364".

We have at great length considered the facts of this case, conviction and in particular the sentence that was handed down to the appellant, in view of the sentence prescribed under section 205 of the Penal Code, namely a life sentence for the offence of manslaughter. We are not inclined to interfere with the sentence on the basis that it was excessive or that the learned judge overlooked any material facts in exercising her discretion.

If we may add, in Kenya it is common knowledge that, our society accords respect and treats its elderly people with a lot of admiration. In our view the ordinary person would abhor the fact that a young man aged 24 years and young enough to be a grandson of an old lady like the deceased, would however drunk,

plan, ambush and rape an old woman and in the whole process strangle her to death. We agree with the learned judge that it was “a disgusting and beastly act”.

In the circumstances of this case it cannot be validly contended that the sentence of 10 years, for such a heinous act is wrong in principle or manifestly excessive as would warrant our interference with the same.

We find no merit in this appeal. The same is therefore dismissed.

Dated and delivered at Nakuru this 28th day of February, 2003

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR