



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: TUNOI, LAKHA & OWUOR, J.J.A
CRIMINAL APPEAL NO.144 OF 2000

BETWEEN

MAURICE M. KENYATTA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from the Judgment and sentence of the High Court
of Kenya at Kakamega (Tanui J.) dated 12th November,
1999
in
H. C. CR. CASE NO.24 OF 1998)**

JUDGMENT OF THE COURT

MAURICE MBAISA KENYATTA , was after trial convicted by the High Court of Kenya at Kakamega (Tanui, J) on 12th November, 1999, of the murder of Jacob Khayumbi, the Assistant Chief of Ikuywa sub-Location in Vihiga District, at about 7.00 p.m. on 14th January, 1998, and sentenced to death.

The facts with regard to the death of the deceased are brief and not largely in dispute. They are as follows. The deceased together with his two village elders Henry Mbeiywa (PW 1) and John Muhani (PW 2) were walking home from the village market during the evening of the fateful day. On the way they encountered a rowdy group of youths singing. The deceased who was armed with a somali sword asked them to identify themselves and wanted to know why they were singing at night. PW 1 and PW 2 testified that without uttering a word the appellant, who was also armed with a panga, raised his panga and proceeded to cut the deceased on the neck. These witnesses denied that there was any dispute between the deceased and the appellant before the brutal attack. After this, the appellant fled into forest. The members of the public mounted a search for him and arrested him shortly after 10 a.m. the next day. It is apparent that mob justice was administered upon him and he was seriously injured. However, the local Police officers saved him from further injuries. A post-mortem performed on the body of the deceased on 20th January, 1998 revealed that the cause of death was cardio-respiratory arrest due to internal haemorrhage occasioned by a deep cut on the neck which severed the carotid jugular vein.

In his statement before the trial court, the appellant said:-

"The deceased removed a somali sword and stabbed me on the left hand. I had a panga on the hand and I cut him when he tried to use it."

The appellant was medically examined by Kakamega MOH on 6th February, 1998. No reasons were given as to why he was not called to testify. The omission to call him or to offer him to the defence as a witness has left many pertinent unanswered questions. The lack of answers to them or otherwise may occasion miscarriage of justice to the appellant. For example, is there evidence that he sustained a cut wound on the hand? If the answer to this question is positive, then it is manifestly clear that the plea of self defence was available to the appellant.

The learned Judge also considered and rejected that part of the appellant's Statement Under Enquiry in which the appellant stated:-

"This was the first time I got annoyed and I cut the deceased with the panga I had, on the neck . . . because the deceased was in love affairs with my brother's wife which made her ran back to her home leaving her children disturbing my wife".

Considering the evidence as a whole, we think that the learned Judge has not given sufficient weight to the facts which on the evidence are undoubted that the whole encounter between the deceased and the appellant was characterised by a quarrel of some sort; that attacks were freely exchanged with a panga and a somali sword; and that the weapons used were the ones lying by to hand and not the ones procured with premeditation; and that one cut was given to the deceased. The case seems to fall within the decision in REX v. BROWN (1 Leach 167) which is used to illustrate the following comment in KENNY CRIMINAL LAW, 119:-

"One of the most common cases of voluntary manslaughter is that of its being committed in the anger provoked by a sudden combat. Thus if, upon a quarrel which was not premeditated on the part of the prisoner, persons fall to fighting and then in the heat of the moment either of them (for the combat affords matter of provocation to each) inflicts some fatal injury upon the other, the slayer will not be guilty of more than manslaughter".

The law as laid down above is unexceptionable and we consider it is properly applicable to the present facts. We accordingly quash the conviction for murder and substitute a conviction for manslaughter and sentence the accused to serve ten (10) years imprisonment.

Dated and delivered at Kisumu this 23rd day of March, 2001.

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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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