IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, SHAH & O'KUBASU, JJ.A.)

CRIMINAL APPEAL NO. 103 OF 1999

BETWEEN

AMBARI GANDANI KONDE .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Justice Waki) dated 8th October, 1999

in

H.C.CR.C . NO. 11 OF 1997)
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JUDGMENT OF THE COURT

The appellant, Ambari Gandani Konde, was charged before the superior court, of the offence of murder, contrary to section 203 of the Penal Code as read with section 204 of the said Code. He was convicted of the lesser offence of manslaughter and sentenced to serve a 5 year term of imprisonment from 8th October, 1999. He has appealed against both the conviction and sentence.

Mr. Magolo who appeared for the appellant advanced one ground of appeal against the conviction in question. This ground of appeal reads:

> **"1. That the Learned Trial Judge erred in law and fact in finding that lack of opinion on the cause of death and the nature of injury on the deceased was not fatal to the prosecution case, and did not go to the root of the charge in proceeding to convict despite the lack of opinion evidence aforesaid."**

The evidence pointing to the death of Nyakondo Gandani Konde (the wife of the appellant) emanated from the testimonies of P.W.l, Konde Mwazambo, P.W.2 Washe Mung'aro Washe, P.W. 4 Dzame w/o Mwadzamo, P.W. 5 Ndeye Mung'aro Mwadzambo and others all of whom confirmed seeing the dead body of the victim. From the place where the body was, it was collected by two policemen P.W.7 Omar Mwagumba and P.W.9 Reuben Kimani. From the mortuary the body was taken for post mortem

examination before being released for burial.

Whilst it is prudent to call evidence of an expert as to the cause of death, when death is so obviously apparent lack of evidence of an expert does not vitiate a conviction of murder or manslaughter. The learned Judge, in our view, properly considered the issue of death itself and concluded that the evidence of the expert notwithstanding, there was enough evidence of death which in fact was an instantaneous death. The first ground of appeal therefore fails.

Although not made a ground of appeal Mr. Magolo advanced the argument that the charge and caution statement of the appellant ought not to be looked at for basing the conviction of manaslaughter. He argued that the conviction was based on a wrong premise in that the appellant was charged with the offence of murder and none other and that as such only evidence that could be adduced must have been such as to point to murder only. This argument is not sustainable and the learned Judge rightly pointed out in his ruling delivered on 3rd July, 1998 that manslaughter is a cognate and a lesser offence to that of murder and it is open for the court to convict of a lesser cognate offence in appropriate circumstances.

The appellant made a full confession of the fact of the killing and the confession statement was admitted in evidence without any objection as to the truth of what it contained. The only objection was, as pointed out, to the effect that on a murder charge, facts in the statement which point to a manslaughter offence, could not be admitted.

In the confession the appellant said:

> **"It is true I murdered my wife. If charged with that offence, its alright. I killed her for I got her with a man in my house as they were making love. I got mad at that sight and immediately I cut her with a jembe. I would have wanted to beat-up the man he jumped out very fast and ran away. Then I turned to my wife whom I had to cut severally with that 'jembe' (a hoe) ."**

The appellant was admitting that on seeing his wife in flagrante delicto, he got annoyed and killed her. There is no other way we can put it. He hit his wife with a hoe and killed her. The appeal against the conviction therefore fails.

Mr. Mugolo in arguing the severity of sentence (his second ground of appeal) alluded to the fact that the appellant was in custody for over 4 years before the sentence was pronounced. That is certainly so but the legal sentence was pronounced on 8th October, 1999. It is certainly correct to say that the court ought to take into account the length of incarceration period before sentencing. It was said by this Court in the case of Muruanjugi vs. Republic, Criminal Appeal No. 85 of 1982 (unreported) as follows:

> **"The appellant had been in prison in connection with this offence since 30th August, 1978, that is to say for 4 years and two and half months. We think he has been sufficiently punished."**

The reason why this Court in the Muruanjigi case considered a total of 9 1/2 years period of incarceration excessive was that the appellant in that case at the material time was drunk and that his wife's neck got fractured when she fell against a bed-host during the course of the struggle. There is no such evidence here. On the contrary the evidence points to no struggle. It points to a direct hit by a lethal instrument directed at the head of the deceased. In these circumstances we do not think that a sentence of 5 years upon conviction is excessive and we dismiss the appeal against sentence also.

The upshot is that this appeal is dismissed.

Dated and delivered at Mombasa this 20th day of January,2000.

J. E. GICHERU

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.