Mwangi v Republic

Court of Appeal, at Nakuru

June 22, 1990

Hancox CJ, Nyarangi & Gicheru JJA

Criminal Appeal No 10 of 1990

On June 22, 1990, Hancox CJ, Nyarangi & Gicheru JJA delivered the following

Judgment.

The appellant in a first appeal to this court against the sentence of 5 years imprisonment passed on him by the then resident judge Nakuru for the offence of manslaughter on 25th April, 1989, an offence to which he pleaded guilty in view of the reduction of the original charge from one of murder to that of manslaughter.

When this court first convened to hear this appeal on 29th March, 1990 at that which was the first ever sitting of the Court of Appeal in Kericho, Mr Mitei, who now represents the appellant, alleged the conviction on the basis that there was no admission of the facts as stated by the prosecution and no mitigation, both of which are essential conditions before a supposed plea of guilty can be legally accepted. It was then discovered that there was a gap in the records supplied to us and this matter has now been rectified by the inclusion of the missing page as page 18A

Page 18A shows that the appellant unequivocally admitted the facts which appeared on the previous page as having been stated by prosecuting Provincial State Counsel. Mitigating factors were then advanced by the appellant's advocate Mr Awori. We are satisfied that the suggestion to the contrary appearing in the Memorandum of Appeal, notably Grouds 2 and 4, are without foundation and that the appellant was rightly convicted of the unlawful killing of the deceased.

The facts by the prosecution included the very natural averment that:

> On interrogation he the appellant admitted killing the deceased because he had an affair with his wife.

In ground 4 of the Memorandum of Appeal the appellant said he caught the deceased red-handed making love to his wife. That would suggest that the appellant caught them in the act of making love, which of course would not only entitle the appellant in law to a reduction of the offence to one of manslaughter , but would also provide strong mitigating circumstances when sentence is being

considered for the lesser offence.

But the facts which the appellant unequivocally admitted, do not bear this out. Nowhere in the committal documents is there any evidence that the appellant caught the couple in flapante delicto. Indeed the statements of Margaret Njeri shows that on the fatal day, 12th April 1988, in the late afternoon, she saw the deceased pushing a bicycle and holding a red umbrella against the rain. She then went back in, heard scream, rushed out and saw the deceased lying on the ground, and the appellant on the road nearby with a knife which he folded in his handkerchief. Another witness saw the appellant facing the deceased with a knife in his hand. The deceased was lying on the ground with his bicycle sideways. Moreover, when the appellant gave himself up to the police, which was on the same day, he confessed to assaulting someone he knew with a knife. He, the appellant then produced the knife which had bloodstains on it. Moreover, the appellant's identity card was found at the scene at about 6.00 pm by I/P Nehemiah Bitok, and in his caution statement he admitted stabbing the deceased with a deadly weapon, with no mention of the matters to which we have just referred.

In those circumstances it cannot seriously by advanced that the appellant caught the deceased making love to his wife. The most we are prepared to accept, in view of the fact that the prosecution accepted it at the High Court, is that the appellant was aware of such an affair, a matter which is also referred to in the post mortem form.

We have taken all this into account, together with the time the appellant has been in custody, now over 2 years, his age and has family circumstances as stated by Mr Mitei, but we are unable to say that the sentence passed was manifestly excessive, or that the learned judge disregarded or erred in any principle in passing it. While therefore

appreciating the submissions made by both learned counsel to us, we find that there are no grounds for reducing the sentence to any lesser period than 5 years.

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