IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gicheru, Muli & Tunoi JJ A)

CRIMINAL APPEAL NO. 98 OF 1991

BETWEEN

DAVID CHERUIYOT ARAP KENDUIYWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Mr Justice B K Tanui) dated 21/6/91

in

HCCRC No 9 of 1990)

****

JUDGMENT

The appellant was charged and convicted of the offence of murder of his own father on 4th December, 1989 contrary to section 203 as read with section 204 of the Penal Code. He was sentenced to the only lawful sentence to suffer death in accordance with the law. He appealed to this Court against both the conviction and the sentence imposed by the superior court (B K Tanui J) sitting at Nakuru.

The facts are not seriously in dispute. The deceased, Kenduiywa Arap Maluluchi, lived with his five (5) sons on an undivided piece of land at Olesoi village in the Kericho district. Members of the deceased family cultivated that parcel of land in common. There was no evidence to show whether each of the five sons, the deceased and other members of his family had been given specific portions by the deceased who owned the entire parcel of the land. Be that as it may, the deceased confronted one of his sons, the appellant, and told him that he intended to lease a portion of his land to a Mr Taplelei. The appellant protested and refused to permit him to lease the portion of the land. The deceased then retorted that he would sell it. Thereafter the appellant knocked the deceased down and started to strangle him. Ruth Jepkurui (PW3), the appellant's sister-in-law, started to scream and went a distance from the house to raise the alarm. Kimasit and Samuel in the company of Ruth came to the scene and found that the deceased had been killed and covered with a *lesso*. Nearby was a blood stained *jembe*.

The deceased suffered severe head injuries from which he died almost instantly. The cause of death was due to intracranial haemorrhage and post traumatic haemorrhage following the cut wounds which penetrated the skull to the brain.

The appellant maintained that he had a land dispute with his father and that he had taken alcohol. His counsel, Miss Otieno submitted that the appellant had no intention of killing his father and that he was drunk at the time he committed the offence. She went further to contend that the appellant had been provoked by his father who wanted to lease or to sell the only portion he had prepared or about to prepare for the on-coming seasonal rains.

Mr Etyang, the Assistant Deputy Public Prosecutor, supported the conviction submitting that there was no legal provocation and that the degree of drunkenness, if any, did not amount to a temporary insanity in law.

We ourselves have evaluated the evidence, the submissions by counsel the summing up for the assessors and their opinions. We have also considered the learned trial judge's judgment and the authorities cited in support of both the cases for the appellant and the Republic. We find no fault except that the learned trial judge did not consider the surrounding facts which would have tilted the balance in favour of the appellant. We think that it can be taken as judicial knowledge that land is a very sensitive matter amongst most African communities including the appellant's community. Families depend on land for their livelihood. The appellant is said to have been cultivating a portion of that family land. No quarrel existed between the deceased and his sons or the members of his family before the fatal day. We are of the view that the sale of the portion of the land or the lease of that land to deprive the appellant and his brothers the use of the land was sufficient provocation in law on the part of the appellant, who acted in the spur of the moment when he was confronted by his father's retort that he would not only lease the land but he would sell it altogether. To that extent the learned trial judge should have considered reducing the offence from that of murder to that of manslaughter contrary to section 202 as read with section 205 both of the Penal Code. He did not do that and that was a misdirection.

We do not agree with Miss Otieno for the appellant that the appellant was so drunk that he did not know what he was doing was wrong. He was in his full senses because, soon after attacking his father and inflicting severe cut wounds on his head, he went straight to the police station to report the incidence. There was no evidence to support the contention that the appellant was so drunk that the degree of temporary insanity in law existed.

In the result we allow the appellant's appeal, quash his conviction for the offence of murder, set aside the sentence of death and substitute therefore a conviction for the offence of manslaughter contrary to section 202 as read with section 205 both of the Penal Code and sentence him to 6 years imprisonment which latter shall run from the date of his conviction by the superior court 21-6-91. The appellant is now 24 years of age and will live with the stigma of having killed his father for the rest of his life.

It is so ordered.

Dated and Delivered at Nakuru this 30th day of September 1994.

J.E.GICHERU

.....

JUDGE OF APPEAL

M.G.MULI

.....

JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR