IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GICHERU, SHAH, JJ.A & BOSIRE, AG. J.A.)

CRIMINAL APPEAL NO. 47 OF 1996

BETWEEN

MORRIS ALUOCH…… APPELLANT

AND

REPUBLIC…… . . RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Ondeyo J.) dated 10th July, 1996

IN

H.C.CR.C. NO. 8 OF 1995)

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JUDGMENT OF THE COURT

Morris Aluoch (the appellant), was convicted of the offence of murder contrary to Section 203 of the Penal Code as read with Section 204 thereof. The conviction followed the trial in the superior court at Nakuru. The appellant appeals against his conviction and sentence of death.

Mr. Konosi who appeared for the appellant confined himself to arguing only one ground of appeal namely that "the learned trial Judge erred in law and in fact in holding that the appellant was guilty of murder, when the facts disclosed the offence of manslaughter." For this, the only remaining ground of appeal, facts become relevant.

In view of the stand now taken by the appellant his version of what happened on 24th July, 1994 becomes irrelevant. When the deceased and his wife were in the house once occupied by the appellant and the deceased, the appellant came to the house and demanded to know what the deceased and his wife (P.W.1) were doing in his (the appellant's) house. An argument ensued between the two as to the ownership and occupancy rights of the house and the appellant ordered the deceased and his wife to leave the house immediately. At that stage the deceased's wife suggested that she and the deceased go for prayers at a nearby house leaving the appellant in the house.

Before proceeding for prayers the deceased's wife went to remove clothes drying on a line outside the house and the deceased re-entered the house to take a coat (jacket) with him. It was then that further arguments ensued between the appellant and the deceased. The deceased told the appellant that if he (the appellant) was offended by the deceased's return to the house to collect his jacket then the appellant ought to have shown to him another way into the bedroom. The appellant was heard ordering the deceased not to talk to him rudely. There was already a strained relationship between the appellant and the deceased and the arguments between them made matters worse. A heated argument between the two was heard by P.W.1. P.W.1 was not able to see what transpired between the deceased and the appellant. This fact she confirmed during her cross-examination in the superior court although she had earlier stated that she saw the appellant start beating the deceased with a stick. Although she insisted on saying that she saw her husband being beaten for sometime the truth of the matter seems to us to be that what she was aware of was the exchange of words between the two men and a quarrel between the two behind closed door.

The said quarrel (exchange of words) arose as a result of the appellant insisting he had a right to occupy the house in question and the deceased insisting it was his right to occupy the said house.

So far, as the facts go, the deceased had done nothing to provoke the appellant so as to cause the appellant to retaliate. The deceased acted quite properly although he may have been annoyed with the appellant.

What happened then is material. The appellant picked up a stick or club and hit the deceased on the stomach. It is clear from the post-mortem report that the attack on the deceased by the appellant caused a 5cm perforation of the small intestine. There is no evidence of repeated blows. This factor does lead us to believe that the blow was an isolated one probably without any malice aforethought on the part of the appellant. In other words, it was likely that the appellant did not intend to kill the deceased but intended simply to beat him once.

Mr. Onyango Oriri for the respondent, however, argued that the fact of beating up of the deceased by the appellant in the circumstances of this case revealed malice aforethought and he relied on the case of REX VS TUBERE S/O OCHEN (1945) 12 EACA 63 as an authority for his argument. If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until after the death of the deceased some four days later. In the case of REX VS TUBERE S/O OCHEN (supra) the assault was of a serious nature causing severe injuries from which the victim died shortly afterwards. In that sense, the case of TUBERE is distinguishable. It was correctly pointed out in TUBERE case as follows;-

"With regard to the use of stick(s) in cases of homicide, this Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has, of course, to be judged on its own facts. The same remarks applies as regards the view that which this Court takes were a ruptured spleen is the cause of death."

As pointed out in TUBERE case, every case must depend on its own facts and in this particular case we have some doubt in our minds as regards malice aforethought and the benefit of such doubt must go to the appellant.

Accordingly we allow this appeal to the extent that the conviction on the charge of murder contrary to Section 203 of the Penal Code is substituted by conviction of manslaughter contrary to Section 202 (1) of the Penal Code as read with Section 205 of the Penal Code.

We come now to the sentence that we ought to pass. Neither Counsel addressed us on what sentence to pass should we reduce the conviction from murder to manslaughter. The attack on the deceased was as pointed out earlier by us an unprovoked one. Reasonable persons do not inflict a blow to settle their differences, and even one blow which causes death cannot be viewed lightly. A life has been lost and the appellant must suffer the consequences. We sentence him to eight (8) years imprisonment to run from the date of his conviction in the superior court (that is, 10th July, 1996).

Dated and delivered at Nakuru this 26th day of September, 1997.

J.E. GICHERU

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

S. E. O. BOSIRE

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR