



IN THE COURT OF APPEAL

AT NYERI

Criminal Appeal 16 of 2006

1. AYUB MEME PETER

2. DAVID KOBIA M'MIGAINÉ

3. PETER M'MINGAINÉ..... APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from the sentences of the High Court of Kenya at Meru (Sitati, J) dated 10th November, 2005

in

H.C. Cr. Case Nos. 12, 13 & 29 of 2002 (Consolidated))

JUDGMENT OF THE COURT

The three appellants, **Ayub Meme Peter (1st appellant)**, **David Kobia M'Migaine (2nd appellant)** and **Peter M'Migaine (3rd appellant)** were jointly tried on one charge of murder contrary to **section 203** as read with **section 204** of the Penal Code but at the end of their trial, the learned trial Judge (Sitati, J) convicted them of the lesser offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The particulars of the offence on which the appellants were tried were that on the 11th day of August, 1998 at around 10 a.m. at Kathelwa Sub-location, Ngognoga Nzavi Village in Meru North District of Eastern Province, the three appellants, jointly with others not before court, murdered Ibrahim Kaireki M'Kailanya. Though the offence of which the appellants were convicted took place way back on 11th August, 1998, for one reason or the other, including a retrial *de novo*, the trial of the appellants was not concluded until 10th November, 2005 when Sitati, J, as we have said, convicted them of the lesser offence of manslaughter. She then sentenced each appellant to **twenty (20) years** imprisonment. By the time she sentenced the appellants to that term, they had been in custody for a period of some **seven years**.

The appellants appealed against their conviction and sentences but at the hearing of their appeals, Mrs. Ntarangwi who argued the appeals before us abandoned the appeals as regards the convictions and only addressed us on the question of sentences. We also note from the record that the appellants

themselves had offered to plead guilty to manslaughter and it was only the Republic which had objected to that course.

The 3rd appellant is the father of the 1st and the 2nd appellants. Mrs. Ntarangwi told us, with no objection from Mr. Orinda for the Republic, that the 3rd appellant is aged about 84 years and is paralyzed. He was carried into the court-room by prison officers, when this appeal came up for hearing before us on 23rd October, 2006.

We readily agree with Mrs. Ntarangwi that the sentences imposed upon the appellants were harsh and excessive and totally ignored the well laid down principles. As we have said, the appellants had been in custody for some seven years before the date of sentence. That is a factor which the learned trial Judge was bound to take into account in determining the appropriate sentence to impose on each appellant. Her notes on sentence are wholly silent on that aspect of the matter. Each appellant was said to be a first offender though the learned Judge appears to have been non-committal on that aspect. She merely said in her notes that:

“The court has also been informed that the accused persons are first offenders.”

Being “*informed*” is a different thing from accepting the information and in view of the very long sentence of twenty years, it is possible to say that the Judge placed very little weight on the issue. Even Mr. Orinda did concede that the sentences are harsh and excessive. We must accordingly interfere.

In respect of the 1st and 2nd appellants, we set aside the sentence of 20 years imprisonment and substitute the same with a sentence of **seven years** imprisonment on each one of them i.e. the 1st and the 2nd appellants, the said sentences to run from **10th November, 2005** when the trial Judge convicted them.

In respect of the 3rd appellant, he is an old man of some eighty four years. He is paralyzed and he must be a bit of a nuisance to the prison authorities. He has been in custody for some eight years and taking into account his physical circumstances, we reduce the sentence of twenty years imprisonment to **such a period as will result in the immediate release from prison of the 3rd appellant**. Those shall be our orders in the appeals.

Dated and delivered at Nyeri this 27th day of October, 2006.

R.S.C OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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