



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Criminal Appeal 7 of 2009**

**SAMUEL NYAGA MISI.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

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Samuel Nyaga Misi was (referred to as the appellant) was convicted on a charge of manslaughter contrary to section 202 of the Penal Code as read with 205 Penal Code and sentenced to serve 20 (twenty) years imprisonment.

The particulars of the case were that on 25<sup>th</sup> day of December 2008 at about 7.00pm at Uziwa village in Lamu District within the Coast Province, he unlawfully killed Kilonzo Musio Musimi. At plea, the charge was read over and explained to the appellant in Kiswahili and his reply was:-

***“It is true”***

The facts were narrated on the next day to the effect that on 25<sup>th</sup> December 2008, the appellant and the deceased were invited for a drink of traditional liquor. While in the house of their host differences arose between appellant and the deceased. The deceased reached for an axe and advanced towards the appellant, intending to cut him but the appellant overpowered him and took away the axe. Appellant then began beating the deceased using the axe, cutting the deceased several times on the chest and back. The deceased died from the injuries before he could be taken to hospital. Police collected the body and took to the mortuary a postmortem was carried out and the post mortem report produced as ex.1 which showed deceased had multiple deep cut wounds on the occipital region, a punctured wound on the right cheek, mandible, multiple cut wounds on the anterior thorax, a cut wound on the right leg.

The 2<sup>nd</sup> – 6<sup>th</sup> ribs on the left side and 2<sup>nd</sup> – 4<sup>th</sup> ribs on the right side were broken and there was also a fracture of the sternum just below the sternum angle.

The right lung had collapsed having been punctured by fractured ribs.

The cause of death was frail chest and fractured ribs causing tension pneumo-thorax leading to asphyxiation.

In response to these facts, the appellant replied:

*“facts are true”*

In mitigation, appellant sought forgiveness saying he was 51 years and had young children.

Appellant listed nine grounds of appeal which really amounted to mitigating and an attempt to explain the circumstances of the incident saying it was not his wish to kill the deceased, saying they were both under the influence of alcohol. His appeal is basically on sentence.

He filed written submissions in which he again expresses his remorsefulness regarding the incident and explains that the deceased was his uncle.

Mr. Ogoti for the State informed this court that, taking into account the circumstances under which the offence was committed, then twenty years was rather harsh.

This is a traffic situation where merry making turned into mourning as a life was lost. It would seem that perhaps the liquids appellant and deceased were bibing had robbed them of proper reason and self control. Appellant has expressed remorse, I think the purpose of sentence is not only to punish, but also to rehabilitate and so it should not be excessively punitive. The interest and rights of society must be weighed and balanced with the offender's desire and willingness to change.

The circumstances are also taken into consideration and I agree with Mr. Ogoti, that 20 years was rather harsh. Yet I cannot shut my eyes to the manner that deceased met his death, the multiple cuts all over his body suggest that he must have experienced a lot of pain before he succumbed and having regard to all these, I would interfere with the sentence to the extent of reducing the term to two years imprisonment. Consequently I set aside the 20 year imprisonment term imposed and substitute it with two years imprisonment from the date of conviction.

Delivered and dated this 11<sup>th</sup> day of **December 2009** at Malindi.

**H. A. Omondi**

**JUDGE**



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