



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 39 OF 2018

GEORGE KIMUGE KIPYEGON.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Criminal Case no. 317 of 2015 delivered on the 6th day of March, 2018 by Hon. S.O. Temu, PM/

JUDGMENT

Introduction

1. The appellant was convicted for the offence of manslaughter c/s 202 as read with 205 of the Penal Code and sentenced to imprisonment for seven (7) years on 6th March 2018. The particulars of the offence were that the appellant had *“on the 29th day of April 2015 at Ngolbelon Village in Marigat Sub-County within Baringo County unlawfully killed Hillary Kimutai Ngetich.”*
2. Upon considering the evidence of the prosecution witnesses and the statement of the appellant in defence, the trial court resolved the issues before the court as follows:

“The issues for determination were:

- 1. Whether it was the accused that had stabbed the deceased.**
- 2. Whether the incident was planned by the accused to stab the deceased.**
- 3. Whether the defence tendered contradicted the prosecution's evidence.**

As per Pw1 Dalmas's evidence the accused was outside with the deceased, accused when Pw1 stated that he wanted to leave as he was sick and the accused had asked him not to go and Pw1 had assisted to leave and the accused had hit him without any provocation and that was when the deceased went to rescue Pw1 and the accused had turned on him and he stabbed him.

That evidence was corroborated by Pw2 and Pw3 who were all at the scene.

On the accused's defence he stated that Pw1, Pw2, Pw3 and one Joel had started a fight but he did not state as to who had the knife but he stated that he was holding the deceased and Joel had separated them and he had seen the deceased falling down.

That did not contradicted PW1, PW2 and PW3's evidence that the accused had held the deceased and he had stabbed him and they had fallen down and the accused had stood to go for PW1 but PW1 had ran away.

PW1, PW2 and PW3 confirmed that it was the accused that had the knife and that evidence was not contradicted by the defence tendered or on cross examination by the accused.

As per the evidence by the prosecution the accused had no issue with the deceased but with PW1 and the deceased was stabbed when he went to rescue PS1 was sick and he was then stabbed.

It was thus clear from that evidence that the accused had no malice afore-thought when he stabbed the deceased as the fight was first between the accused and PW1.

It was clear from the investigations office evidence that when the accused's shirt was taken for analysis on the blood that was on it, it was confirmed that it was the deceased's blood and thus it was beyond doubt the accused had held the deceased when he stabbed him and the deceased's blood had got into contact with his shirt.

Even the accused on his defence stated that when Joel had separated him with the deceased the deceased had fallen down which was then clear that indeed the accused had held the deceased as he stabbed him.

The doctor who conducted the post mortem confirmed that the cause of death was a stab injury that had penetrated to the deceased's heart.

That was then clear that indeed the deceased had died out of the injuries that were inflicted on him by the accused.

With the above in mind I do find that indeed it was the accused that had stabbed the deceased, the stab had caused the deceased death, and there was no malice afore thought before the accused stabbed the deceased.

I thus find that the accused was rightfully charged for manslaughter and I find him guilty for the said offence as charged under section 205 of the Penal Code and I convict him as charged.

S.O TEMU (PM)

8/2/18"

The appeal

3. Being aggrieved with the sentence, the appellant filed a Petition of Appeal enclosing what he labeled "**Ground of Mitigation**", as follows:

"GROUNDS OF MITIGATION

1. That my lord I am a first offender.
2. That I am a young Kenyan citizen still undertaking critical issues to make up my life and future family.
3. That, my lord my family and the deceased restored to live together.
4. That my lord I am the only sole provider of my old aging parent and the entire family that being held in custody for the whole 7 years will automatically make them lack their daily bread and loss of the family's property.
5. That my lordship I am most remorseful, contended and obedient that if this honourable court decides to order probation reports it will be positive.
6. That my lord I do promise to adhere to the laws governing our land.
7. That my lord I humbly beg this honourable court to consider and allow my prayers.

REASONS WHEREFORE:

I pray that my appeal be allowed sentence reduced as the honourable court deems fit."

Submissions

4. At the hearing of the appeal, the appellant relied on his written submissions set out as follows:

"WRITTEN SUBMISSIONS

1. That my lords as indicated I my grounds of appeal no (1) that my lord I am a first offender. My lords I have been a law abiding citizen despite the fact that I am a casual worker in order for my family to get their basic needs which is the duty of a parent to ensure that children get their rights.
2. That my lord's, I have learned the mistake through the tough conditions in prison and I promise to be an upright citizen and show lawful acts that may not cross purpose with laws of the land.

3. That my lords as per the records it truly shows I am still a young citizen. My lords I left my siblings while still young and they are now suffering due to my absence. My lords now that I have gained skills in prison I pray to be given a second chance to do and use my skills and provide them with their basic needs.

4. Your lordship in a nutshell I am truly remorseful of what transpired on that fateful day and ending up losing a very good friend of mine whom we used to be enjoying ourselves taking busaa and even on that material day we were taking our drinks as usual.

5. My lords I promise that when given a second chance I will keep distance from any sort of drinks including busaa. I promise to shun that immoral behavior.

6. In a snapshot it is clear that the allegation arose unplanned and the deceased without thinking about the outcome rolled on me taking advantage of his huge body with a knife to fight me a small bodied young man and unfortunately the knife he was holding stabbed him while he was in the process of rolling me on the ground.

7. Your lords imagine about such painful scenario which ended up putting me appellant in prison.

8. Your lords the two families the deceased's family and our family (appellant) have now decided to restore peace and to live together.

9. Your lordship this court being a superior court I beg that may it consider the genesis of the allegations and consider the sentence that I am serving I pray that may the sentence be terminated and the court may do anything better that will enable me meet my family and save the worsening situations of my siblings.

REASONS WHEREFORE

I pray that may this honorable court hear my mitigation and the sentence be reduced or do anything which will amount to acquittal.”

5. The DPP made oral submissions in response to the appellant's written submissions as record in the proceedings for the day as follows:

“5/2/2020

Appellant

I filled written submission. I pray for reduction of sentence. **I do not challenge the conviction.**

DPP

Appeal is opposed.

The appellant convicted of Manslaughter contrary to section 202 as read with 205 of Penal Code and sentenced 7 years imprisonment on 6/3/18.

The evidence on record is overwhelming. Appellant stabbed the deceased causing his death and was arrested at the scene. Appellant's shirt had blood stains. It was taken to Government Chemist for comparison with sample of the deceased and it was established that the blood on the appellant's shirt was the deceased's.

Deceased was stabbed by appellant in process separating the fight between appellant and another person. The appellant had no reason to stab the deceased. The maximum sentence is life imprisonment. The Court considered that there was a life which was lost and 7 years was lenient. The appellant was barely served half of the sentence. I pray that the appeal be dismissed for deterrence.

Appellant

I pray for reduction of sentence. I am breadwinner for my brothers and children.”

Issues for determination

6. Although the appellant does not challenge the conviction by his petition of appeal or the submissions thereon, this court in accordance with its duty as a first appellate court as held in *Okeno v. R* (1972) EA 32, and in upholding the constitutional right of an accused, upon conviction, to a review by a higher bench under Article 50 (2) (q) of the Constitution has considered the evidence before the trial court to make its own determination of the matter before considering whether the conclusion of the trial court is valid.

7. It is only after such determination that the appeal from the severity of the sentence shall, if necessary, be considered.

Determination

8. The evidence before the trial court as presented by the prosecution witnesses and the statement of the appellant upon being placed on his

defence are in the record of the trial court as follows:

“PW1

My name is Darmas Sang. I am a resident of Ngulbelol. I am a driver.

On 29.4.15 at about 7 p.m I was at Joel’s house.

I was with Amos, Kibiwot, George and Joel.

We were arranging with Hillary how to work. We were at Ngolebelol.

We decided to make food and eat as we parted for our work.

Kibiwott had gone to the posho mill, Amos was cooking in the kitchen and I was outside with Hillary and George Kipyegon.

The accused was also outside with us.

I informed the group that I was not going to wait for food as I had injuries. The accused had asked me not to go.

I went my way.

The accused had followed me and he had hit me on the leg and slipped and I had fallen down.

Hillary had asked the accused as to what was wrong and why he was hitting me.

The accused had hit me again.

Hillary had got hold of the accused and I was on the ground. The accused had then stabbed Hillary on the stomach using a knife.

I had screamed for help and Amos and Joel had come to where we were.

Hillary had summoned me three times and he kept quiet.

Hillary had fallen down on his back and I saw blood oozing from his stomach.

The accused had thrown the knife to his land and I heard it falling down.

The accused had informed me that I was the next and I had then ran away.

The deceased was wearing a white vest. Accused is identified in court.

CROSS EXAMINED BY ACCUSED IN TUGEN

- I had seen you on the ground with the deceased.
- You are the one who had pushed the deceased to the grounds.
- I did not see you stab the deceased.
- The incident had taken place at 7 p.m.
- You are the one who started the fight.
- I had ran away when the deceased fell down because you stated that I was next.
- There were other people who saw you attack the deceased.
- There were other people who saw you attack the deceased.
- There are other witnesses who saw the knife.
- I had heard the knife fell to where you had thrown it.
- The knife was not mine.
- There are other people who know your knife and you are the one who pointed it to the police.

Prosecutor – Re-Examination

- *We were three outside. The deceased the accused and myself.*
- *When I ran away Hillary was on the ground and the accused was on the deceased.*

- *When the accused stated that I was next I had ran away as I screamed for help and the others had come and they had got hold of him and he threw the same thing away.*

PW2

My name is Aston Kiptuia. I am a resident of Marigat.

I am a farmer. On 29.4.15 at about 2 p.m I was at Joel's home.

I was with Amos, Hillary, Joel and the accused.

I was sent to the posho mill to purchase flour.

When I went back I had found the accused outside and Joel had asked me to put the flour inside.

When I went out I saw the accused hitting Dalmas with his fist and I had left to my home.

I had left Joel, Amos, Dalmas and George accused and Hillary the deceased.

The following day Joel came to my home and he asked me to go with him and he stated that his brother Hillary had been killed.

CROSS EXAMINED BY ACCUSED

- I had seen you hit Dalmas.
- We did not start any fight.
- I did not see when the deceased was stabbed.
- I was informed that the deceased had been killed.

Prosecutor – no Re-Examination.

PW3

My name is Amos Ngetich.

I am a resident of Marigat.

I am just at home.

On 29.4.15 p.m I was at Joel Komen's home.

I was with Dalmas, Joel, George and Hillary.

I was in the Kitchen cooking and Aston had been sent to bring flour.

When I went out I heard George and Dalmas quarrelling.

Dalmas had an accident injuries on his body.

Hillary had gone to ask the two to stop, the accused had fought with him.

The accused had stabbed the deceased with a knife on the stomach.

I had seen the knife when the accused stabbed the deceased.

The accused had thrown the knife to another land.

The knife before court is the one the accused had used to stab the deceased.

Blood had come out of the deceased's stomach.

The shirt before court is for George the accused.

The knife is marked as MFI P1 and shirt is marked as MFK P2.

Hillary had died and we got hold of George and we took him to our home and we called for our neighbours.

George is our neighbor.

The accused is identified in court.

Hillary was my brother.

We had summoned the chief and the chief had summoned the police.

The police had taken George and Hillary's body.

CROSS EXAMINED BY ACCUSED

- I was there when you were quarrelling with Dalmas.
- I was outside before you killed Hillary.
- The incident had taken place at 7 p.m.
- You started to fight with Dalmas.
- It was not the deceased that had started the fight.
- We had arrested you after the incident and we took you to our home.
- I had seen your knife.
- The knife was not brought after the incident.
- I had seen you throw the knife away.
- I had seen you before you stabbed the deceased.
- We are not the one who started the fight.

Prosecutor – no Re-Examination.

PW4

My name is John K. Yatich. I am a resident of Patkawanini.

I am the Assistant Chief of Getemwa Sub Location.

ON 29.4.15, at 8 p.m I had received a call from Julius Amdany who informed me that one person had been murdered at Ngolbelon village. I had gone to the scene.

I had met Zakayo Chirchir and Julius Amdany, Amos Ngetich and Kipkemoi Ngetich with the suspect.

They had informed me that George had killed Hillary.

I had then summoned the OCS Marigat.

The OCS had sent a motor vehicle and we took the suspect to the police station.

We had gone to the scene and we had found the deceased's body lying a few metres from Komen's house.

The police had searched the compound and they recovered a blood stained knife.

The knife is identified in court.

The deceased had a deep cut on the chest.

The knife was taken by the police.

The police had taken the body to Kabarnet County hospital mortuary.

I had also gone to the mortuary. I later went to the police station and I recorded my statements.

- The shirt before court is the one the accused was wearing.
- The accused is resident of my sub location.
- The accused is identified in court.

CROSS EXAMINED BY ACCUSED

I had met you on the way.

You were arrested by Julius Amdany and Kipkemoi Ngetich and Zakayo Chirchir.

I had met you after river Teresa.

You were 1¹/₂ km form the river.

We did not met near my home.

I was walking when I met you.

I did not have any motor bike on that date.

Prosecutor – no Re-examination.

PW5

My name is doctor Chrispine Ngerechei. I am attached to Marigat Sub County hospital as the Medical Superitendant. I have postmortem report dated 8.5.15.

The report was for one Hillary Kimutai Rotich. I had examined the body at Kabarnet County hospital at 11.30 a.m.

The body was for male African well builded age 20 years.

On external appearance of the body. He had cut wound on the anterior of the chest wall.

The wound was 2cm across.

On the internal appearance of the body. The respiratory system was normal.

The cardiovascular system had blood clotting around the heart.

The heart had a cut wound.

The head was normal.

I had formed an opinion that the cause of death was as a result of cardiac arrest and accumulation of blood around the heart secondary to stabbing of the heart.

I had filled the report and I signed it.

I wish to produce it as an exhibit.

The report is produced as exhibit p3.

I have photographs which were taken before examination.

The photograph are marked as MFI 4a-c.

CROSS EXAMINED BY ACCUSED

- I have worked as a doctor since 2011.
- The cause of death was stab to the heart.
- I do not know who had stabbed the deceased.
- There was blood that had clotted near the heart and the other parts of the body were normal.
- The injury was caused by a sharp object as it had a well defined shape.

Prosecutor – no Re Examination.

PW6

My name is Josphat Keitany Simokwa.

I am resident of Ngorbelon within Marigat.

I am businessman. The deceased Hillary was my cousin.

On 8.5.15 I had gone to Kabarnet hospital mortuary where the deceased's body was and I had identified it before postmortem was conducted on it.

It was Kibowott my cousin. My name is on the postmortem report.

The body on the photograph is the one I had identified for postmortem.

The body has an injury to the chest upper side.

The photographs are identified.

CROSS EXAMINED BY ACCUSED IN TUGEN AND ENGLISH

- I did not see you commit the offence.
- I only witnessed postmortem.

PW7

I am number 65492 PC Barnabas Chesire. I am attached to Marigat police station. On 29.4.18 I was at Marigat police station CID.

The DCIO had minuted this case to me.

I was to investigate a murder case.

I with OCS and driver to Ngoribelian estate. We had met the area Chief on the way with one suspect the accused herein George Kimuge.

We had interrogated the suspect to know what had happened.

We went to the scene where the incident took place.

We went to Joel Ngetich's homestead and we found the victim.

Hillary death outside the homestead.

His clothes were full of blood.

We realized that he had been stabbed near his heart.

We took the body on GK motor vehicle.

We searched for the knife that had been used and we had found it outside the compound.

The accused had stated that the knife was at the scene.

The said knife was pen knife.

We took the body to Kabarnet mortuary where postmortem was conducted.

The cause of death was established as over bleeding.

I had taken the deceased's blood sample to enable match the blood that was on the accused's clothes and knife.

I had sent them to the government analyst.

I had sent them by exhibit memo form dated 10.7,15 the same is marked MFI P5.

I had government chemist had prepared a report dated 31.10.16.

The report is marked as PMFI 5.

The report had marched the blood sample to be human beings blood.

The said accused's shirt is marked as MFI P2.

The knife is produced as exhibit P1.

The shirt is produced as exhibit P2.

The photographs are produced as exhibit P4.

The memo form is produced as exhibit P5.

The report is produced under section 77 of the Evidence Act as exhibit P6.

The report on the accused's clothes marched the blood of the deceased.

I had recorded statements from witnesses and I had confirmed that the accused and the deceased were drinking beer at Hillary's house with other people who have testified.

Hillary was talking with Dismas and the accused was troublesome and he had fought with Dismas and the deceased had gone to separate them and he had put the accused to the ground and the accused had then stabbed him and he threw away the knife.

The accused was arrested by Ngetich and his brother and they took him to his parents and was handed over to the police.

The deceased was with the accused only when he was stabbed.

The accused had stated that the incident had taken place when he wanted to defend himself.

He confirmed that the knife belonged to him.

I had then charged the accused.

CROSS EXAMINED BY ACCUSED

- *You are the one who committed the offence.*
- *The people who were at the scene had seen you.*
- *You were the one who had disturbed other people at the scene before stabbing the deceased.*
- *As per the evidence you are the one who started the fracas as Dalmas had a leg injured and he could not start the fight."*

9. When put on his defence, the appellant made an unsworn statement in which he accepted that he had been with the deceased and other friends at the at the place where the fatal stabbing of the deceased is said to have occurred when according to the appellant the friends attacked him with a knife and in the ensuing struggle the deceased was fatally stabbed, s follows:

"DW1 Unsworn Statement of the accused

My name is George Kimuge Kipyegon. I am a resident of Ngolbeloni.

I am a farmer.

The charges are not true.

On the date of incident we were at the home of Joel when Joel and Hillary and Amos started to attack me.

They had removed a knife and I had held it and Hillary was stabbed on the chest.

Joel had separated us and I saw Hillary on the ground.

I asked them what it was and Joel stated that I had stabbed him and I was arrested by the two.

They took me to their father. Their father had removed a knife and the elder son had taken the knife from him.

The father had again picked a panga.

The son had taken the panga again.

The man had again taken arrows and one prison officer had taken the arrows.

The officers took me to the Chief's office.

When we reached there we had met the village elder and we went with him and we had met the chief on the road.

The chief had taken me to the centre of Ketawanini and the chief had rung the police officers.

Four persons had recorded a statement at Marigat but they did not come to court to testify.

We were in Joel's house but he did not come to court to testify.

All the persons who testified were from the same family.

This was a frame up."

The Conviction

10. Upon consideration of the evidence led by the prosecution and the statement by the accused as a whole, the court finds the charge of manslaughter proved to the required standard of beyond reasonable doubt.

11. The chain of evidence before the trial court is one which put the appellant at the scene in a drinking spree where he started a fight with PW1 which was testified to by the PW1 himself, PW2 who saw he appellant hitting PW1 upon the witness' return from purchasing flour and by PW3 (deceased's brother) who witnessed the appellant stabbing the deceased when the latter sought to stop the appellant hitting PW1, and the appellant had turned on to the deceased fatally stabbing him with a knife which he then threw away and which was recovered by police officer (PW5) near the scene. PW4, the area Assistant Chief confirmed receiving PW3 with others escorting the appellant whom they said had killed the deceased and testified to the recovery of the knife by the police upon a search in the compound of the scene. The appellant was arrested at the scene, a fact that the appellant admitted in his statement. The appellant also admitted the scenario of the fight but alleged in an unsworn statement whose evidential value is that much reduced for want of cross-examination (see *May v. R* (1981) KLR 129) that his friends had ganged up on him and attacked him with a knife which "*They had removed a knife **and I had held it and Hillary was stabbed on the chest.***"

12. The only controversy which the court need resolve, therefore, is whether it was the deceased who had, using the knife whether belonging to him or the friends, stabbed the deceased, killing him without malice aforethought as made the act one of manslaughter or unlawful killing as charged. PW1, PW2, PW3 testified that it was the appellant who stabbed the deceased when he sought to stop him from hitting the first person he attacked PW1, and that he had thrown the knife away. PW6 was the deceased's uncle who identified the body before post mortem examination was conducted. PW7 the Investigating Officer testified to the search and recovery of the knife used in the attack in the compound and of the confirmation by Government analyst that the blood on the accused's clothes matched the deceased's blood.

13. The unintentional killing is established herein on the lack of premeditation and the fact that the appellant and his friends had been drinking but it clear that it was the accused who stabbed the deceased, and the presence of the deceased's blood on the appellant's clothes corroborates the evidence of the said witnesses. The absurd (not reasonable) explanation by the appellant in his submissions before this court that "**the deceased without thinking about the outcome rolled on me taking advantage of his huge body with a knife to fight me a small bodied young man and unfortunately the knife he was holding stabbed him while he was in the process of rolling me on the ground**" does not raise any reasonable doubt as to is guilt in view of the depth on stab injury occasioned on the deceased. The almost magical and allegedly accidental stabbing of the deceased by the knife which he held as they rolled on the ground in a struggle with the appellant could not reasonably have caused the deep stab wound from which the deceased died. A stab in those circumstances should have been superficial and not deep as to penetrate the deceased's heart, as testified by the medical expert who performed the post mortem examination on eh deceased's body, PW5, and in any event the consistent accounts of the witnesses PW1, PW2, PW3 at the incident and subsequent arrest as confirmed by PW4, that it was the appellant who had the knife which he used to inflict the fatal stab, and the appellant subtly admits the stabbing when he said in his unsworn statement that he had held the knife: "... *I had held it and Hillary was stabbed on the chest.*"

14. In pointing out the absurdity the court does not place on the accused any burden to prove his innocence; it is that the appellant's explanation does not when weighed as against the evidence of the prosecution witnesses raise any doubt as to his guilt established by the consistent evidence of the prosecution witnesses.

15. There was further no merit in the appellant's objection that the owner of the house, Joel was not called as a witness. There was sufficient evidence in the testimony of the key players PW1, PW2 and PW3 and in accordance with section 143 of the Evidence Act no specific number of witnesses must be called to prove a fact, and the adverse presumption on failure to call a witness or adduce evidence under the principle in *Bukenya & Others v. Uganda* (1972) EA 549,551 only applies where there is inadequate evidence as follows:

“[W]hile the Director [of Public Prosecution] is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success.”

16. I would, therefore, find that the appellant was properly convicted for the offence of Manslaughter contrary to section 202 as read with 205 of the Penal Code.

The sentence

17. In sentencing the appellant, the trial court held as follows:

“SENTENCE

I have considered the nature of the offence and fact that it calls for life sentence.

The accused is first offender and as per the evidence it was not clear that the two had a grudge before the attack.

I have considered the probation officers report that the two families had not been able to reconcile.

And non-custodial sentence may not help.

The accused is a young man and he required to be corrected and learn some trade while in prison.

I have considered the fact that the accused was in custody for a while and I will add the period with the sentence.

The accused will serve 7 years imprisonment to enable him learn some trade while in prison.

S.O.TEMU, PM”

Principles for interference with the sentencing discretion of the trial court

18. The principle of appellate interference with the trial Court’s discretion in sentencing was set out in *Wanjema v. R* (1971) KLR 493, 494 as follows:

“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. **An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.** The instant sentence merits this court’s interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51, Cr. App. R. 165 and Geoffrey (1967) 51 Cr. App. R. 449. (This admits no doubt because the magistrate awarded the maximum sentence to this offender: which of itself is unusual).”

19. And it is immaterial that, if it was trying the case, the appellate court may probably have considered a higher sentence than that imposed by the trial Court, (see *Omuse v. R* (2009) KLR 214 (CA) where it was held that:

“The Court [of Appeal] would not alter a sentence on the mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evidence that the judge acted upon some wrong principle or overlooked some material factors.”

20. See also *Macharia v. R* (2003) 2 EA 559 cited therein, where the court said:

“The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of *Ogola s/o Owuor* (1954) EACA 270 wherein the predecessor of this Court stated:

The Court does not alter sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James vs R* (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case *R v S Shershawsky* (1912) CCA 28 TLR 263.”

21. On the facts of this case, this court has no justification to interfere with the sentence herein, which it considers suited for the

circumstances of the case and object of rehabilitation of the offender and deterrence, and in the words of **Omuse**, “*commensurate to the moral blameworthiness of the offender*”, who according to the evidence of the Investigating Officer PW7 had been drinking alcohol with his friends and could have been drunk at the time of the fighting incident which resulted in the fatal stabbing of the deceased when he sought to stop the appellant from hitting their friend PW1.

22. It was clear from the sentence that the court had, as directed by section 333 (2) proviso of the Criminal Procedure Code, considered the period that the appellant had been in pre-trial detention. I do not find any error of principle in the sentence, nor do I find it excessive in the circumstances of the case, as would warrant this court’s interference with the sentence of the trial court.

Orders

23. Accordingly, for the reasons set out above, the court does not find merit in the appeal and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MARCH 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.