



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO 37 OF 2020**

**DAVID KIPKEMOI KAINO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from conviction and sentence by H. M. Nyaberi (SPM) in Tot SPMCRC NO. 107 OF 2017)*

**JUDGMENT**

1. The appellant (**DAVID KIPKEMOI KAINO**) was convicted on a charge of manslaughter contrary to section 202 as read with 205 of the Penal Code. The particulars of the charge were that on 13<sup>th</sup> September 2017 at **KASUI** village, **CHESTAN** sub-location in **MARAKWET EAST district within ELGEYO-MARAKWET** County, he unlawfully killed **CHARLES RUTO CHELANGA**. He denied the charge. After trial in which prosecution called 8 witnesses in support of its case, whereas the appellant was the only defence witness, he was convicted and sentenced to serve 10 years imprisonment. Aggrieved by the outcome, he filed an appeal which is basically on sentence.

2. The evidence presented at the trial was that on 13/09/2017 at about 2.00pm, the appellant emerged from the bushes and got to the homestead of **FLORA CHELANG TALAA (mother of the deceased)**, and demanded to know why the deceased had called him a thief, but the deceased did not answer. He hurled a stone at the deceased, but missed the first aim. As the deceased got up and begun running into the house, the appellant hurled another stone hitting him on the head, and he fell down while bleeding profusely.

The appellant then disappeared.

3. The deceased was rushed to hospital but succumbed to his injuries and a post-mortem showed a linear scar on the head with a depressed fracture on the parietal region. There was massive subdural haematoma on the right side of the head, and the cause of death was severe head injury due to blunt trauma.

4. The appellant's defence was that he was framed up.

5. The incident was witnessed by PW3, PW4 and PW5 whom the trial court described as eye witnesses, and who recounted how the appellant hurled the stones at the deceased. The trial magistrate noted that the appellant's action was in reaction to feeling that he was falsely being called a thief.

6. In mitigation, the appellant stated that he had young children who depended on him, and beseeched the court to consider the period he had spent in remand custody. The trial court called for a probation report before sentence, but the same was not favourable, and thus given a custodial sentence.

7. In this appeal, the appellant urges the court to reduce the sentence saying that for the period that he has been in prison, he has fully rehabilitated, and has acquired some skills which would enable him to serve the society. He expresses remorse, and in the written submissions states that he had no malicious intention.

8. In opposing the appeal, Miss Okok on behalf of the DPP urges this court not to interfere with the sentence, as the same is commensurate to the offence, and that the appellant did not show remorse at the trial.

9. I take note that the offence carries a maximum life imprisonment sentence, prior to conviction and sentence on 3/12/2018, the appellant had been in remand from 03/10/2017, which was just slightly over a year. Actually at the trial, upon conviction, the appellant expressed remorse, and repeated that to the Probation Officer as recorded in the report dated 03/12/2018. At the time, the victim's family was still very agitated and tensions were high, and there was fear for his own safety due to the likelihood of revenge attacks.

10. I have considered the events leading to this incident, which was propelled by a feeling of anger on the part of the appellant who had been

referred to as a thief by the deceased, I think the appellant's better judgement as clouded by emotions, I hold the view that 10 years imprisonment as rather harsh, taking into account the circumstances. I would thus set aside the 10- year sentence substitute it with 3(three) years imprisonment to run from the date of arrest. The appeal on sentence succeeds and is reduced accordingly.

**Virtually delivered and dated this 17<sup>th</sup> day of November 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**

*Miss Okok for DPP*

*C/A Komen*