REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 161 OF 2016

CORAM: D.S.MAJANJA J.

BETWEEN

GEORGE NYAGWA OKOTH ……...…….APPELLANT

AND

REPUBLIC …..…….…..RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. Obiero, PM dated 27th October 2016 in Criminal Case No. 914 of 2015at Principal Magistrates Court at Bondo)

JUDGMENT

1. The appellant, **GEORGE NYAGWA OKOTH** was charged and convicted with the offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence are that on 23rd September 2015 at Ururi Village Were Yimbo location in Bondo District within Siaya County, the appellant unlawfully killed **JAMES MANAS OKOTH**.

2. The trial magistrate sentenced the appellant to serve five years in prison. The appellant has now brought this appeal on the grounds that PW 1 was not present when the alleged killing took place. The appellant faulted the trial magistrate for allowing PW 5 to produce the post mortem report yet he was not the author thereof. That the trial magistrate erred by ignoring the appellant's defence and sentencing him to serve a jail term without consideration of the probation report. The State, on its part, supported the conviction and sentence on the ground that the prosecution had proved its case.

3. The facts of this matter are that on 23rd September 2015 at around 5:00pm, the deceased wife, Dorothy Atieno Okoth (PW 1) was at her home preparing to take a bath when a child came and informed her that two people fighting in the field. She rushed to the scene and found the deceased lying lifeless on the ground and the appellant was running from the scene. When the appellant saw PW 1, he came back to the scene and when PW 1 asked him why he had killed the deceased, he denied it and stated that he had not spoken to the deceased. PW 1 called for help and by the time people gathered, the appellant had already left the scene. PW 1 told the court that she observed the deceased's body and did not detect any injury.

4. Police Constable James Korir (PW 3) testified that on the material date at around 6:00pm while he was duty at Usenge Police Station, the appellant came and reported that when he was grazing his cattle on their farm he was confronted by the deceased who complained that his cattle had damaged his sugarcane farm. The two got into a fight and the deceased collapsed and died. PW 3 testified that after the report, he

booked the appellant pending investigations. PC Francis Musili (PW 4) testified that after the report by the appellant he and other officers visited the scene and they found the deceased's body. They took the body to the morgue and later recorded witnesses. PW4 stated that after investigations he was satisfied that he appellant had committed an offence and he thus charged him with manslaughter.

5. Dr Collins Oginga (PW 5) produced a post mortem report of an autopsy performed by Dr Bob Owino. According to the report, the deceased's heart was enlarged, his spleen was raptured on the lateral side and there was blood on the body cavity. Dr Owino concluded that the cause of death was bleeding from a raptured spleen secondary to assault.

6. When placed on his defence the appellant denied killing the deceased and stated that the deceased used to collapse and on this day it was not an exception. He stated that he did not have a grudge with his brother and he did not get into a fight with him.

7. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction bearing in mind that the it is only the trial court that saw and heard the witnesses testify (see ***Njoroge v Republic*** **[1987] KLR 19**).

8. The main issue in this appeal is whether the prosecution proved a case manslaughter against the appellant to the required standard. The essential elements of the offence of manslaughter are the fact and cause of death of the deceased and that the accused committed the unlawful act which caused the death of the deceased.

9. The appellant complained that the trial court relied on a report of a doctor who did not testify. The post mortem form was produced by PW 5 under the provisions of **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which allows a person other than the one who prepared a report such as the Post Mortem report in issue to produce it provided the presumption of authenticity is met. The section provides as follows:

> *77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
>
> *(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

10. Once the presumption of authenticity under **section 77(2)** aforesaid is met the document is admissible and flowing from the report, it is clear that the deceased was killed and died as a result of raptured spleen due to assault. The only question that remains to be answered is whether the appellant assaulted the deceased.

11. The prosecution case was based on circumstantial evidence as PW 1 did not witness what the appellant did nevertheless when she was informed that two people were fighting in the field, she rushed there and saw the appellant leaving the scene where the deceased lay. The appellant was the last person to be seen with the deceased before his death. The fact that the appellant was present at the scene and was fighting is confirmed by the report he made to PW 3 at the police station. His own report and the fact that he was at the scene of the fight where the deceased was found dead points to the appellant as the only person who could explain what could have happened. Since he voluntarily admitted as much to PW 3, I find and hold that he assaulted the deceased. I therefore affirm the conviction.

12. I now turn to the sentence. Sentencing is an exercise of discretion and the appellate court will not interfere in the sentence unless it is shown that the trial court took into account an irrelevant factor, or that a wrong principle was applied or short of that, the sentence was so harsh or excessive that it manifests an error of principle (see ***Ogalo s/o Owuora v R*** **[1954] EACA 270**, ***Nilsson v R*** **[1970] EA 599** and ***Wanjema v R*** **[1971] EA 493**). In imposing a sentence, the court should always bear in mind the principles of proportionality, deterrence and rehabilitation and in considering these factors the court ought to weigh both mitigating and aggravating factors (see ***Arthur Muya Muriuki v R*** **NYR HCCRA No, 31 of 2010 [2015] eKLR**).

13. The maximum sentence for the offence of manslaughter is life imprisonment. In mitigation, the appellant stated that he had two school going children and his wife was sickly. The trial magistrate adjourned the matter to consider the victim impact assessment report. In summary, the deceased's family had come to terms with the death of the deceased and were willing to forgive the appellant. They all noted that the appellant and deceased were not in bad terms. In the sentencing notes, the trial magistrate did only state that he had perused the report and sentence the appellant to serve 5 years' imprisonment.

14. The trial magistrate did not set out the factors he considered to arrive at the appropriate sentence. These factors included the fact that the appellant was a first offender, the incident took place during a fight, that the appellant went and reported to the police that he was involved in a fight and the views of the victim's family. On the other hand, the fact that the appellant killed someone cannot be wished away. In the circumstances, I reduce the appellant sentence to 3 years' imprisonment.

15. The appeal is allowed to the extent only that the sentence is reduced to 3 years' imprisonment from the date of conviction.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this 20th day of APRIL 2018

J. A. MAKAU

JUDGE

Mr Ochieng, Advocate for the appellant.

Mr Okach, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.