REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 107 OF 2013

DUNCAN MUTHEE KETHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal Arising From The Judgement Of The Ag. Principal Magistrate Court At Kerugoya By K.K. Cheruiyot – Criminal Case No. 1 Of 2013 On 23rd May, 2013)

JUDGEMENT

The appellant Duncan Muthee Kethi was charged with the offence of manslaughter Contrary to Section 202 as read together with Section 205 of the Penal Code. The Chief Magistrate's Court at Kerugoya Criminal Case No. 1 of 2013. The appellant pleaded not guilty and the trial commenced. The prosecution called eight (8) witnesses who testified after which the appellant changed plea and plead guilty to the Charge of Manslaughter. He was convicted and sentenced to serve 30 years imprisonment.

The appellant was dissatisfied with the sentence and filed the following grounds of appeal:

1. I pleaded not guilty to the charge when I first took plea.

2. The trial Magistrate erred in law and facts by not considering that the prosecution through intimidation forced the appellant to change his plea at the middle of the trial.

3. That the learned trial Magistrate erred by law and in facts by failing to inform me of the consequence of changing the second time.

4. That the learned trial Magistrate erred by law and facts by failing to consider the testimony of PW3 who went to call the second accused and found him asleep and then they proceeded the PWI (Complainant)

5. The trial Magistrate erred in law and facts by imposing a harsh sentence in disregard to the circumstance that led to the incidence. (we were both drunk prior to the incidence).

6. That the Learned trial Magistrate erred by law and in facts by not considering that I was a first offender.

7. That the learned trial Magistrate erred by law and facts by not considering my mitigation.

However in his submissions filed by his advocate Lucy Mwai and Company Advocate, the appellant chose to argue grounds 5 of the appeal regarding the sentence. The appellant contends that the sentence was harsh considering the circumstances that led to the incidence, that is to say they were both drunk.

That the facts which were read by the prosecutor indicated that the deceased and the appellant were conscious. That the two and others had gone to drink alcohol at Kariguini Bar for Christmas cerebrations.The two quarreled over beer which was poured deliberately by the deceased. Later on their way home the deceased and the appellant had a confrontation and the appellant inflicted fatal injuries on the deceased.The deceased succumbed to the injuries as he was abandoned by the appellant after the fight.

In his mitigation the appellant pleaded that he had no intention to kill and asked for leniency. He submits that given the circumstances of the case the sentence of 30 years was harsh and excessive and urges the court to reduce the same to the period already served. The appellant relies on persuasive decisions in

R – V – Denis Maiko Nyambane Cr. Case No. 1/2014 Kisii H.C and ***R – V- Francis Ombuna Ochoi Kisii H.C. Cr. Case No. 64/2011*** and

The state through D.D. Sitati Prosecution Counsel opposed the appeal and prayed that the appeal be dismissed and the conviction and sentence be upheld. He submits that the appellant was liable to a sentence of life imprisonment and the sentence was proper considering the prevailing mitigating circumstances. That the appellant pleaded guilty to the charge and to the facts which were comprehensively read to him. He further submits that there was no illegality in the sentence imposed on a plea of guilty by the appellant. He distinguishes the cases cited and submits that in the cased the circumstances were that death was a result of an accident while in the present case the attack was intentional.

I have considered the appeal which is basically on the sentence. In considering the appeal, the court has to determine whether the trial magistrate acted on a wrong principle or failed to consider a material fact when passing the sentence. The court will also consider whether the sentence is manifestly excessive in the circumstances of the case. There are factors which the court will consider in an appeal on sentence. Sentencing is the discretion of the trial magistrate and the appeal court will not normally interfere with the discretion of the court.

Appeal on sentence

> **In the case of Bernard Kimani Gacheru V Republic [2002] eKLR.**
>
> **The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;**
>
> **It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**

In George Karanja Njoroge V Republic [2008] eKLR

> **The court in affirm the sentence imposed by the Court below stated;**
>
> **The last-listed case, an appellate Court decision, sets out the pertinent principles which must guide this Court in disposing of the instant matter. The Court in that case stated (p. 270):**
>
> **"The principles upon which an Appellant Court will act in exercising its jurisdiction to review sentences are firmly established.**
>
> **The Court does not alter a 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 v. R (1950) 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case....."**

The Court considers the offence charged in determining the sentence to the imposed.

Section 202 of the Penal Code provides:

> **1. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.**
>
> **2. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.**

Section 205 of the Penal Code provides:-

Any person who commits the felony of manslaughter is liable to imprisonment of life.

The penalty for the offence of manslaughter under Section 205 ***above is life imprisonment therefore the sentence imposed upon the appellant was lawful. The trial court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence meted out to the appellant by the trial court as the same was neither harsh nor overly excessive.***

The trial magistrate considered all the factors. The appellant had threatened to kill the deceased. Despite being warned he went ahead and executed the threat. Despite realizing that he had inflicted a serious injury on the deceased, he left him for dead at the scene. The trial magistrate considered the circumstances including the fact that the deceased and the appellant were related. The trial magistrate called for a social enquiry report. A probation officers report was filed but it was not positive for the appellant to serve a none custodial sentence. This was in line with the sentence provided for the offence. The authorities cited by the appellant were persuasive. They were distinguishable to

the circumstances

prevailing in this case. My opinion is that the sentence passed was deserved and I find no reason to interfere with it. I am of the view that the appeal is without merits and is dismissed.

Dated and delivered at Kerugoya this 13th day of April 2018

L.W. GITARI

JUDGE

13.4.18

Read out in open court, appellant present Mr. D. Sitati Prosecution Counsel, Court Assistant Kinyua

L.W. GITARI

JUDGE

13.4.18