



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT SIAYA
CORAM: (R.E.ABURILI J)
CRIMINAL APPEAL NO. 147 OF 2016

BETWEEN

LEONARD OWINO OPONDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a sentence of the Senior Resident Magistrate's Court at Ukwala (G. Odhiambo, SRM)
dated 21st October, 2016.*

In

Ukwala SRM Criminal Case No. 157 of 2016

JUDGMENT OF THE COURT

1. The appellant herein, **LEONARD OWINO OPONDO** was charged with the offence of Manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code, Cap. 63, Laws of Kenya**. The Information dated 14th April 2016 filed by the Prosecution Counsel at Siaya Mr F.K Namasake contains particulars of offence to the effect that the appellant who was the accused person in the subordinate court did on the 31st day of March, 2016 at Magoya Sublocation, Ugunja Sub County within Siaya County, kill Peter Mugando Sumba.

2. The charge and facts were read over and explained to the appellant and he denied those facts. The trial was conducted by the Senior Resident Magistrate Ms G. Odhiambo. The Prosecution called 9 witnesses who testified and at the close of the prosecution case, the learned trial Magistrate placed the appellant on his defence. The appellant testified giving unsworn testimony, denying the offence. He gave the defence of alibi. After the trial, the learned trial magistrate found the appellant guilty of Manslaughter as charged. She accordingly convicted him and after considering his mitigation, she sentenced him to serve twenty (20) years imprisonment.

3. The events that led to the charge occurred at Magoya Sub location, Ugunja Sub-County within Siaya County. On the 31st day of March, 2016 the deceased Peter Mugando Sumba was going about his business of fetching water when the convict appellant herein attacked him with a sword and panga. According the evidence adduced in the lower court, the appellant had claimed that the deceased owed him

some charcoal and that the deceased had refused to hand over the said charcoal to the appellant. The appellant felt provoked. He went to the deceased's house at night on 30th March 2016 while armed, demanding that the deceased pays up for the charcoal or the deceased would "see him"-the appellant the following day. (meaning the deceased would face the appellant's wrath).

4. On 31st March 2016 the appellant followed the deceased who was on a mission to fetch water. The appellant first in a rage of anger destroyed the deceased's water cans. He was heard telling the deceased that he-the appellant would kill the deceased. Shortly thereafter, the appellant attacked the deceased and struck him with a panga-like sword. He also stabbed the deceased in the neck. The deceased bled and died as he was being taken to hospital. The lower court also relied on the deceased's dying declaration to convict the appellant. There was also evidence of PW6 who saw the appellant strike the deceased with a sword like panga on the neck. The deceased staggered and lay under a tree. He was taken to hospital but pronounced dead on arrival. The appellant was arrested and charged with Manslaughter.

5. At the time of commission of the offence in 2016 the appeal record shows that the appellant was aged 45 years old and married with three children whose ages were not provided to the court. The appellant was schooled up to Form Four and was a charcoal smolder (burner).

6. The appellant initially filed this appeal challenging both the conviction and sentence meted out to him by the learned trial magistrate. However, on 16th May 2018 he abandoned his appeal against conviction and urged the court to consider his appeal against sentence. He urged the court to reduce his sentence.

7. In his handwritten written submissions filed in court and adopted by this court as canvassing the appeal herein, the appellant submits that albeit he pleaded not guilty to the charge, he urges the court to exercise leniency and to substitute the sentence of 20 years imprisonment with a lesser non-custodial sentence because his health has deteriorated as he suffers from Tuberculosis.

8. The appellant further submits that he is his family's sole breadwinner and that his long incarceration has subjected his family to suffering as they can no longer fend for themselves.

9. The appellant submits that he is remorseful and that he is a rehabilitated person hence he should be considered to be released back into the society to play a role in building the nation. He promises to be a law abiding citizen and a change agent in society.

10. The Prosecution represented by Miss Odumba submitted on behalf of the state that the sentence meted out was lawful and that the trial magistrate exercised her discretion in meting out such sentence hence it was upon this court to determine whether it should interfere with such sentence.

11. In his mitigation before sentence was passed on him, the appellant stated that he was married with three children and that he also supported children of his two brothers and that his parent was sickly and depended on him.

12. In meting out sentence, the trial Magistrate Ms. G. Odhiambo stated:

"I have considered the nature and gravity of the offence which the accused person has committed, his mitigation and the fact that he is a first offender. The accused has abused the trust placed upon him by the society which expected him to protect life of a human being. A person with the character of the accused in my view does not deserve to be released to the society until he reforms. The accused needs to be given intense counselling on anger management and the need to peacefully co-exist with fellow human beings. The offence which the accused committed is prevalent and I find that he deserves a deterrent sentence. I hereby sentence the accused to serve twenty (20) years imprisonment. Right of Appeal within 14 days."

13. I have carefully considered the record and the submissions by both the appellant and the Prosecution Counsel. In **Fatuma Hassan Salo V. Republic [2006] eKLR** the court stated:

***“Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors*”**

14. Honourable Willy Mutunga the former Chief Justice of the Republic of Kenya in his message in the **“Judiciary: Sentencing Policy Guidelines”** observed:-

“Sentencing has been a problematic area in the administration of justice. It is one of those issues that has constantly given the Judiciary a bad name – and deservedly so. Sometimes outrightly absurd, disproportionate and inconsistent sentences have been handed down in criminal cases. This has fueled public perception that the exercise of judicial discretion in sentencing is a whimsical exercise by judicial officers.”

15. Judicial Officers are obliged to apply these sentencing policy guidelines which “though not intended to fetter judicial discretion but to structure it as it provides a policy framework within which they can exercise their discretion in a manner which is objective, impartial, accountable, transparent and whose end result is intended to enhance the delivery of justice and public confidence in the judiciary” - see page 11 of the sentencing guidelines.

16. The directions require the trial court to not only consider the nature of the offence and character of the offender but must also be guided by whether he has pleaded guilty or not. The directions however caution courts not to discharge an offender “if it amounts to an injustice and the offender is simply spared from taking responsibility for his/her actions.”

17. It is generally accepted in the guidelines that where an accused has pleaded guilty and is remorseful his sentence ought to be reduced – see page 43 of the Policy guidelines. It is against the backdrop of the case cited and these Sentencing Policy Guidelines that this Court wishes to consider this appeal against sentence of 20 years imprisonment imposed on the appellant by the tribal court upon his conviction for the offence of manslaughter.

18. In the instant case the accused person pleaded not guilty to the charge of manslaughter. He was a first offender and in his mitigation he never showed any remorse even after being found guilty by the trial court because he believed in his innocence. He only sought for assistance from the court as he was a father of three children, a husband and a caregiver to his two brothers’ children and that his parents were also sickly and that the mother depended on him.

19. The trial Court considered the appellant’s mitigating factors and the circumstances under which the offence of manslaughter was committed. In my humble view, given the nature of the offence, the conduct of the appellant prior to and at the time that he committed the offence as he has not challenged his conviction, the sentence meted was legal and appropriate in light of the Sentencing Policy Guidelines. The trial magistrate exercised her discretion judiciously in sentencing the appellant and I see no reason to interfere with that discretion.

20. The offence of manslaughter carries a maximum of life imprisonment. The trial magistrate in sentencing the appellant to serve twenty (20) years imprisonment took into account the fact that the accused was a first offender but made it clear that it is the duty of every person to protect human life.

21. I have read the entire record and find it totally unacceptable for a sane 45 year old man who is married with children to kill his fellow man in broad daylight over some little charcoal. There are established means of collecting debts and killing a debtor is not one of those means.

22. The appellant must take responsibility for his uncontrolled anger and lack of value for human life which is sacrosanct. He is absolutely lucky that he was sentenced to serve a much shorter prison term of only twenty (20) years for killing the deceased who from the evidence on record did not pose any serious threat or danger to the appellant. I find no additional persuasive mitigating factors that would motivate me to reduce the sentence meted out to the appellant to a non-custodial sentence. Albeit the appellant claims

that he is a Tuberculosis patient, he can access medical care from Prison. The life that was lost is equally precious. The deceased too deserved to live and had every right to be alive. The appellant should have known that one must live and let others live. It does not appear to this court that there is any other way permitted by law that would suitably deal with the appellant's rage in this case.

23. As earlier stated, the maximum sentence for the offence of manslaughter is life imprisonment. In all the circumstances of the case, a sentence of 20 years imprisonment is neither harsh nor excessive. It is lawful and lenient. I find and hold that the trial magistrate correctly and lawfully exercised her discretion in sentencing the appellant to serve 20 years imprisonment for manslaughter, having taken into account all the circumstances of the case.

24. Accordingly, I Uphold the sentence meted out by the trial magistrate to the Appellant. I find and hold that the appellant's appeal against the sentence of 20 years imprisonment meted out by the trial court on 21st October, 2016 has no merit. The appellant's appeal against sentence is hereby dismissed.

Dated, Signed and Delivered at Siaya this 30th day of May, 2018

R.E.ABURILI

JUDGE

In the presence of:

Miss Odumba Prosecution Counsel for the State

Leonard Owino Opondo the appellant in person

Court Assistants: Laban Odhiambo