REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 13 OF 2016

[From the original conviction and sentence in Criminal Case No. 298 of 2010 in the Senior Principal Magistrate's court at Narok, R. v. Dominic Sadera]

DOMINIC SADERA ……..……..……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 20 years imprisonment in respect of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code (Cap 63) Laws of Kenya.

2. The state has supported both the conviction and sentence.

3. The appellant was convicted on the direct evidence of Sila Santa Parfungas (PW1) and Sinoiyia Ole Partugas (PW2). The defence of the appellant was that he was framed by both PW1 and PW2.

4. The appellant has raised 15 grounds of appeal in his petition to this court. In ground 1, he has stated the unchallengeable fact that he did not plead guilty. In grounds 2 and 3, the appellant has faulted the trial court for failing to consider that there was contradiction in the evidence of the prosecution witnesses, which was not water tight to justify a conviction. In this regard, PW1 testified that he heard a loud bang and he rushed towards that direction. Upon arrival, he found many students outside the bar whose front door was closed. He saw the appellant assaulting someone with a rungu. The person who was being assaulted was lying on the ground with bleeding from his head. This was on 24/2/2010 at about 5 p.m. In response to that assault, the appellant left the scene but was followed by one Kelepei who brought him back to the bar.

5. Furthermore, PW1 and other members of the public rushed the deceased to hospital. At that point in time, members of the public wanted to lynch the appellant. The evidence of PW1 was supported by that of PW2.

6. Furthermore, Dr. Gerishon Abakakwa (PW4) performed a postmortem examination on the body of deceased on 2/3/2010. He found the deceased was 45 years old and measured 6 feet 2 inches in height. On the external appearance he found that the deceased body was covered with blood stained clothes which drained from his mouth and nostrils. He also found bruises on the front chest mid-line. Additionally, he found conjectural infection redness in both eyes. He also found a full depth laceration of the head snap underlying a fracture of the frontal bone with internal displacement. In other words, the forehead was depressed. Furthermore, the doctor found bleeding into the antenor in the frontal part of the skull which

was the probable cause of death. Additionally, he found a raised intra-cranical pressure due to internal bleeding into the skull. He then signed his report which he put in evidence as exhibit as PMFI 1. In the circumstances, I find that there was cogent and consistent evident to support the finding that it is the assault of the appellant that caused the death of the deceased. I find that the evidence of PW1,PW 2 and PW 4 fully justified the finding that the offence was proved beyond reasonable doubt.

7. In grounds 5 and 6, the appellant has faulted the trial court for failing to find that the case against him was fabricated and that his defense was not considered as required by law. In this regard, I find that the evidence of PW1 and PW2 was credible. They saw the appellant assault the deceased using a rungu. The defense of the appellant was that these witnesses owed him a debt and that is why they framed him. I have considered the judgement of the trial court and I find that the defence of the appellant was considered and was rejected because it was a bare denial. Additionally, his allegation that he was framed was equally considered and rejected. I therefore find no merit in this ground of appeal and I hereby reject it.

8. In ground 10, the appellant has faulted the trial court in failing to find that the prosecution evidence was not corroborated. In this regard, I find that the evidence of PW1 was corroborated by the evidence of PW2. And for that reason, this ground of appeal is lacking in merit and is hereby dismissed. In ground 11, the appellant has faulted the trial court for delivering a judgement that was full of misdirections and errors, which resulted in a miscarriage of justice. I have considered the judgement of the trial court and I find that it properly directed itself on 2 main issues. First, who inflicted the fatal blow on the deceased? Second, whether the infliction of that fatal blow was lawful or not. After considering the evidence, the court found that it is the appellant who inflicted the fatal blow on the deceased, who was not armed. The court then found that the infliction of the fatal blow was unlawful. That court went further and found that the defence of self-defence and provocation were lacking in this case. I therefore find that the judgement of the trial court did not contain any misdirections and errors, that resulted in the miscarriage of justice. And for that reason, I find that this ground of appeal is lacking in merit and is hereby dismissed.

9. In ground 12, the appellant has faulted the trial court in failing to find that the prosecution did not produce any medical evidence in the form of DNA to link him to the commission of the offence. From the evidence adduced, I find that this was not necessary as the conviction of the appellant was based on the direct evidence of Pw1 and PW2. I therefore find that this ground of appeal is lacking in merit and is hereby dismissed. In ground 13, the appellant has faulted the trial court for failing to consider substantial and compelling circumstances namely the kind of force he used, the age of the deceased and the appellant's age. In this regard, I find that the force used was unlawful and it was such that it caused the death of the deceased. As regards the age of the deceased, the doctor found he was aged 45 years old. The issue as to whether he was older or younger than the appellant is immaterial. It is equally immaterial that the deceased was stronger than the appellant. It is settled law that one has to take his victim as he finds him. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

10. In ground 14, the appellant has faulted the trial court for not taking into account the evidence of character of the witnesses. I find that the issue of character of witnesses is inapplicable in this case. It was not an issue for determination. In the circumstances, I find this ground of appeal is lacking in merit and is hereby dismissed.

11. In ground 15, the appellant has faulted the trial court for violating his constitutional right as enshrined in articles 22 and 50 of the 2010 Constitution of Kenya. I have considered the proceedings and the judgement of the trial court and I find that the appellant was accorded a fair trial in terms of article 50 of the 2010 Constitution of Kenya. I therefore find no merit in this ground of appeal and is hereby dismissed.

12. In ground 4, the appellant has faulted the trial court in imposing a manifestly excessive sentence. In this regard the trial court took into account that the appellant was a first offender, that he was a middle aged graying man, he was unrepentant, that he had shown no remorse and that he assaulted an unarmed helpless victim. The court also took into account that the appellant committed this offence and escaped later. It also took into account that the deceased suffered a fractured and depressed forehead. It then proceeded to impose a sentence of 20 years imprisonment because the attack on the deceased was totally

unprovoked and was extreme.

13. Finally, the court also found that a deterrent sentence was called for in the circumstances. In this regard, I find that sentencing is a matter of discretion of the trial court in terms of section 28 (1)(b) of the Penal Code (Cap 63) Laws of Kenya. An appellate court is only permitted to interfere with a sentence imposed by a trial court where it is shown that that court acted on a wrong principle of law or fact. It may also interfere if the trial court took into account extraneous matters. And finally, it may also interfere with the discretion of the trial court if it is shown either that the sentence is manifestly excessive or manifestly lenient to the extent of causing a miscarriage of justice. In the instant case, I find that the trial court took into account all the relevant factors and properly imposed a sentence of 20 years imprisonment. In the circumstances, there is no justification for the court to interfere with the discretion of the trial court in imposing that sentence, in the light of the fact that the offence of manslaughter carries a sentence of life imprisonment.

14. This is a first appeal. As a first appeal court, according to *Okeno v. R. (1972) EA 32*, I am required to scrutinize the entire evidence tendered at trial and make my own findings and conclusion. I have done so and I find that the conviction and sentence of the appellant are supported by the evidence produced at trial.

15. In the light of the foregoing findings, I hereby confirm the conviction and sentence of 20 years imprisonment. The appellant's appeal is hereby dismissed in its entirety.

Judgement delivered in open court this 31st day of July 2017 in the present of appellant and Mr. Mukofu for Respondent.

J. M. Bwonwonga

Judge

31/7/2017