



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 83 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**DAVID ODHIAMBO MOLO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against both the conviction and the sentence in Criminal Case No. 857 of 2013 in Bondo Law Court before Hon. C. A. KUTWA – P.M.)***

**JUDGMENT**

1. **DAVID ODHIAMBO MOLO** and another were charged with an offence of **Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code**. The particulars of the offence are that on 16th day of July 2013, at about 6.00 p.m. at Raliew village in Omia-Diere sub-location in East Asembo location in Rarieda District within Siaya County the appellant and another jointly and unlawfully killed **MORRIS KITCH SWAGA**.

2. **PW1 Grace Owuor** testified that on 16.7.2013 at 6.00 p.m. that two young men one wearing a red shirt came from the lakeside and at PW1's gate they met PW1's brother-in-law **MORRIS KITCH** who had a child called **W**. **Morris Kitch** was quarrelling the boy for stepping on a barbed wire. PW1 described the man wearing the red shirt as the 1st accused in the dock (*I have perused both the typed and the handwritten proceedings and noted that the typed record is erroneously typed "short" whereas the handwritten proceedings is "shirt"*). The 1st accused asked **Morris** why he was disturbing the boy and whether he knew him. The 1st accused then hit **Morris** on the face with his hand and **Morris** fell down. **Morris** got up and asked the 1st accused if he wanted them to fight. The 1st accused once again hit **Morris** and he fell down and he continued hitting him with his fist. PW1 then raised alarm. The 2nd accused came and asked the 1st accused what he was doing, who told the 2nd accused that he was beating **Morris** because he had disturbed the child. The 2nd accused wanted to beat **Morris** but when he saw him bleeding he stopped. The 2nd accused took the child **Wesley** and left. PW1 went to check on **Morris** and found him bleeding but was talking. **Morris** asked PW1 to call some people to take him to hospital. That one **Roseline Anyango** came to the scene. PW1 telephoned **Lucas** who also came and proceeded to confirm the name of the person who had assaulted **Morris**. He returned thereafter and took **Morris** to the hospital. PW1 categorically stated that the 2nd accused did not beat **Morris**. During cross-examination, PW1 maintained that the 1st accused, the appellant, herein is the one who assaulted **Morris** and that she used to see him going to the lake that after assaulting **Morris** he went back to the lake near where the mother of **Wesley** was working.

3. **PW2 Willis Ogillo Swaga** testified that on 22.7.2013 he went to identify the body of his brother

Morris which was at Matangwe Mortuary to Dr. Ahero who carried out post mortem.

4. **PW3 Brian Wesley Otieno** testified that he knows Onyango in the court and stated Nyangasa was the first accused and Onyango the 2nd accused. He testified that Nyangasa was shaking the barbed wire's fence when Kitch, a watchman who was going to school held PW3 and hit him on his chin, asking PW3 why he was shaking the fence. PW3 told Morris, the deceased, that it was the 1st accused, the appellant herein that the 1st accused came and they started fighting with fists. PW3 then ran away. PW3 knew the appellant before as he used to see him in the lake. That material day he was wearing a red short with white stripes. (*I have perused the handwritten proceedings the word used is "shirt" and not "short" as erroneously typed in the typed proceedings*) PW3 stated the 2nd accused Onyango was far with PW1. During cross-examination, PW3 testified that the appellant was using fists to assault Kitch, who was hitting him back. PW3 testified the appellant was beating the deceased because he had assaulted him.

5. **PW4 George Owuor** also known as Lucas testified that on 16.7.2013 at 6 p.m. he was at Asembo Bay Shopping Centre, when he received a call from his wife Grace Aoko (PW1) telling him there were two people who had assaulted his brother Morris Kitch and he was lying down. PW4, took a motor cycle and rushed to the scene of crime. PW4 talked to Morris who told him he met two people who assaulted him. Morris told him he did not know them but he could identify them by their mode of dressing. He told him one had a red shirt (*typed proceedings erroneously typed "short" but handwritten is "shirt"*) and the other had a black clothing and had gone towards the lake where changaa is brewed. PW4 proceeded to the direction with other people and found the two. He asked the one with red shirt and the other said "yes" and asked PW4 whether they had come for fight. PW4's brother came, held the one with the red shirt. The other one hit him with stick and he fell down. That the one wearing red shirt stayed on. PW4's brother (*I have perused the court handwritten proceedings and compared with the typed one and the handwritten word by trial Magistrate is "red shirt" and not "red short" This is again a typing error*) PW4 took a panga and hit the one with red shirt. He then ran away to where Morris was and took him to hospital. Morris died while undergoing treatment and the body was taken to Aram Police Station where PW4 made a report. The body was subsequently taken to Matangwe Mortuary. PW4 later went to Bondo District Hospital for treatment. That the accused was also taken to hospital and police arrested them. He identified the one with red shirt (*erroneously typed "short" instead of "shirt" as per lower court proceedings*) while the one in black was the 2nd accused. PW4 testified that he had known the said accused before the incident.

6. **PW5 Christine Awuor Otieno** testified that on 16.7.2013 at 6 p.m. he was at the lake with David and Benson. That after a while he saw Lucas (PW4) with others carrying pangas, rungas and a spades. PW4 told her David and Benson had injured his brother. PW6 testified David was the first accused whereas Benson is the 2nd accused. That Lucas PW4 started fighting David, the appellant, and PW5 took his phone and left the scene. PW5 stated the brother of Lucas is called Kitch. PW5 testified that he heard Kitch had died.

7. **PW6 Paul Otieno Wayu** testified that on 16.7.2013 at 6 p.m. he was working together with the deceased. That he went to take bath after work and on the way he met Luca's brother to the deceased and he told him is brother was assaulted and was lying down somewhere. PW6 went to where Kitch was and he told him where his assailants had rushed to. He was told by the deceased that one of them had a red T-Shirt while the other had a black one. That PW6 proceeded with others to direction of the group and found them at the lake shore. They enquired from them what had happened but they turned hostile towards them. That they went and took the deceased to the hospital who died after a short while. PW6 testified the people they found at the lake shore were the two accused in the dock, stating he knew only one called Onyango, the second accused. During cross-examination PW6 testified at the shore the appellant started fighting them. He stated the appellant was cut with a panga.

8. **PW7 Roseline Anyango Otieno** testified that on 16.7.2013 at 6 p.m. she heard people screaming and saw the men she had met earlier on, while she was at the gate of her home. One

of them was beating a person. The 1st accused she stated was the one assaulting someone using his fist. She went to the scene and found he was beating her brother-in-law. The assailant had by then left. Morris told PW7 he was beaten by the man who had a red cloth. During cross-examination, PW7 testified she knew the appellant by his physical appearance as she had met him while coming from fetching water. PW7 testified, she saw appellant assaulting her brother-in-law. That she was able to recognize the appellant's appearance.

9. **PW8 Doctor Ogoti Evans**, of Bondo District Hospital, testified that he knows Dr. Joan Atieno who is his colleague at the District Hospital. Having worked with her for 8 months and that she was currently on her annual leave and that he is conversant with her handwriting, the prosecutor applied for PW8 to produce the medical document, however on objections by the accused, the Court rejected the application.

10. **PW9 Doctor Joab Otieno** based at Bondo District Hospital testified that he carried postmortem on the body of Maurice Sirenya at Matangwe Funeral on 2.7.2013 at 11.03 a.m. The body had injuries on head, tender limb (right) and lower eye (laceration), no abnormality on respiratory system. The nervous system had a brain stem. He testified the cause of death was herniation leading to acute respiratory and cardiac arrest. A sharp object was used on the axial bone. PW9 produced treatment book as exhibit P2 and identified photos as MFI P3 (a) (b) (c).

11. **PW10 No. 232333 C.I. Abdirahim Abdulahi** testified that on 16.7.2013 he was at his house when he received a call from Cpl. Juma, O.C.P.D. Masembo Bay Police Base and after 10 minutes he received also a call from Cpl. Naman, informing him of admission of someone at Abidha Dispensary after assault by two people. Cpl. Naman told him the body had been taken to Police Station. He proceeded to the station and the scene. He drew sketch plan the following day and then proceeded to Bondo District Hospital, where the 1st and 2nd accused were admitted after being assaulted by members of Public. He arrested them and referred them to Jaramogi Referral Hospital for examination, they were later charged. He recorded statements and issued them with P.3. forms. That he later went to mortuary and took photos of the deceased. He forwarded the photographs to Kisumu. He stated the deceased was killed because of a dispute over fencing posts that were being uprooted by a small boy. PW10 identified the 1st and the 2nd accused in the dock. He produced sketch plan as exhibit 4 and Memo as P exhibit 7.

12. **PW11 Doctor Evans Ogot** based at Bondo District Hospital testified that he knew doctor Malingi who he used to work with, before he resigned from the Public Service. That he knew stand trial. He produced P.3. as exhibit P. 5. He added that he also examined Benson Ezekiel Ouma and found him fit to stand trial. He produced P.3. as exhibit 6.

13. **PW12 No. 219397 C.I. Timothy Chemengubi**, incharge scene of Crime Nyanza Region, was gazetted in gazette No. 5853 of 3.8.2007 testified that on 8.8.2013 he received a film duly photographed and a memo from O.C.S. Aram Police Station. He processed the film with P.C. Abuda. He presented the film and produced 4 photos of the deceased. He prepared and signed a report. He produced memo P exhibit 7, 4 photos P exhibit 3 (a) to (d) and report P exhibit 8.

14. The appellant when put on his defence opted to give unsworn statement. The appellant stated that on 16.7.2013 he was walking within Kialeyo Village together with the 2nd accused going to the lake, when they reached near a field they met an old man, that the old man grabbed a small child and started to cane him. That they decided to go to the lake but some people arrested them, alleging they had assaulted someone, they started to assault the appellant and after sometime they ran away. That they were rescued and taken to Bondo Sub-District Hospital. He denied having killed the deceased.

15. The trial Magistrate evaluated the prosecution's evidence and appellant's defence and convicted the appellant for the offence of manslaughter and sentenced him to serve 20 years imprisonment.

16. Aggrieved by the conviction and the sentence the appellant preferred this appeal setting out 5

grounds of appeal in his petition of appeal filed on 17th March 2015. The Appellant's Counsel filed supplementary petition of Appeal dated 16th November, 2015 setting out 5 grounds of appeal being as follows:-

***“a) The learned trial Magistrate erred in law in coming to the conclusion that the prosecution had proved the case against the appellant beyond any reasonable doubt.***

***b) The learned trial Magistrate erred in fact in failing to appreciate the obvious and glaring contradictions in the evidence adduced by several prosecution witnesses and thereby arriving at a wrong decision.***

***c) The learned trial Magistrate erred in fact in failing to observe that the cause of death as stated by PW9 was herniation and that a sharp object was used on the axial bone and ipso facto could not have been caused by the appellant.***

***d) The learned trial Magistrate erred in law by failing to properly analyse the evidence and come to the only logical conclusion under the circumstances and give the appellant the benefit of doubt.***

***e) The judgment and conviction of the subordinate Court was against the weight of the evidence adduced.”***

17. At the hearing of the appeal, Learned Counsel B.F.O. Odhiambo appeared for the appellant while M/s. Odumba prosecution Counsel represented the State.

18. Counsel for the appellant relied on his supplementary petition of appeal. He combined ground numbers 1 and 4 and argued them together. The Counsel emphasized that the issue in this appeal relates to identification of the appellant, that the Learned trial Magistrate failed to test the evidence of identification and determine whether the inconsistencies in the prosecution's evidence and glaring inconsistencies and contradictions were not fatal to the prosecution's case. He urged the contradictions went down to the credibility of the prosecution witnesses and raised doubt which should have been resolved in favour of the appellant, that the cause of death was not proved and there was no linkage to the appellant and lastly that the sentence was excessive in the circumstances.

19. The State in opposing the appeal submitted that the appeal before court is not proper as leave was not sought to file appeal out of time, that the contradictions on dress code of the appellant was minimal and of no consequences and the appellant was properly identified as the offence was committed during broad day light, that cause of death was established by the doctor and there was no contradiction, that sentence imposed was proper as the offence provided for life sentence and the authorities relied upon by the appellant, the State submitted the same, were persuasive and were not relevant as they dealt with a plea bargain.

20. I have considered the submissions by the appellant and the State as I note that this is first appeal, in which this court has to subject the entire evidence adduced before the trial court to a fresh evaluation and analyse and draw its own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so I cannot comment on their demeanor. I am in this regard guided on the duties of a first appellate court by the **Court of Appeal decision of Kiilu and Another V. R (2005) 1 KLR 174** where the Court of Appeal addressed itself thus:

***“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”***

21. The appellant contend the learned trial Magistrate erred in coming to the conclusion that the prosecution had proved the case against the appellant beyond any reasonable doubt and that by failing to properly analyse the evidence, come to the only logical conclusion under the circumstances and give the appellant the benefit of doubt. In the case of **Salim Juma Dimiro V R Criminal Appeal No. 114 of 2004 at Mombasa** the Court of Appeal stated that **reevaluation of evidence is a matter of law**. In the case of **Tetu Ole Sepha V. Criminal Appeal No. 15 of 2008 at Nairobi** Court of Appeal stated **evaluation need not follow a particular pattern and the style of evaluation was as of necessity a writing style, provided the critical evidence was dealt with**. It is therefore my duty to examine if the lower court erred in law in dealing with evidence on identification.

22. In the case of **Abdala Bin Wendo V R (1953) 20 E.A. C.A. 166**, it was held that **where the conditions for identification are difficult there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced**. In **R. V. Turnbull & Others (1973) 3 ALL ER 549** it was stated the factors to be taken into account **where the only evidence turns on identification by a single witness**. That include how long did the witness have accused under observation? what distance? what light? whether observation was impeded in anyway? Whether the witness had seen the accused before? How often? The reasons for remembering the accused? How long elapsed between original observation and subsequent identification?

23. In the present case PW1 testified a young man in red shirt came from the lake side. He came to PW1's gate and he confronted the deceased and exchanged words with the deceased in presence of PW1. This was at 6 p.m. and PW1 was able to see the appellant. PW3 testified that he saw the appellant who he knew and used to see him at the lake pick a fight with the deceased. PW3 stated the appellant was in red shirt with white stripes (*See correct word "shirt" and "white" not "short" and "while" as typed but as in the trial Magistrate's hand written notes*) PW3 testified he received a telephone call from PW1 Grace Aoko his wife of attack of the deceased by the men around 6.00 p.m. He proceeded to the scene and found Morris Kitch the deceased who described his assailants by their mode of dress and that they had gone towards the lake. The deceased told PW3 one was dressed in red shirt (*handwritten proceedings was shirt not short as typed proceedings*). And the other had black clothing. PW3 and others and his other brother went towards the lake and found the people dressed as then described by the deceased and picked a fight with them, PW6 stated it was also around 6p.m. when he saw accused, the appellant and Benson come to where he was, that after a while he saw Lucas, PW3 come around with a panga. Lucas told him, David, the appellant and Benson had injured his brother. PW5 knew the appellant as a village-mate by his name. PW6 stated at 6 p.m. Lucas, PW3 told him of injuries of his brother Morris Kitch. He proceeded to where Kitch was who told him his assailants one of whom had a red T-Shirt while the other had a black one. PW6 proceeded to lake and found the assailant and the other. PW7 testified at 6 p.m. that she was on her way back and met two young men. That while at her home she heard screams and rushed to the scene and found appellant beating Morris Kitch.

24. I have carefully considered the conditions at the time of commission of the offence from evidence of PW1, PW3, PW4, PW5, PW6 and PW7 and I am satisfied the offence was committed during day time. There was sufficient light for witnesses to see clearly what was happening and therefore able to identify the assailants of the deceased. They observed how the assailant were dressed and were consistent in their evidence. They noted the appellant was dressed in red shirt which the deceased also mentioned. I therefore find and hold the conditions for identification of the assailants were favourable and there is no need of other evidence, circumstantial or indirect pointing to the guilt of the appellant. He was under observation of PW1, PW3 and PW7 at close range when he was assaulting the deceased with aid of sunlight and the observation was not impeded in anyway. That though some of the witnesses saw the appellant on the material date of the offence, the appellant was under observation of some witness for considerable time as he talked to the deceased and as he assaulted him severally. They had even time to observe how the appellant was dressed. I therefore find that the identification of the appellant by witnesses was proper and free from mistaken identity.

25. The learned trial Magistrate considered the prosecution's evidence especially evidence of PW1 and PW3 who witnessed the assault of the deceased and found corroboration from evidence of Doctor Joan Atieno. The court held injuries were consistent with the beating of the deceased he received from the appellant. He also found that essential ingredient of manslaughter were established and the case of death proved. I am from the above satisfied that the trial Magistrate properly analysed the evidence and came to logical conclusion. I therefore find no merits in the appellant's ground of appeal number 1 and 4 of the petition dated 10.11.2015.

26. The appellant contend that the trial Magistrate erred in failing to appreciate the obvious and glaring contradictions in the evidence adduced by several witnesses and thereby coming at a wrong decision. According to the appellant the obvious and glaring contradiction were from evidence of PW1, PW3, PW4 and PW6 some of whom stated the assailant of the deceased was wearing a red short, whereas others talked of red shirt. According to the appellant PW1, PW3, PW6 stated the appellant was dressed in red short whereas PW4 and PW6 talked of red shirt. This according to the appellant was unreconcilliable contradictions and which were glaring contradiction which the trial court should have taken into account and found due to the glaring contradictions the prosecution witnesses were incredible and their evidence unreliable. The stated opposed the appellant's submissions and stated the errors were minimal and of no consequences in the prosecution's case.

27. The crucial issue for consideration here is what did the trial Magistrate's handwritten proceedings record state as regard how the 1st accused was dressed. I have had opportunity of perusing the trial Magistrate's handwritten proceedings and I have noted PW1, PW3, PW4, PW5 and PW6 in their evidence talked of red "shirt" word used not "short" as reflected in the typed proceedings. I therefore find that the issue of the "shirt" and "short" is resolved by hand written proceedings. I find no contradictions or inconsistencies of the prosecution's witnesses on assailant's mode of dress. I find no basis to hold their evidence was contradictory and inconsistent in absence of evidence in support. I however have to state that the Judiciary should assign the duty of typing and proof reading of the proceedings to serious and competent staff to avoid situations similar to one we are faced with before submitting and certifying typed records as correctly to avoid creating confusion in the proceedings. I therefore find no merits in ground number 2 of the appeal.

28. It is further contended in this appeal for the appellant that the trial Magistrate erred in fact in failing to observe that the cause of death as stated by PW9 was herniation and that sharp object was used on the axial bone and *ipso facto* could not have been caused by the appellant. PW9 in his evidence stated:-

***“The nervous system had a brain stem. The cause of death was herniation leading to acute respiratory and cardiac arrest. A sharp object was used on axial bone.”***

29. The postmortem form exhibit P1 by Dr. Joan Atieno showed as a result of examination she formed the opinion of death was:

***“Carnal/Herniation leading to acute respiratory and cardiac arrest.”***

30. The appellant's Counsel contended that "herniation" means abnormal protrusion of tissue through an opening. He urged the same was caused by a sharp object. From Wikipedia, the free encyclopedia "Brain herniation" is defined as a potentially deadly side effect of very high pressure within the skull that occurs when part of brain is squeezed across structures within skull the brain can shift across skull structures as the *falx cerebri*, the *tentorium cerebeli*, and even through the foramen magnum (*the hole in the base of the skull through which the spinal cord connects with the brain*) Herniation can be caused by a number of factors that cause a mass effects and increase intracranial pressure. That I noted PW9 did not explain what herniation is hence the need for court to get the definition of herniation. The evidence of PW1, PW3, and PW6, is that the appellant hit the deceased on the face with his fist and he fell down. That he felled the deceased

twice and continued hitting him. That the deceased was bleeding. PW9 noted during postmortem the deceased's body had injuries on the head tender limb (right) and lower eye (lacerations) that the nervous system had a brain stem which was consistent with the beating the deceased had received from the appellant. The fact that the deceased was bleeding from injuries was an indication that a hard object was used to hit him and he fell on the ground that caused bleeding. The evidence connected no other person with the deceased's injuries other than the appellant and the fact that doctor gave the probable cause of injury as a sharp object does not mean the appellant might not have hit the deceased against a hard surface or object when he was hitting the deceased who fell on the hard ground. I find the trial court had carefully considered the cause of death as stated in the judgment. I find no merit in this ground of appeal.

31. The Appellant gave unsworn statement in his defence admitting being at the scene of the incident but denied assaulting the deceased. PW1's, PW3's and PW7's evidence placed the appellant at the scene of the incident and they all testified they saw the appellant assault the deceased. He did not during cross-examination challenge evidence of PW1, PW3 and PW7. PW4 and PW6 testified that the deceased told them he was assaulted by the appellant. The Appellant did not challenge that evidence. He did not at the earliest opportunity put to the witnesses through cross-examination that he did not beat the deceased. His defence that he did not assault the deceased in my view is an afterthought and a mere denial. I find it to be without merit. The learned trial Magistrate correctly rejected the appellant's defence.
32. The State submitted that the appeal was filed out of time without leave of the court, contending judgment was delivered on 4th December, 2014 and petition was filed on 16.11.2015. Section 349 of Criminal Procedure Code provides:-

***“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against.”***

The judgment in this matter was delivered on 4.12.2014. The appellant had upto 18th December, 2014 to file appeal. The court record reveals that the appellant lodged his appeal on 18th December 2014 within time but prisons forwarded the appeal on 17th March 2015. The appeal was therefore filed within time. The appellant's Counsel filed supplementary petition of appeal on 15th November, 2015 without leave of the Court contrary to Section 350(1) 2(IV) of C.P.C. which provides:-

***“350. (1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.***

***(2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal; Provided that -***

***(iv) save as provided in paragraph (I), a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;”***

34. The State raised that objection that supplementary petition of appeal was filed without leave after the appellant's Counsel had argued the appeal. A preliminary point of law should always be raised and dealt with first but not in reply. In view of that I find the State Counsel preliminary objection was not well founded. That if allowed at this stage it would in my view result to unfair trial as the appeal shall be determined and on technicality going against the letter and of **articles 159 (2) (d) and 50 (1) of the Constitution of Kenya**. I therefore find in view of the reasons

stated herein above the supplementary petition of appeal though filed without leave of the court should be considered as no prayer would be prejudiced by allowing the same though no leave was sought.

35. The appellant contended the sentence of 20 years is excessive and referred to **R V Borongo Kenya HCCR Case No. 45 of 2013 Kisii** in which case the accused who found his wife engaging in sex with a man on his matrimonial bed, fought with wife's lover both of whom were armed. The accused was sentenced to serve 1 year non-custodial sentence. This case and the other 2 relied upon by appellant's Counsel are not relevant to the present case as they dealt with plea bargain and the deceased were the aggressors. The appellant as rightly observed by the trial court was the aggressor. That from the evidence on record there is nothing to show his relationship with PW3, the child who the deceased is alleged to have assaulted or quarrelled. There is no evidence of provocation of the appellant by the deceased nor is there evidence of him acting in self-defence. In his mitigation he prayed for forgiveness and non-custodial sentence. The appellant picked fight with the deceased for no apparent reasons. The offence committed by the appellant is serious and there was no justification for it. The appellant did not hit the deceased once or twice but even when the deceased was felt he followed him and continued hitting him. The appellant's brutality resulted in loss of an old man's innocent life. I however find the sentence of 20 years to be excessive and need to be reduced. The appeal against conviction is dismissed and appeal against sentence is allowed. The sentence of 20 years is set aside and substituted with a sentence of ten (10) years.

**35. The upshot is that conviction is upheld, sentence of Twenty (20) years set aside and substituted with imprisonment of ten (10) years.**

**DATED AT SIAYA THIS 15TH DAY OF MARCH, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 15TH DAY OF MARCH, 2016.**

In the presence of:

Mr. Odhiabo for the Appellant

M/s. Odumba for State

Appellant - Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

**J. A. MAKAU**

**JUDGE**