REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 25 OF 2014

SIMON MUGE KIPKETER…..…..……..……..……..APPELLANT

VERSUS

REPUBLIC……..…….……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 255 of 2011 Republic v Simon Muge Kipketer in the Principal Magistrates Court at Eldoret by D. K. Kemei Principal Magistrate dated 18th January 2011)

JUDGMENT

1. The appellant pleaded guilty to a charge of manslaughter. The particulars were that on 11th December 2010 at Kapkures Village in Eldoret West District of the Rift Valley, he unlawfully killed Timon Kipngetich Muge. He was sentenced to ten years imprisonment.

2. The appellant is only aggrieved by the sentence. His petition of appeal urges four grounds: first, that he is remorseful; secondly, that he is married and the family solely depends on him; thirdly, that he has served a third of the sentence; and, fourthly, that he has learnt some useful trades in prison. He now undertakes to be a law abiding citizen.

At the hearing of the appeal, the appellant said he has been in custody since 21st January 2011 and that his children continue to suffer from his incarceration. In a synopsis, the entire appeal is a plea for *clemency*.

3. The appeal is contested by the State. The case for the State is that the sentence was lenient. I was implored not to disturb the sentence.

4. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

5. I have carefully studied the records of the trial court. I am satisfied that the plea of guilt was *unequivocal*. The charge was read in Kiswahili, a language he understood. He answered: *it is true*. The facts were then read to the appellant. They were straightforward. On the material day, the appellant went to his brother's (deceased's) house. He found the door was locked. He knocked and his brother opened the door. He then saw his (appellant's) sandals - which he used to share with his wife – lying next to his brother's bedroom. He went in and found his wife hiding under the bed. His wife started pleading for mercy. He raised an alarm. His brother came out. A fight ensued between the appellant and his brother. The appellant got hold of a knife, stabbed the deceased and left. Members of the public found the deceased on the ground bleeding. They rushed him to Moi Teaching and Referral Hospital where he died.

The postmortem revealed that the deceased died due to excessive haemorrhage in the brain from a penetrating injury. The report was produced as an exhibit in court.

6. Those facts were read to the appellant in Kiswahili. He replied that they were correct. A final plea of guilt was then entered. The appellant was thus properly convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

7. After the conviction, the prosecutor informed the court that the appellant was a first offender. The appellant was given an opportunity to mitigate. He stated as follows-

> *"I pray for pardon. I did not intend to kill the deceased who was my brother."*

8. The trial court observed that the offence was grave and called for a *deterrent* sentence. The appellant was jailed for *ten* years. Sentencing is at the *discretion* of the trial court. But power still reposes in an appellate court to *review* the sentence if material factors were overlooked; or, if the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

9. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

> *"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may……(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or….. "*

10. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

> *"The Court would 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 would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. …The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."*

11. The charge facing the appellant was a *felony*. Section 205 of the Penal Code provides that any person who commits the felony of manslaughter is liable to imprisonment for *life*. Although the appellant was treated as a first offender, the offence was grave and called for a *custodial* sentence. I have considered that the appellant found his wife in the deceased's house under circumstances that pointed compellingly to an *illicit affair*. It was provocative. There was an ensuing fight between the two brothers. The appellant said he had no intention of killing his brother. It was classic manslaughter.

12. The sentence of ten years, though well within the law, was in the circumstances too punitive. I agree that the offence called for a custodial sentence. But the sentence handed down was not *commensurate* with *moral blameworthiness* of the offender. In *Orwochi v Republic* [1976-80] 1 KLR 1638 and *Marando v Republic* [1976-80] 1 KLR 1639, sentences of *four* years for *manslaughter* were held to be manifestly excessive. I think the principle to be distilled from those cases is that sentencing must take into account the unique circumstances of each case.

13. Considering the circumstances leading to the manslaughter, the *moral blameworthiness* of the offender and that the deceased was a close relative, I will allow the appeal on sentence. I *reduce* the sentence to *four* years. The appellant has been in custody since 21st January 2011. I accordingly order that the appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 26th day of February 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Appellant (in person).

Ms. K. Mwaniki for the State.

Mr. J. Kemboi, Court clerk.