



**ELIZAPHAN OMBIRO NDEGE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the Original conviction and sentence of the Senior Resident Magistrate's Court at Kilgoris, Hon. R. A Oganyo in Criminal Case No. 211 of 2008 dated 9<sup>th</sup> November, 2009)***

The appellant, **Elizaphan Ombiro Ndege**, along with another accused person, was charged before the Senior Resident's Magistrate Court in Kilgoris with the offence of manslaughter contrary to section 202 as read with section 205 of the **Penal Code**. The particulars of the offence were that on 29<sup>th</sup> May 2007 at Majengo Estate within Kilgoris Town in Transmara District of Rift Valley Province unlawfully killed **Denis Omwenga Butiri**.

The accused persons were found guilty as charged and sentenced to probation of 3 years each by **Hon. R.A Oganyo** (P.M.) on 23<sup>rd</sup> November 2009.

On 18<sup>th</sup> October 2010, the appellant was brought before the court and the probation officer prayed that the non-custodial sentence given to him be cancelled and that he be remanded in custody. The Probation officer stated that the offender only reported twice and then disappeared. She further stated that the appellant had become a public nuisance and had been found committing unnatural offences although he was yet to be charged.

The Senior Resident Magistrate, **Hon. B. Ochieng'**, went through the reports presented and noted that the accused had broken the probation terms and was still involved in anti-social behaviour. He also noted that the offence for which the accused had been sentenced called for a sentence of imprisonment of life. He therefore ordered that the appellant be imprisoned for 15 years. This sentence was given on 22<sup>nd</sup> October 2010.

Following this, the appellant being aggrieved and dissatisfied lodged a petition of appeal in this court on 2<sup>nd</sup> November 2010. The grounds of appeal were that:

- a) *That the learned trial magistrate erred in law and facts in accepting and recording that the prosecution had proved this case beyond any reasonable doubt at the close of my trial; (sic!)*
- b) *That the learned trial magistrate erred in law and facts in placing undue trust and importance on the prosecution thereby ignoring my plight as an accused person my lord(sic!)*
- c) *That the learned magistrate misdirected himself grossly rejecting my very sincere mitigation that was worth an acquittal your lordship; (sic!)*
- d) *That the fifteen (15) year sentence imposed herein is overly harsh and excessive in the foregoing.*

(sic!)

The appellant therefore prayed that his appeal be allowed, the conviction quashed and the sentence (of three years) be set aside.

At the time the appellant's probationary sentence was cancelled, his appeal had not been heard. He therefore took the step of filing supplementary grounds of appeal to protest the cancellation of the probationary sentence. The grounds were:-

- a) *That the learned trial magistrate erred in both point of law and fact by failing to observe that I could not have been arrested at the probation officers office when I went to report as usual if I was really at large as per his claim;*
- b) *That the learned trial magistrate erred in both point law and fact by failing to take heed to my defence through the sick sheet I produced to both the probation officer and to court to prove that I went to hospital the material day claimed I never reported;*
- c) *That the learned trial magistrate erred in both point of law and fact by relying on the probation officer allegation that I was a public nuisance, notorious and committing unnatural offences, a claim that lacks the required standard of prove (sic) because I had not been arrested by any police or charged in court over that allegation.*

For the reasons apparent from the above grounds, the appellant prayed that this appeal be allowed, and that the cancellation of the probation report be revised so that he could continue to serve the initial sentence of three years under probation.

When the appeal came before me for hearing, the appellant pursued only the issue of the cancelled probationary sentence. His contention is that he was arrested at the probation office and taken to the lower court, where the probation officer informed the court that he had violated the terms of the probation.

The record indicates that the Probation Officer addressed as follows:-

*“The offender is serving probation for 3 years. He first reported twice since then he disappeared. We did a lot of effort to get him but he has been adamant. He is now a public nuisance. He is notorious and he has been committing unnatural offences through (sic) the case is not yet at (sic) court. In that regard, I pray for cancellation of probation and the accused placed in custodial sentence.”*

The lower court in its ruling stated that the accused had broken the probation terms and is still involved in anti-social behaviours (sic). The court also stated that the appellant needed correction for his anti-social activities and ordered the appellant's imprisonment for a term of 15 years. The appellant is however of the view that this sentence is overly harsh and excessive, and would like the same to be set aside, and the original sentence of 3 years on probation be reinstated.

I have perused the lower court file and cannot find the probation officers report, where the appellant was found to have been committing unnatural offences, and/or any other unnatural offences. In any case I am of the view that the learned magistrate ought not to have taken this as grounds to alter the sentence since there was no application filed in court to this effect.

Section 11 of the **Probation of Offenders Act** (Cap 64) allows both the probation officer and a probationer to apply to court for variation of a probation order. It is my understanding that such an application must be for good cause.

Section 8(i) of the **Act** provides:-

*“If after hearing information on oath, it appears to a judge or magistrate that a probationer has failed to comply with any of the provisions of the probation order, he may issue summons to the probationer*

*requiring him to appear at the place and time specified thereon or may issue a warrant of arrest”.*

This section presupposes that an application to cancel a probationer’s probationary sentence must be formal and on oath. It cannot be casual as was the case with the application now under scrutiny in this appeal.

Further, on the 18<sup>th</sup> October, 2010 when the probation officer made the oral application before court, there is no evidence on record that the probationer was heard in his defence. The court just recorded what the probation officer said and subsequently on the 22<sup>nd</sup> October 2010 delivered the ruling cancelling the probation and imposing a 15 year jail term. Even though the court did not indicate, it must have been acting under Section 8 (ii) which allows a trial court to pass any sentence it could have passed on a probationer if the probation sentence had not been imposed.

In the current appeal, I find and hold that the trial court while taking advantage of the above section, did so arbitrarily without the benefit of a formal application and information on oath as required by law and without granting the appellant an opportunity to be heard as is required by the Constitution.

For the foregoing reasons, I find the appeal has merit. I therefore set aside the fifteen year sentence and reinstate the probationary sentence. Taking into consideration that the appellant had already served one year probation and about 2 years imprisonment, I reduce his probationary sentence to the period already served. The appellant is set free forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered at Kisii this 25<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

Elizaphan Ombiro Ndege: appellant (present/absent)

..... Counsel for respondent (present/absent)

..... court clerk

**R. LAGAT-KORIR**  
**JUDGE**