



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 264A OF 2009

JOSHUA MABURURU OMBIRO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(From original conviction and sentence by the Chief Magistrate's court at Kisii criminal case no. 551 by C.H.MBOGO 2008 (SPM))

Joshua Mabururu “the appellant” was charged before the Chief Magistrate's court, Kisii 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 14th January, 2008 at Matunwa village Kisii Central District within Nyanza Province, the appellant unlawfully killed **Thomas Isaboke**. The appellant pleaded not guilty to the charge and his trial ensued.

The case for the prosecution was that on 14th January, 2008 at 6.30 p.m, the appellant chased and beat up **Robert Gwonda** (PW5), **Thomas Isaboke**, hereinafter “**the deceased**”, however intervened. The appellant turned on to the deceased whom he assaulted on the head with a fimbo. The deceased started bleeding from the nose and mouth. The deceased was taken to Kisii District Hospital where he later died whilst undergoing treatment. Investigations were commenced which culminated in the arrest of the appellant and was subsequently charged with the offence.

Put on his defence, the appellant elected to make an unsworn statement of defence and called no witnesses. In his defence, he simply stated that on 14th January, 2008 nothing happened.

The learned magistrate having carefully evaluated the prosecution as well as the defence case found for the prosecution. He convicted the appellant and sentenced him to 8 years imprisonment. The appellant was aggrieved by the conviction and sentence. He accordingly lodged the instant appeal. In his petition of appeal he lamented that the learned magistrate convicted and sentenced him when the prosecution had not proved its case beyond reasonable doubt, the court placed undue reliance on the prosecution witnesses, his mitigation was not considered properly resulting in harsh and excessive sentence.

When the appeal came up for hearing before me on 24th November, 2010, the appellant elected to abandon the appeal on conviction. Instead he chose to pursue the appeal on sentence. His wish was granted. In support of his appeal on sentence, the appellant submitted that he had killed the deceased

accidentally. Since then the deceased's relatives had invaded his homestead and burned his house and chased away his family. He was remorseful and pleaded for leniency.

Mr. Gitonga, learned state counsel opposed the appeal on sentence by submitting that the sentence of 8 years imprisonment cannot be said to be excessive considering that a life was lost in a very needless manner.

The offence for which the appellant was convicted of carries a maximum sentence of life imprisonment. The sentence that the learned magistrate imposed was 8 years imprisonment though the appellant was a first offender. No doubt the sentence imposed was legal and merited considering that an innocent life was lost. I wish to draw the attention of trial courts to the caution sounded by the court of appeal regarding meting out of sentences in the case of **George Otieno Oloo .v. Republic KSM Criminal appeal no. 137 of 2004**

“...Apart from the statutory Maxim, for example, those on the sentencing of persons convicted of robbery with violence contrary to section 296 (2) of the Penal Code and murder, the appropriate sentence is a matter for the discretion of the sentencing magistrate or judge. This being the case, the magistrate and the judge must act judicially and not to award sentences capriciously. Of late, we have noted a trend where maximum and manifestly harsh sentences of imprisonment have been imposed on convicted persons on wrong factual basis. Though it is the duty of the court to protect the public and punish and deter the criminal, the trial courts must adopt a uniformity of approach.....”

The sentencing notes of the trial magistrate did justify why the sentence of 8 years imprisonment was preferred. The offence committed was serious, and justified the sentence imposed, the fact that the appellant was a first offender notwithstanding.

Anyway, I have heard the appellant on his plea for reduction of the sentence and the learned Principal state counsel, **Mr. Gitonga's** input. For my part I think that the offence committed was serious in all the circumstances. However I am of the view that the sentence meted out was neither harsh nor excessive. I have no reason or basis to interfere with the same. Accordingly, this appeal on sentence is dismissed.

Ruling dated, signed and delivered at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE