



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**HC.CRA NO. 80 OF 2008**

**NICHOLAS ONTIRI OTIENO.....**  
**APPELLANT**

**A N D**

**REPUBLIC.....RESPONDENT**

*[Being an appeal from the Judgment of the Principal Magistrate – W.N. Njage dated 13<sup>th</sup> August, 2008*

*at Eldoret Chief Magistrate’s Court in CRC. No. 1015 of 2005]*

**JUDGMENT**

**Nicholas Ontiri Otieno**, the appellant, has filed this appeal to contest his conviction and sentence by the learned Principal Magistrate (**W.N. Njage**) sitting at Eldoret Chief Magistrate’s Court. The appellant was arraigned in court on 29<sup>th</sup> November, 2004, and charged with manslaughter Contrary to Section 202 of the Penal Code. The allegation was that the appellant on the 14<sup>th</sup> November, 2004, at Moi Barracks, Kenya Rifles in Uasin Gishu District within the Rift Valley Province, unlawfully killed **Willy Mulwa Mainga** (hereinafter “**the deceased**”).

The appellant denied the charge and his trial commenced before the said Magistrate whereat the prosecution called eight (8) witnesses in support of their case. The brief facts were that the deceased, then a Senior Private at Moi Barracks, on the material date at about 7.00 p.m., was with his colleagues enjoying drinks at one of the social outlets in the barracks, when his wife **Naomi Wnjiku Mulwa** (P.W.1) went to the facility. She did not enter it but stood outside waiting for someone she could send to the deceased. Three men, including the appellant, then emerged from the facility. The appellant abused P.W.1 and Cpl **Matole**, who was with him, enquired of her what she wanted at the outfit. She moved closer to where he was and was seen by the deceased who came out of the facility. P.W.1 then reported to him that the appellant had abused her and the appellant hurled further abuse at her and on being questioned by the deceased, ignored him and started walking away. The deceased grabbed him and the accused threw a stick which hit P.W.1 in the abdomen. He also hit her on the forehead with a beer bottle and ran away.

P.W.1 was treated by **James Muiruri** (P.W.3) at a Clinic within the barracks and they (P.W.1 and the deceased) went to their house within the barracks. The deceased then decided to report the behaviour of the appellant to his brother, **Agwara**, who was a fellow officer and was residing within the barracks. P.W.1 decided to join him and they both went to the said officer’s house but did not find

him. As they left, the appellant emerged from the house and there was a verbal exchange between him and the deceased. He produced an army knife and stabbed the deceased on the left side of the chest at the lower ribs. P.W.1 screamed for help which screams attracted **CPL Lucas Oduor**, (P.W.4) who together with others including **WO2, Ephantus Chazima**, and (P.W.6) assisted her take the deceased to the said Clinic within the barracks where the deceased was seen by P.W.3. P.W.3 observed that the deceased was bleeding profusely and was not breathing.

P.C. **Gerald Njuguna** (P.W.8) of Soy Police Station was then informed of the incident and visited the scene while accompanied with other officers. They recovered a blood stained knife from the room where the accused used to sleep which knife was produced at the trial after being identified by P.W.1. They took the deceased to Moi Teaching and Referral Hospital where Prof. **Kuslova** later performed a post mortem on the body of the deceased. The report was produced by Dr. **Joseph Imbenzi**, (P.W.5) because Prof. **Koslova** had left the country. The cause of death was found to be the stab wound which penetrated to the heart and caused internal bleeding. Dr. **Imbenzi** also examined the appellant and certified that he was fit to stand trial.

The appellant ran away to Kisii but was arrested by **CPL Thomas Ogetange** (P.W.8) and later charged as already stated.

At the close of the prosecution case, the appellant was found to have a case to answer and was placed on his defence. He gave a sworn statement in which he admitted having been in the company of the deceased on the material night when they took alcohol. He further testified that it was P.W.1 who abused him and not the other way round as had been alleged by her. The deceased then grabbed him and dragged him along claiming that he had abused P.W.1. He broke off from his grip and ran to his house where he fell asleep. Shortly afterwards, the deceased forced open the door to his room, grabbed him and pulled him to the corridor. P.W.1 gave him (deceased) a knife and a struggle ensued resulting in the deceased falling down on the knife. He therefore denied the offence.

After analyzing the evidence, the learned Principal Magistrate convicted the appellant of the charge and sentenced him to ten (10) years imprisonment. Being dissatisfied with the said conviction and sentence, the appellant has appealed to this court on eight (8) grounds. **Mr. Omboto**, learned counsel for the appellant, argued the appeal on behalf of the appellant while **Mr. Oluoch**, learned Senior Deputy Prosecution Counsel who appeared for the respondent State supported the conviction of and sentence imposed upon the appellant.

At the hearing of the appeal, **Mr. Omboto** abandoned the appeal against conviction and submitted on the ground of appeal against sentence only. Learned counsel submitted that the sentence of ten (10) years imprisonment handed down to the appellant was harsh in the circumstances given that the appellant and the deceased were friends and further that the attack occurred at the house of the appellant where he had been followed by the deceased.

**Mr. Oluoch**, on his part, submitted that the sentence was not manifestly excessive and all relevant factors were considered by the learned Principal Magistrate. He therefore urged the dismissal of the entire appeal.

Having perused the record and further having considered the grounds of appeal, I think **Mr. Omboto** rightly abandoned the appeal against conviction. I am of that view given the testimony of P.W.1 who was an eye witness to the killing of the deceased who was her husband. The learned Principal Magistrate found P.W.1 “**a truthful, candid and reliable witness**”. Having believed P.W.1, the conviction of the appellant was inevitable as the cause of death was confirmed to be a stab wound which had penetrated to the heart of the deceased and caused internal bleeding. There was no doubt that the stab wound was inflicted by the appellant.

With regard to sentence, the record shows that the learned Principal Magistrate regarded the appellant's mitigation before imposing the sentence of ten (10) years imprisonment. The record, however, shows that the deceased and the appellant had been drinking together. It also indicates that after the initial scuffle, the

appellant ran away to the house where he was staying. It is possible that the status of both the deceased and the appellant and the fact that the deceased followed the appellant to where he was staying had a direct bearing on how the deceased met his death. These two factors do not appear to have been considered by the learned Principal Magistrate. They were, no doubt factors that ought to have been considered – and had they been taken into account, the appellant would have received a lighter sentence.

In the premises, I am entitled to interfere. The sentence of ten (10) years imprisonment is hereby set aside and is substituted with a sentence of imprisonment for seven (7) years from the date of the appellant's conviction.

The conviction of the appellant is otherwise upheld.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 31<sup>ST</sup> DAY OF MARCH 2011.**

**F. AZANGALALA**

**JUDGE.**

**Read in the presence of:-**

(1) Nicholas Ontiri Otieno (the appellant) and

(2) Mr. Oluoch for the Republic.

**F. AZANGALALA**

**JUDGE**

**31/03/2011**