REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYAAT KAKAMEGA
Criminal Appeal 143 of 2004

JACKSON ATEYA OPONYO ……..…… APPELLANT

V E R S U S

REPUBLIC ……..…… RESPONDENT

JUDGEMENT

JACKSON ATEYA OPONYO, the appellant, was convicted on 28.01.2004 of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The particulars of the charge were that

> ***"on the 8th day of November 2003 at Mwitoti village, Luchea Sub-location, Shibinga Location in Butere/Mumias District of the Western Province he unlawfully killed Simon Bwakhali."***

He appeared before the Chief Magistrate on 28.01.04 when the charge was read to him in Kiswahili and he pleaded to it by stating that it was true. After the facts were read out to him, he confirmed that they were true, whereupon the trial court convicted him on his own plea of guilty. After the conviction, the appellant was called upon to mitigate against sentence, after the record was read to him. He stated in mitigation that he had a wife and children who were dependent on him. Thereafter the court proceeded to sentence the appellant to nine (9) years imprisonment.

The appellant subsequently lodged the present appeal in which he proffered five grounds in four of which he submitted that the sentence was excessive and sought leniency. In one of the five grounds he submitted that the court had not considered his defence in which he alleged he had explained what had happened. The latter ground is misplaced. Firstly, the appellant offered no defence. This is borne out by the record. He was convicted on his own plea of guilty and the only thing he offered was mitigation. Secondly, under section 348 of the Criminal Procedure Code, the appellant is not entitled to challenge his conviction on appeal as the conviction proceeded from a plea of guilty. The appellant did not challenged the unequivocability of his plea and therefore the only issue for consideration in this appeal is whether the sentence meted out was manifestly excessive or not.

Mrs. Kithaka who appeared for the Republic in this appeal submitted that the sentence was not excessive and that the trial court had taken the mitigation of the appellant against sentence into account before sentencing. She urged the court to reject the appeal.

Manslaughter is a felony which carries a maximum sentence of life imprisonment. It involves unlawful killing of a person, and for this reason is an extremely serious offence. The facts relating to the felony which the appellant admitted showed that the appellant beat and killed his father when he found him assaulting his (appellant's) mother who was sickly and bed-ridden. The appellant's mother had screamed on being beaten by the deceased, who was her husband, and the appellant had rushed to her aid. The appellant tried to stop him from beating his mother but the deceased persisted whereupon the appellant forcefully pulled him away and punched him severally until the deceased fell down. The appellant did not stop there. He proceeded to kick the deceased after he had fallen down until the deceased became unconscious. The appellant then ran away. The deceased subsequently died of the injuries inflicted on him by the appellant.

The postmortem report produced at the trial and marked as exhibit No.1 showed that the deceased's cause of death was cardiopulmonary arrest due to a ruptured spleen. The deceased had also suffered fractured left ribs numbers 6 and 10.

While considering an appeal against severity of sentence, an appellate court will not normally interfere with the discretion exercised by the trial court unless it is evident that the trial court acted upon the wrong principle or overlooked some material factor or the sentence was manifestly excessive in the light of the circumstances of the case (see R. v Shershewsky (1912) C.C.A. 28, T.L.R. 364). In passing sentence, it is necessary for the trial court to indicate that it has taken the mitigation against sentence into account and to also why state why a severe sentence has been imposed or a light sentence given and the circumstances that the court has taken into account in so doing.

I observe that the appellant was not armed and that the deceased was his father. The circumstances of this case clearly show that the excessive force used by him on the deceased was in part due to the conduct of the deceased who continued to beat the Appellant's ailing mother whom the deceased had drugged out of bed. Once he had pulled the deceased away, the appellant should have stopped the intervention there. It was absolutely unnecessary for him to continue to unleash violence after he had knocked down the deceased. It was absolutely unnecessary for the appellant to continue kicking the deceased as he did when the latter was lying helplessly on the ground. The deceased was not in any case armed. Nevertheless, it is my finding that in the circumstances of this case, the sentence of nine years was excessive. In the result, I uphold the conviction but reduce the sentence from nine years to seven years. It is so ordered.

Dated at Kakamega this 28th day of October, 2005.

G. B. M. KARIUKI

J U D G E