REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 83 OF 2017

JOANNES OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence in Ukwala SRM's

Criminal Case No. 137 of 2017 delivered by Hon. G. Adhiambo, SRM

on 24th August 2017)

JUDGMENT

1. The appellant **Joannes Otieno Aor** was charged with the offence of manslaughter contrary to Section 202 as read together with Section 205 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on 21.03.2017 the appellant while at Ugunja sub-location in Ugunja sub-county within Siaya County murdered one **Charles Omondi Otieno.** The appellant denied the charge preferred against him and the prosecution called 10 witnesses.

2. At the end of the trial, the trial magistrate found the appellant guilty of the offence as charged and upon convicting him, sentenced him to serve ten years imprisonment. Aggrieved by the said judgment, conviction and sentence, the appellant filed this appeal on 1/9/2017 setting out the following grounds of appeal:

> *i. The learned trial magistrate erred in law and in fact in disallowing the testimony of PW6 when the said witness was neither declared hostile nor untruthful.*
>
> *ii. The learned trial magistrate erred in law and in fact in disregarding the totality of the accused's defense and mitigation in plea of the defense of provocation and self-defense.*
>
> *iii. The Learned trial magistrate misdirected herself in law and in fact by disregarding the clear evidence of aggressive, unprovoked and violence conduct of the deceased on a public road prior to and during the incident subject of the manslaughter charge.*
>
> *iv. The conviction was against the weight of the evidence in totality, and the learned trial magistrate misapprehended the effect of the testimony of PW7 on the effect of the delay in medical treatment of the deceased, as to cause of death.*

v. The sentence of ten (10) years imprisonment was manifestly excessive in the circumstances of the case, and contrary to sound legal principles on sentencing of offenders.

3. This being a first appeal, this Court is alive to the principles laid down in ***Okeno Vs. Republic [1972] E.A. 32*** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination **(*see also Pandya Versus Republic [1957] E.A. 336*** and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

4. Further in ***Shantilal M. Ruwala Versus Republic [1957] East Africa 570*** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. ***(See Peters Versus Sunday Post [1958] East Africa 424.***

5. Revisiting the evidence adduced before the trial court, PW1 **Samson Onyango Ooro** told the trial court that on that 21.03.2017 at around 6.00p.m he was from Nyasanda Community High School and that on that day there were sporting activities taking place at the Nyasanda Primary School. He stated that on his way home he found his cousin **Charles Omondi Otieno** now deceased chasing some school girls then the wife of the appellant alias Oanda intervened and told the said Charles to stop chasing the girls. He explained how the wife of Oanda the appellant threatened to place the baby ***(she was carrying)*** down and fight with Charles if Charles would not stop following the girls and that Charles responded by stating that he does not fight with adults. He stated that Godi intervened and that Charles said that he had left the issue but the appellant emerged from his parent's home and started pulling Charles.

6. PW1 further testified that Charles and the appellant pulled each other and that in the course of the struggle Godi separated them then hit Charles' leg with a stick thrice. He insisted that he was referring to a stick and not a fimbo. He stated that Charles left that place while weeping because Godi had hit his legs with a stick and he (PW1) also left for home only to hear noise after a short while. He ran to where the noise was emanating from and saw Joannes also known as Oanda the appellant hitting the head of Charles with a fimbo two times then Charles fell down. He stated that after that the appellant disappeared. He confirmed that PW2 was the one who carried Charles on motorcycle and took him to his parent's home and that later at midnight he learnt that Charles had died.

7. PW2 Joseph Okoth Odhiambo testified that on 21.03.2017 at around 6.30p.m he was aboard his motorcycle when he came across Charles weeping and complaining that someone could not just beat him. He stated that he saw the said Charles going to his grandmother's home and coming back with a jembe. He said that when he asked Charles as to what had happened, Charles told him to leave (Charles) him alone and lifted the jembe threatening to cut PW2 with the said jembe. PW2 ducked off his motorcycle and escaped leaving his motorcycle behind.

8. PW2 stated that the appellant approached the said Charles while asking Charles why Charles was disturbing people and that it is at that point that the appellant hit the jembe that the said Charles was carrying then the jembe fell and after that using the fimbo, (which PW1 identified in court as the fimbo that the appellant used to hit the said Charles) that the appellant was carrying. That the appellant hit Charles on the head thrice. He narrated how the people who were at the scene told the appellant that he was killing Charles. He stated that he was the one who carried Charles on his motorcycle and took him to his parent's home where he found the father of Charles. He stated that the father of Charles told him to rush Charles to Homeground Hospital Ugunja stating that he was availing himself at the hospital. He said that he complied and took the said Charles to Homeground and also informed Charles' mother of the incident. He said that he found Charles' mother at the market and that on informing Charles mother Charles mother claimed that she was busy but stated that she wound follow up on the issue after completing what she was doing. He stated that when he later went to check on Charles at Homeground Hospital in Ugunja he found that Charles had been transferred to the Busia County Referral Hospital. He further stated that he later received information that Charles had died.

9. In cross examination he reiterated his testimony in chief and stated that he knew the appellant for 5 years and that the appellant was one eyed.

10. PW3 **Kennedy Otieno Odhiambo** the father of Charles Omondi Otieno the deceased testified that on 21.03.2017 at around 6.30p.m, towards 7.00p.m, he was at his house when Joseph [PW2] a boda boda rider arrived while carrying Charles and another boy on the motorcycle. He stated that the other boy was supporting Charles from behind and they told him that Charles had been beaten at Nyasanda area. He said that he told the people who had taken Charles to him to take him to the Homeground Medical Hospital and that he followed them at the hospital. He said that at the said Homeground Hospital he was informed that Charles needed to be xrayed and so he had to take him to the Busia District Hospital for the xray. He said that he hired a vehicle which took Charles and him to the Busia District Hospital. He said that at the Busia District Hospital, Charles was xrayed and admitted in ward 5 where he was placed on oxygen but after ten minutes he died. He said that the doctor showed him the xray film and showed him the fractures that were noted on Charles' head. He said that at around 1.30a.m he travelled back to Ugunja and recorded his statement at the Ugunja Police Station.

11. In the company of the police they went to arrest the person who beat up Charles. He said that two young men who witnessed as Charles was being beaten also escorted Charles to Busia District Hospital. He identified the appellant as the person who beat up Charles and stated that he knew the appellant as Oanda. He said that he had known the appellant for a period of 30 years and that he even attended the same primary school with the appellant that is Ugunja Primary School. He said that later, a post mortem was conducted on the body of the deceased at the Busia District Hospital. He identified the aforesaid post mortem form dated 28.03.2017 as PMFI 2.

12. On cross examination by the appellant's counsel, PW3 said that his son was buried on 01.04.2017 at his parents' home in Sega. He said that they purchased land in kinda but their original home is in Sega. He said that by the time his son was dying he had completed class 8 but was not employed and further that he used to live with his son in Ugunja. He said that his son was a good person. He said that on that 21.03.2017 he was even with his son at around 3.00p.m but he said that he did not see his son on the morning of 21.03.2017. He said that he could not know what his son did from morning because he went to work. He said that the biological mother of Charles was Caroline Achieng and that Caroline Achieng separated with him (PW3) then got married elsewhere and died while she was married at the home of the other husband.

13. In re-examination PW3 stated that the doctor said that the xray showed that said Charles was hit on the head occasioning him to sustain fractures and occasioning him to bleed into the brain.

14. PW4 **Godfrey Oduor Omondi** testified that on 21.03.2017 there were sports events taking place at the Nyasanda Primary School. He said that when the sports ended at 5.00p.m he left for home but when he reached the road he saw students running while screaming. He said that as a parent he decided to find out what was going on and found three young men whose physical appearance was known to him running after the girls who were in school uniform and the girls were screaming. He said that he told the young men to stop doing what they were doing and that the young men calmed down and left the girls but that one of the young men who was furious continued walking and since the young man appeared as if he wanted a fight, PW4 avoided provoking the said young man. PW4 went back to the school direction to avoid the young man who was furious and that later at around 7.00p.m as he was heading home he found a crowd of people gathered at the road. He inquired and he was informed that the young man he had been speaking to had been beaten and he was lying down. He went to check and saw that it was indeed the young man who was lying on the ground. He said that he did not see the person who hit the young man and further stated that he could not tell which part of the young man's body had been hit because it had started growing dark. He said that he saw the appellant at the sports place.

15. On cross examination by the appellant's counsel PW4 stated that he had not mentioned the appellant and further stated that he did not see the appellant after the sports. He said that he went to the sports ground as a parent and that many people were at the place where the sports were taking place. He said that he was not with Charles throughout the day so he could not tell what Charles ate, drunk or what

Charles did. He said that he had known Charles for ten years. He said that the act of Charles chasing the girls was not normal to him. He said that he was with the appellant during the games and that the appellant was not furious. He said that he had not seen in court the cane that the young men were using to beat the young girls with.

16. **PW5 Lavender Adhiambo** a minor was taken through voire dire examination and gave evidence on oath recalling that she was **aged 14 years**. She testified that on 21.03.2017 in the evening she was from school when she found the boy who died on the way, holding a stick and that the said boy started beating her. She said that a woman asked the boy if the boy knew her (PW5) and the boy answered in the affirmative and even told the woman that he would even beat the woman. She said that the boy dared the woman to place the baby down and that the woman ran home. It was her testimony that Godi [PW4] then came and asked the boy why the boy was beating her but the boy turned against Godi. She said that the boy held Godi and wanted to beat up Godi. She said that the boy eventually started beating Godi and after that the boy left Godi and proceeded to their home to pick a panga. She said that the boy did not find a panga but came back with a jembe. She said that as the boy was passing, Joseph the motorcyclist asked another boy as to what was wrong but when the boy heard Joseph asking such questions, the boy turned and approached Joseph then tried to hit Joseph with the jembe but Joseph dodged. She said that Joseph alighted from the motorcycle and started running away and that it is at that point that the boy who died smashed the side mirror of Joseph's motorcycle. She identified the parts of the smashed side mirror as PMFI 2 and PMFI 3 being a black side mirror holder and a piece of plastic with shattered glass respectively. She said that the boy ran after Joseph and Joseph kept running away.

17. PW5 stated that the boy went back and found Oanda. He tried to hit Oanda with the jembe and Oanda kept moving backwards. She said that the boy and Oanda kept following each other up to a certain home, while attempting to hit Oanda with the jembe but that Oanda kept dodging him.

18. . She said that after that, Oanda picked a rungu from his home and used it to hit the boy thrice on the head and the boy fell down. She stated that she knew the appellant since she was in class six as she was now in class seven and that on that day it was not yet dark so she saw him very well. She identified PMFI 1 as the rungu she was talking about. The following day on her way to school she heard people saying that the boy who had been beaten had died.

19. On cross examination PW5 stated that 21.03.2017 was a sports day and that no studies were taking place that day. She said that even though they were five children the boy chased her while beating her and that at that time the boy was drunk. She said that the boy was smelling of alcohol and that is how she got to know that the boy was drunk. She said that the boy did not say anything as the boy was chasing her. She said that the boy also chased away the woman who had a baby. She said that Godi is Godfrey and pointed at PW4 as the Godi she was referring to. She said that the boy also chased away Joseph when Joseph intervened. She said that she did not hear Oanda uttering any word.

20. **PW6 Miriam Auma** a minor testified after voire dire examination and stated that she was a class 7 pupil at the Nyasanda Primary School. She said that 21.03.2017 was a sports day at their school and that as they were heading home from school when a boy chased them and beat Lavender in the course of chasing them. She said that it was her first time to see the boy. She said that when the boy started beating Lavender, Godfrey intervened and asked the boy whether she knew Lavender and the boy answered in the affirmative. She said that Godi slapped the boy and the boy left saying that he was going to bring a panga. She said that the boy did not find a panga and instead the boy came with a jembe. She said that at that time the boy was coming with a jembe the boy met a motorcyclist called Joseph then Joseph asked the boy if he wanted to pick a fight with Godi and even went ahead to ask the boy if he indeed knew Godi.

21. She said that the boy tried to hit Godi with a jembe but Godi missed and then the boy smashed the side mirror of the motorcycle using a jembe. She identified PMFI 3 and 4 as the parts of the motorcycle's side mirror that was smashed. She said that at that time Oanda came from the upper side and then the boy told Oanda that he was the person he (the boy) wanted and that at that time Oanda had a fimbo. That that Oanda and the boy branched to somebody's home and further that when the boy wanted to cut Oanda with a panga Oanda dodged then Oanda hit the boy's head with a rungu. She identified PMFI 1 as the

rungu that Oanda used to hit the boy's head. She said that the incident occurred at around 5.00pm as they were on their way from school. She said that she saw Oanda hitting the boy's head once and the boy fell down. She said that the following day, she heard people saying that the boy who was beaten died at the hospital. She identified Oanda as the appellant herein and stated that she knew Oanda when she was in class 6. She however stated that she never knew the boy before that day.

22. On cross examination, PW6 stated that she was in class 7 and that she started schooling at Nyasanda in nursery school. She said that it was common for people to fight during sports days and that the fights used to take place outside the school compound. She said that most of the time the fights do not involve students. She then reiterated her earlier testimony. She said that at the time the boy was chasing Lavender, Lavender and the boy did not say anything. She said that they did not insult anyone. She said that she did not see a woman with a baby. She identified PW4 as the Godi she was talking about. She said that the boy did not fall when Godi slapped him.

23. PW7 **Doctor Hillary Kiplagat** of Busia County Referral Hospital who carried out an autopsy on the body of the deceased on 28/3/2017 testified and produced a postmortem as exhibit 2 and stated that the deceased had that the deceased's body had a frontal parietal subgaleal [sic] haematoma, there was a liner fracture and the site was slightly depressed. He said that there was underlying epidural haematoma that is bleeding between the inner skull bone and the covering of the brain tissue. He said that as a result of the examination his opinion as to the cause of the death was severe head injury secondary to blunt trauma to the head. He issued death certificate number 0136588 and that the post mortem form was dated 28.03.2017.

24. On cross examination he reiterated his earlier testimony and stated that the body of the deceased was identified to him by Kennedy Otieno Odhiambo but he said that he did not establish the relationship between Kennedy and the deceased. He said that the deceased did not have any open wound. He said that for such kinds of injuries it takes hours for death to occur and that it can even take days for death to occur depending on the bleeder. He said that if one looks at the patient from external appearance one would say that the patient did not have injuries but from internal appearance, it was noted that there was haematoma. He admitted that if an injured person gets immediate medical attention death can be prevented. He said that the delay in getting medical attention could have contributed to the deceased's death.

25. He went on to state that there was nothing toxic in the deceased digestive system. He said that he did not take any specimen but according to his examination the most probable cause of the death is the injury to the head and the central nervous system. He said that when there is no certainty as to the cause of death it's when samples get collected for analysis at the laboratory.

26. He said that the deceased was not his patient and further stated that he did not capture that the deceased took alcohol. He said that since the body was embalmed it would be difficult to ascertain whether or not the deceased was drunk. He said that he had never seen the fimbos that were in court, in the past. He admitted that such fimbos could occasion the injuries he saw on the deceased's body. He said that in his opinion the cause of death was severe head injury secondary to blunt trauma. He stated that blunt trauma is trauma from a blunt object.

27. **PW8 No.105593 PC Caro Kosgei** attached at Ugunja DCI told the court that on 22.03.2017 at around 6.00a.m she was in her house within Ugunja Police Station when she received a call from the DCIO Chief Inspector Nyambache informing her that a murder case had been reported and informing her that she would be the one to investigate the case. She said that the DCIO informed her that the suspect had already been arrested by the police officers who were on patrol that night that is Corporal Kimurgor and Corporal Kirwa. She said that she was also told that her aforesaid colleagues had also visited the scene and recovered exhibits being two wooden fimbos. She said that she immediately went to the station where she met some witnesses. She said that on enquiring from the witnesses as to what had happened, she told that there was some difference between the appellant Joannes Aor and the deceased Charles Otieno Omondi which resulted to the death of the said Charles on the previous day that is 21.03.2017 at around 6.00p.m. She said it was reported that the appellant used a Eucalyptus wooden stick to hit the deceased on the head and that the said Charles (now deceased) was taken to Homeground Hospital within Ugunja Township

and later referred to the Busia County Hospital where he died while undergoing treatment. She said that after recording the statement of witnesses she visited the scene but by then the scene had already been disturbed because of the rains. She however stated that she was able to see the place where the incident occurred.

28. She also arranged for a post mortem on 28.03.2017 on the body of the deceased in the presence of the deceased's father and it was established that the deceased died as a result of severe head injury. She said that she compiled the police file and forwarded it to the ODPP Siaya for directions after which she was advised to charge the appellant with the offence of manslaughter. She identified 2 sticks as the sticks/exhibits that were recovered and said that PMFI 1 was the eucalyptus fimbo that was used to hit the deceased, she produced the 2 sticks as P Exhibit 1a and 1b. She said that one of the witnesses by the name of Joseph met the deceased carrying a jembe and asked him why he was carrying a jembe then out of anger the deceased hit the side mirror of the motor cycle of Joseph thereby destroying Joseph's motorcycle. She produced the side mirror wider and the plastics and broken side mirror glasses earlier marked as PMFI 3 and 4 as P Exhibit 3 and 4 respectively.

29. On cross examination she stated that the appellant was arrested at his house at night by the police officers who were on patrol that is around morning hours after information had been relayed from the hospital on the death of the deceased. She said that the exhibits were recovered by the police officers who were on patrol and that she only saw the exhibits the following morning. She said that the fimbos were not freshly cut but they were just dry the way they were in court. She said that the stick that the appellant used to defend himself before the appellant picked the second stick that he used to hit the deceased. She said that the appellant picked the other stick from a house which was being demolished and while he was moving his arm the eucalyptus stick which is stronger than he picked it and used it to hit the deceased.

30. She stated that at Homeground Hospital the deceased was just given first aid and since the injuries were severe the deceased was then still alive, was referred to the Busia County Referral Hospital. He said that the said Charles reached the Busia County Referral Hospital after around one hour. She admitted that Lavender a witness said that the deceased hit her with a stick and then confronted Joseph.

31. She also admitted that the said Lavender said that the deceased intended to cut Oanda but Oanda dodged. She said that after the deceased was confronted by Godfrey he went back home and picked a jembe with intent to hit Godfrey but Godfrey had left. She said that since there were many people the deceased met Joseph who asked the deceased why he was carrying a jembe then the deceased attacked Joseph and as the deceased was running after Joseph he met Joannes Otieno Aor. She said that that time Joannes Aor asked the people around why the boy was disturbing people. She said that Joannes then said that the boy that is the deceased abused the appellant of being one eyed. She said that the deceased wanted to hit the appellant and broken side mirror glasses earlier marked as PMFI 3 and 4 as P Exhibit 3 and 4 respectively. She could not tell the motive for the killing of the deceased.

32. PW9 **No.72631 Corporal Isaack Kimurgor** of Ugunja Police Station testified that on 22.03.2017 at about 2.30a.m he was on Patrol duties with Corporal Kirwa and PC Katano at Ugunja area when they received a call from the report office personnel that a murder case had been reported. He said that they went back to the police station and on arrival they met the Reportee who reported that his son was assaulted by a known person then he was rushed to the Homeground Hospital where he was referred to the Busia County Hospital when his son succumbed to the injuries of the assault while undergoing treatment.

33. PW9 stated that they proceeded to Nyasanda village where they were told the suspect was residing and after they identified the house of the appellant they knocked the door of the appellant's home then the appellant's wife opened the door. He said that one of the witnesses who witnessed the assault identified the appellant to them as the person who assaulted the deceased. That the appellant and the witnesses took them to the scene of the incident.

34. He said that at the scene they saw wet ground where the witnesses said that the victim urinated on himself when he was assaulted by the appellant by being hit on the head. He said that they were also able

to recover two big sticks and the witnesses said that one of the sticks was the stick which the appellant used to hit the deceased on the head and then the said deceased succumbed to the injuries and that the other stick was used by the appellant to threaten the deceased. He said that they arrested the appellant and took him to the police station together with the two big sticks and they booked the appellant in. He said that he arrested Oanda the appellant herein and that it is the witnesses who told him that the person is called Oanda. He identified Oanda as the appellant herein and stated that he never knew the appellant before the date of arrest.

35. On cross examination he reiterated his earlier testimony and stated that at the time of the arrest he was with his two colleagues the Reportee and a young boy who witnessed the assault. He said that they proceeded to the place where they were going to effect the arrest in a motor vehicle but they left the vehicle far. He said that it is the Reportee who pointed out the house of the appellant to them but he confirmed that the Reportee was not at the scene at the time the incident occurred but the Reportee where the appellant because the court of the Reportee lives in a house adjacent to that of the appellant.

36. He confirmed that they found the appellant with his family in his house and that at the time they went in the scene the other members of public were not at the scene. He said that it is a young boy who explained the incident to him but he said that he had no idea whether or not the young boy is a witness in this case. He confirmed that he did not recover parts of a motorcycle but he said that it is the investigating officer who knows where the parts of the motorcycle were recovered from. He said that the boy told him about the jembe but they were unable to recover the jembe as the jembe was not at the scene. He confirmed that the appellant did not resist arrest.

37. He stated that they arrested the brother of the appellant after the brother of the appellant misguided as to the house where the appellant and that they only took him to the police station for interrogation. He said further that they wanted to charge the brother of the appellant with accessory after the fact but they discovered that the evidence was insufficient so the brother of the appellant was released by the OCS. He said that Corporal Kirwa was the arresting officer who recorded his statement even though he (PW9) was with Corporal Kirwa at the time of recording statement. He said that the said Corporal Kirwa is currently unavailable. PW9 confirmed that a part from arresting the appellant and recovering the exhibits he did not play any other role.

38. On being placed on his defence, the appellant gave sworn evidence and called 2 witnesses. He testified as **DW1 Joannes Otieno Aor** and stated that he was 34 years old and married to Emily Adhiambo Otieno and confirmed that he understood the charges facing him. He stated that the charges facing him are untruthful and he confirmed that he heard the testimony of the prosecution witnesses made before the trial court. He stated that none of the witnesses had a grudge against him. He said that apart from the doctor and the two police officers and the two minor witnesses Lavender and Mariam, all the other witnesses were known to him. He further told the court that Charles Omondi Otieno was not known to him.

39. The appellant testified that he woke up on the morning of 21.03.2017 then he took the cows to the field to graze. He then went to dig a pit latrine and that later when he went back home he found that the cows had not been moved from where he left them grazing. He said that when he arrived home at around 4.00pm he took the cows to take water and left to check on someone who wanted to see him. He stated that on the way he met a woman at around 5.30p.m and the woman warned him to take care because on that route there was a child who appeared to be running mad.

40. He said that the woman warned him that the child was fighting with people and he was armed with something that looked like a jembe. He went on to state that the woman also told him that the child was even beating people who had not annoyed him. He said that he continued moving and after a while the young man he had been warned about emerged from the side of a certain compound while chasing Joseph. He said that Joseph ran towards the direction where he was and the said young man by the name Charles pursued her. He said that when Joseph reached where he was he asked Joseph why Joseph was running then Joseph told him that he was going to Ugunja then he met his father on the way. He said that Joseph went on to narrate that as he was standing talking to his father the said Charles went to where he

was and by then Charles was armed with a jembe stating that he was going to hit Godi with the jembe. He stated that Joseph told him that when asked Charles if he really knew the Godi who wanted to attack the said Charles turned on him and hit Joseph's motorcycle.

41. He stated that Joseph told him that he jumped off the motorcycle and started running away as Charles pursued him. He said that Joseph went on to lament as to who was going to repair his motorcycle and yet he said that when Charles saw Joseph talking to him (DW1) Charles asked him (DW1) if he was the one who had been sent by Godi. He said that Charles then insulted him about the fact that he was mono eyed and even told him that his work was easy because he was one eyed. He said that Charles told him that he would beat him up so that he (the appellant) would be an example to Godi. He said that since the deceased threatened to cut him with the jembe and it is at the same spot that he was previously attacked, he started moving backwards to avoid being attached by the said Charles. He said that PW1 then followed him and he was forced to escape to a certain compound but on reaching the middle of the compound dogs started barking. He said that at the scene there were 15 people but he did not see his wife at the scene. He said that he did not have the two fimbos that were produced before this court as exhibit and further that the aforesaid two fimbos were not found at his house. He said that he had no idea as to where the two fimbos were found and further stated that it was not verified whether his fingers were found on the said fimbo.

42. He said that he never caused the death of Charles unlawfully. He went on to state that he was arrested on 22nd at 3.00a.m as he was at his house sleeping in the company of his wife and children. He stated that he did not resist arrest and did not obstruct the police officers in any way. He said that he was arrested together with his brother Raphael Oduor Aor but his brother was released after his brother paid a bribe of Kshs.15,000/= to the arresting officer.

43. On cross examination he stated that when Charles found him talking to Joseph and Charles threatened him, he moved backwards because he noticed that Charles was serious about his threats. He said that Charles threatened to cut him with a jembe and since he had left the ward in the recent past he feared that Charles would occasion him to go back to the ward. He said that when he moved backwards, Charles continued moving towards him and he noted that Charles was serious so he (DW1) decided to run away.

44. He said that he escaped to a certain home and as he was about to reach the middle of the compound dogs started barking. He said that he was now between the barking dogs and Charles who was moving towards him while armed with a jembe. He said that he stopped and the Charles while referring to him as one eyed told him that he (Charles) was looking for him (DW1) and that he was going to kill him (DW1) and that he was going to kill him (DW1).

45. He said that he told Charles that there was nothing he (DW1) could do because there were barking dogs behind him and he (Charles) was armed with a jembe. He said that Charles then hit him with a jembe on the right shoulder and when Charles tried to hit him again he said that he dodged by bending down then the jembe fell. He said that Charles stood up and he also stood up. He stated that on Charles realizing that he was no longer armed Charles started moving backwards and that he then feel and hit his head on the stump.

46. He said that he jumped, passed Charles and then escaped while telling Charles to remain with his devils. He said that the crowd which was at the scene kept urging people to come out and assist him because they feared that the child could kill him. He said that there were some school children among the crowd because some children were from the sports event. He said that he does not know the name of the police officer whom his father bribed and that he was not present when his brother bribed the police officer. He said that the police officer wanted Kshs.20,000 but his brother only managed to raise Kshs.15,000. He said that when Charles fell and hit his head he was moving backwards faster. He said that one can fall and hit his or her head on something.

47. In re-examination he stated that he did not fight with Charles and he stated that the other people were far because Charles was scaring people with the jembe. He went on to state that the public and the village elder never went to him to challenge as to why he had caused the death of Charles. He insisted that the

reason why his brother was not in court was because his brother bribed the police. He then stated that no one has ever threatened him.

48. **DW2 Emily Adhiambo** the wife of the appellant confirmed that she understood the charges facing the appellant. She said that she had been married to the appellant for many years and they had 3 children. She stated that on 21.03.2017 her husband the appellant was engaged in doing casual work and that she was not with the appellant. She said that she did not know Charles who died she stated further that on that 21.03.2017 she completed her home chores and after taking lunch with her children, she left in the evening to find out her chamaa/group money which she was supposed to be paid. She said that she left her home carrying her baby then aged 6 months and on the way she met two school girls who were still in school uniform running and screaming. She said that when she enquired from the school girls as to what was wrong they told her that a young man was chasing them.

49. She said that she eventually saw the young man and asked him why he was chasing the school girls. She said that the young man then slapped her as well as the baby. She said that after that she just proceeded to where she was going and that she did not tell her husband of what had transpired. She said that she was the one who rescued the two girls and further stated that she was present when the appellant was arrested at their house. She said that the police officers found them sleeping and that her husband never told her that he was being sought.

50. She confirmed that Godi was known to her and that Godi was where the young man slapped her. She said that Godi was the one who beat up the child. She stated that Joseph is known to her and that she did not see Joseph where she was slapped. She confirmed that she saw Samson Onyango at the aforesaid scene and that it is Samson who told the young man that he should listen when an adult is talking. She said that Samson Onyango thereafter left the scene. She insisted that she had told this court the truth.

51. On cross examination she stated that when Charles slapped her she did not do anything and that what she did was to leave that place because she feared that the young man could injure her. She said that she had not come to court to lie but to say the truth.

52. **DW3 Charles Onyango Awuor** testified on his relationship with the appellant and as his surety but never witnessed anything happening on 21/3/2017. He however knew the deceased Charles as a village mate.

SUBMISSIONS

53. In support of this appeal, the appellant represented by Mr Onyango Advocate made oral submissions asserting that the offence of manslaughter was not proved against the appellant beyond reasonable doubt. That the evidence by prosecution witnesses was contradictory and could not sufficiently establish that the injury inflicted by the appellant is the one that caused the death of the deceased Charles. It was submitted that PW2-PW6 were consistent that they were at the scene of the incident and stated that the deceased was violent and aggressive on a public road and that he was assaulted by PW4 before being assaulted by the appellant. That PW2 stated that PW4 hit the deceased three times with a stick and that therefore there was no reason why PW4 was not charged with the killing of the deceased.

54. That the appellant raised the defence of provocation and self defence hence he did not unlawfully kill the deceased. That the appellant was threatened by the deceased who held a jembe and that the appellant only hit the deceased with a stick which was not a revenge. That PW7 did not see any treatment notes as he carried out the postmortem of the body of the deceased. That if the deceased had not been resisted he would have done more harm as he was beating PW1 and PW2. Counsel urged the court to set aside the conviction and sentence imposed on the appellant.

55. The appeal was opposed by Mr. Ngetich Prosecution Counsel who supported the conviction and sentence imposed on the appellant contending that the ingredients of manslaughter were established against the appellant who was at the scene and who participated in assaulting the deceased. Further, that ll witnesses who were at the scene knew the appellant and testified that they saw the appellant assault the

deceased. That the cause of death was proved to have been as a result of the assault as testified by PW7 and that the postmortem report was never challenged.

56. In a rejoinder Mr. Onyango submitted that PW7 had reservations as to the cause of death hence the postmortem report was challenged.

57. On sentence it was submitted that the trial court should have called for a presentencing report.

DETERMINATION

58. I have considered the evidence for the prosecution and the defence, I have also considered the grounds of appeal and submissions for and against this appeal. In my humble view, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt that the appellant unlawfully killed the deceased. The burden of proof lay throughout the trial with the prosecution to prove the elements of the offence of manslaughter, beyond reasonable doubt. Section 202(1),(2) of the Penal Code Cap 63 Laws of Kenya provides:

> ***"Any person who by an unlawful act or omission causes the death of another person is guilty of the offence term manslaughter.***
>
> (***2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by the intention to cause death or bodily harm.***

59. Section 205 of the Penal Code is the penal section for any person who commits the felony of manslaughter. Such person is liable to be imprisoned for life.

60. In this case, from the evidence of the prosecution witnesses, and the postmortem report produced in evidence as an exhibit, it is not in dispute that the victim of the alleged offence died and that he died from severe head injuries which were occasioned by beatings that he received on 21/3/2017 at about 6.30 pm. The appellant denied assaulting the deceased but in this appeal, he openly admitted assaulting the victim save that he claims that there was no proof that the injuries inflicted by him were the cause for his demise and goes ahead to lament that PW4 also assaulted the deceased hence he should also have been charged with the offence. he also claims that he acted in self defence and extreme provocation after the victim became violent and attacking him and other people on the road.

61. It is trite law that every homicide is unlawful unless authorized by law or excusable under the law. That proposition was expounded in **Sharm Pal Singh [1962] EA 13, see also Guzambizi Wesonga v Republic [1948] 15 EACA 63** where the court held:

> ***"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."***

62. The real point of this case turns up whether or not legal provocation as defined under section 208 (1) of the Penal Code was disclosed to trigger the actions taken by the accused. In order to answer this question it is appropriate at this stage to set out the law relating to provocation. Section 207 of the Penal Code provides:

> ***"When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter."***

63. Section 208 (1) of the Penal Code defines the term provocation as follows:

"The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

64. This question on provocation and provisions of section 208 (1) of the Penal Code have been a subject of interpretation and discussion in our courts in several cases. In the earlier case of **Republic v Hussein S/O Mohamed [1942] EACA** at pg 66 the Court of Appeal Eastern for Eastern Africa held:

"When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation."

65. In **Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR** the court stated that, ***"for provocation to exist the following two conditions must be established:***

(1) The subjective condition that the accused was actually provoked so as to lose his self-control and

(2) The objective condition that a reasonable man would have been so provoked."

66. In deciding a similar situation on provocation the Court of Appeal in **Elphas Fwambatok v Republic [2009] eKLR** held:

"In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims....."

67. In **Mabanga v Republic [1974] EA 176** the court further held interalia:

"The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter.....

We have on our own revisited the content of section 208 of the Penal Code and construed it. To us content of provocation means any wrongful act of insult of such a nature as to be likely when done to an ordinary person.....To deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

68. The question to be answered in this case is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did to the deceased? Section 17 of the Penal Code provides:

"Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law. Those principles have been clearly elucidated in the persuasive authorities in Palmer v Republic [1971] AC 814 and in Republic v Mcinnes 55 Cr. Appeal

551 where the Privy Council and the Court of Appeal respectively stated as follows:

> ***"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."***

69. The Court of Appeal in a similar situation discussed the doctrine of self-defence in **Mokwa v Republic [1976-80] 1KLR 1337** and held:

> ***"Self-defence is an absolute defence even on a charge of murder unless; in the circumstances of the case the accused applies excessive force."***

70. In this case, it is not in dispute that Charles Omondi Otieno is deceased and that he died on the 21.03.2017. It is further not in dispute that the appellant who is alleged to have caused the death of Charles Omondi Otieno met with the appellant on that 21.03.2017 and there was some fear of confrontation between the appellant and the said Charles Omondi Otieno. PW1, PW2 and PW5 were at the scene and saw what happened. They all stated clearly that the appellant went and picked a fimbo(club) came with it and after disabling the deceased who was armed with a jembe and was violent, the deceased fell down and that the appellant then embarked on hitting the deceased on the head thrice using the fimbo-club, not a stick. As correctly observed by the trial court, at no point did PW7 the doctor who performed the postmortem on the body of the deceased state that he found that the deceased died as a result of the injuries he allegedly sustained on his legs. The said PW7 did not see any injuries on the deceased's legs but of the deceased head and abrasions on the deceased knees. It is therefore fallacious for the appellant to claim that PW4 also hit the deceased using a stick and that he should have been charged with the crime as well. There was no evidence to suggest that the deceased died as a result of injuries on his legs. The witnesses were clear that PW4 only used a stick.

71. The eyewitnesses who testified witnessed the incident in broad day light, from a close position and he had ample time to view the offender. The testimony of PW1 was further corroborated by PW2. The testimony of PW2 is consistent with that of PW1 in terms of the identity of the offender, the time of the offence, the weapon that was used to hit the said Charles and which part of Charles body was hit. It is evidence from PW2's testimony, that he viewed the offender from a close position in broad day light, and that there was nothing which could have impeded his proper identification. He confirmed in his testimony that it is immediately after Charles' head was hit by the appellant using a fimbo that the said Charles became incapable of walking or even sitting without being supported but immediately prior to being hit with the said fimbo he could walk, talk and even ran because he explained that prior to Charles being hit, Charles had chased him (PW2) while armed with a jembe. The testimony of PW1 and PW2, was further corroborated by PW5. The said PW5 though a minor was taken through voire dire examination and PW5 stated that the said Charles held Godi and wanted to beat Godi then Charles went to collect a panga from their home, while corroborating the testimony of PW2, PW5 stated that instead of Charles availing a panga Charles went back to the scene while armed with a jembe and PW2 intervened by asking the said Charles as to what was wrong, while further corroborating the testimony of PW2, PW5 stated that at that point Charles tried to hit PW2 with the jembe but PW2 dodged and ran away and that Charles went ahead and smashed the side mirror of PW2's motorcycle.

72. PW5 while further corroborating the testimony of PW2 stated that the said Charles pursued PW2 and in the course of doing so he met the appellant. PW2 stated in her testimony that the said Charles tried to hit the appellant moved and he backwards. It was the testimony of PW5 that the appellant went to their home picked a fimbo which he then used to hit Charles head thrice.

73. From these testimonies it is evident that the appellant had a chance to escape from the said Charles but instead of escaping like PW2 and PW5 he armed himself again and went to the scene where he hit Charles' head not once but twice.

74. In my humble view, the appellant cannot claim that he hit the deceased in self defence because he had a chance to escape from the scene but instead he went and armed himself again and went to the scene where he hit Charles as stated by PW1 and PW5. According to PW1, before the appellant hit Charles' head, the appellant had confronted Charles while asking him why he was disturbing people then there was a bit of a struggle between the appellant and Charles but Godi separated them. He then stated that after that he saw the appellant hitting Charles' head with a fimbo. Thus according to PW1's and PW5's version of what transpired, the appellant had sufficient opportunity to leave the scene and he left the scene, armed himself and then went back to the scene.

75. Indeed, both PW2 and PW5 were at the scene and they were both provoked by the said Charles but they opted to escape and not to retaliate. Self defence as the term itself suggests, is defence of self that is the use of force on threat to use force to defend oneself. The appellant in his defence denied ever hitting the complainant but the consistent testimony of the prosecution witnesses is that he was the one who hit the head of Charles with a fimbo not just once but two times.

76. Although the trial magistrate discredited the evidence of PW6, even without that evidence, the evidence of PW1,2 and 5 is sufficient to place the appellant at the scene of crime and it showed clearly that it was the appellant who assaulted the deceased on the head using a fimbo-club thereby inflicting fatal injuries on the victim.

77. The idea that PW4 could have assaulted the deceased as I have stated was brought about by the defence but there was no evidence that the said witness assaulted the deceased on the head. PW4 was clear in his testimony that he found the deceased violently chasing the school girls and that the deceased on being questioned why he was behaving furiously, wanted to fight PW4 but he avoided the deceased and went away. Although PW6 stated that Godi-PW6 used a stick to hit the deceased on the leg, there was no evidence suggesting that the deceased suffered any fatal injuries on the leg. Furthermore, Godi only used a stick to beat the deceased on the leg in a bid to separate the deceased and the appellant who appeared to be fighting.

78. The appellant denied assaulting the deceased but there is overwhelming evidence from PW1.PW2 and PW5 on the role that the appellant played at the scene. The defence witnesses' evidence could not dislodge that evidence as they did not witness the assault. There is no question of mistaken identity of the appellant as the assailant of the deceased.

79. PW7 the doctor who conducted a post mortem on the body of the deceased Charles Omondi Otieno on 28.03.2017 confirmed that the deceased had an abrasion on the left anterior knee and the right frontal region of the head. He further stated that externally, there was a swelling on the frontal parietal region of the head but there was no open wound. He confirmed that the affected system was the heard and nervous system. He explained that on the head there was frontal parietal subdural haematoma that is bleeding between the scalp and the skull bone and there was also a linear fracture at the same site which was slightly depressed. He further stated that there was underlying epidural haematoma that is bleeding between the inner skull bone and the covering of the brain tissue. He concluded that the cause of the death was severe head injury secondary to blunt trauma to the head.

80. From the above testimony of PW7 and contrary to the submissions by the appellant's counsel, there is nowhere the doctor doubted as to what could have caused the death of the deceased. He was clear that the affected area was the head and nervous system, which evidence was consistent with the beating the

deceased received as narrated by PW1.2 and 5.

81. I further find that the allegation by the appellant's counsel that no treatment notes were relied on by PW7 in carrying out the postmortem on the deceased and that there may have been delay in taking the deceased to hospital leading to his death is not merited. PW7 gave a proper explanation as to why he did not dwell on the treatment notes of Charles and did not collect samples from the deceased's digestive system.

82. He explained that since the cause of Charles' death was obvious, there was no need to conduct any further tests. The defence counsel appeared to be suggesting that the said Charles was drunk. PW7 stated that he could not ascertain whether the deceased prior to his death was drunk because by the time he examined the deceased's body the body had already been embalmed and it could be difficult to ascertain whether or not he was drunk.

83. It is possible that the deceased was drunk and that is why he was behaving abnormally the way he did, chasing school girls and attacking anybody on site. He even smashed the parts of the motorcycle for Joseph who later assisted in taking him to his father's house and to Homeground Hospital. However, to disarm a drunken person is not by hitting the head. As earlier stated, the appellant had the opportunity to escape from the scene and leave the deceased alone or to disable him by any other means other than hitting his head. The appellant in my humble view used excessive force to disable the stubborn victim.

84. PW2 explained the unique factors of the fimbo that the appellant, according to him used to hit Charles' head. He stated that the fimbo had a bent nail and he confirmed that the fimbo that PW8 produced as exhibit had a bent nail on it, as observed by the trial magistrate.

85. The trial magistrate who had the opportunity to see and hear witnesses as they testified believed that the prosecution witnesses who were eyewitnesses, were credible and consistent and that despite the minor discrepancies in some of the witnesses, those discrepancies explaining a similar transaction were honest differences which are likely to exist because the powers of observation, expression and the memory of different persons are different.

86. The defence counsel in his submissions on appeal and before the trial court claimed that the death of the said Charles was occasioned by negligence on the part of the people who were taking him to seek medical attention. He alleged that PW7 said that the delay in seeking medical attention contributed to the death of the deceased. I have considered the testimony of PW7 especially and note that the witness only responded to a question in cross examination that "***... yes the delay in seeking medical attention could were contributed to his death."*** The use of the word could is indicative of a possibility but not that the witness was saying that that is what caused the deceased's death. The doctor was answering to a question which could have been a leading question and more importantly, the said witness who was the doctor was emphatic that in the instant case, he was certain that the cause of death was severe head injury secondary to blunt trauma. Answers in cross examination cannot form the basis of a defence for the appellant. The Supreme Court of Kenya in **Christopher Odhiambo Karan v David Ouma Ochieng & 2 others [2018] eKLR** cited with approval the decision by the Court of Appeal in **John Wainaina Kagwe Vs Hussein Dairy Limited Mombasa Court of Appeal 215/2010** and stated:

> ***"In the Court of Appeal decision of John Wainaina Kagwe Vs Hussein Dairy Limited Mombasa Court of Appeal 215/2010 (Githinji, Makhandia and Murgor JJA), the Court of Appeal was categorical that "answers in cross-examination cannot form a basis of a party's case or built a defence. They must tender evidence in support of the allegation."***
>
> ***[87] This Court (Concurring Opinion by Njoki Ndungu SCJ) has also defined the significance of cross-examination in the Kidero case as follows:***
>
> ***"295] Generally, the purpose of cross-examination as elucidated in Cross & Tapper on Evidence, (Oxford University Press, 12thed, 2010, page 313), is: first, to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose***

behalf the cross-examination is conducted; and second, to cast doubt upon the accuracy of the evidence-in-chief given against such party.

[297] In the Indian High Court decision of **Delhi R. K. Chandolia v Cbi &Others, 225/2012** the Court held that:

"The "relevant facts" in cross examination of course have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness, and such questions are permissible in the cross examination as per Section 146 and 153 but, questions manifestly irrelevant or not intended to contradict or qualify the statements in examination-in-chief, or, which do not impeach the credit of a witness, cannot be allowed in cross examination. It is well- established rule of evidence that a party should put to each of a witness so much of a case as concerns that particular witness. … While allowing latitude in the cross examination, court has to see that the questions are directed towards the facts which are deposed in chief, the credibility of the witness, and the facts to which the witness was not to depose, but, to which the cross examiner thinks, is able to depose. It is also well-established that a witness cannot be contradicted on matters not relevant to the issue. He cannot be interrogated in the irrelevant matters merely for the purpose of contradicting him by other evidence. If it appears to the Judge that the question is vexatious and not relevant to any matter, he must disallow such a question. Even for the purpose of impeaching his credit by contradicting him, the witness cannot be put to an irrelevant question in the cross examination.

However, if the question is relevant to the issue, the witness is bound to answer the same and cannot take an excuse of such a question to be criminating. That being so, it can be said that a witness is always not compellable to answer all the questions in cross examination. The court has ample power to disallow such questions, which are not relevant to the issue or the witness had no opportunity to know and on which, he is not competent to speak. This is in consonance with the well-established norm that a witness must be put that much of a case as concerns that particular witness." [Emphasis added]"

87. The trial magistrate also analyzed the defence of the appellant and his witnesses DW1 and 2 and correctly concluded that the two defence witnesses were not at the scene of crime hence they were not in a position to confirm whether or not the appellant committed the offence which he was charged with.

88. The appellant in his own defence stated that all witnesses except the police officers and the minors were known to him and that there was no preexisting grudge between him and any of the witnesses for the prosecution. Accordingly, I find that there is no reason why the prosecution witnesses could have framed the appellant with such an offence where a precious life was lost.

89. Having considered the circumstances in which the deceased met his death at the hands of the appellant, in my view, iam in agreement with the finding and holding by the learned trial magistrate that the appellant indeed used excessive force in the circumstances of this case. He cannot rely on the defence of self defence or provocation as absolute defenses to get away with the conviction for the offence of manslaughter.

90. Iam satisfied on the evidence adduced before the trial court for the prosecution and as analyzed deeply by the trial magistrate that the conviction of the appellant for the offence of manslaughter was safe and sound. The appellant unlawfully killed the deceased Charles, albeit there was no evidence that he planned to eliminate him. In my view, the appellant overreacted to the situation at hand. He dealt with the victim in a ruthless manner not deserving of such action or reaction. In **Manzi Mengi v. Republic [1964] E.A. 289 at P. 292** the Court of Appeal for Eastern Africa in dealing with the issue of self defence stated:-

"On all of these findings we find it difficult to conceive a clearer case of killing in self defence, subject only to consideration of the learned Judge's finding that excessive force was used. On that question the learned judge did not go into detail but stated that the assessors' view that the appellant acted in self defence was right up to a point but, " I do not think the accused should be

acquitted because of the degree of force used by him."

91. In **David Lentiyo v Republic [2006] eKLR the Court of Appeal stated:**

> ***"The law to be applied in relation to self defence is the common law of England (see S. 17 of the Penal Code, Cap. 63 of the Laws of Kenya). Dealing with a similar provision in the law of Tanganyika, this court said in Selemani v Republic (1) [1963] E.A at p. 446):***
>
> ***"Under English law, there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter: R. v. Biggin (2), R. v. Howe (3), Robi v. R. (4) (in relation to defence of property)".***

92. In the above cited case the Court of Appeal emphasized that:

> "***in a case of self defence, if an accused finds he is in evident danger from his opponent, he must retreat from the danger but, if he finds that he cannot retreat further, then he can use force to defend himself. That was what was held in the recent decision of this Court in Musyoka and Others v Republic [2003] 1 E.A in which the decision of Mengi v Republic (supra) was followed.***

93. The evidence on record did not demonstrate that the appellant was in eminent danger from his opponent the victim

94. For the above reasons, I find and hold that this appeal against conviction is devoid of any merit. The same is hereby dismissed.

95. As regard the sentence that was imposed, sentencing entails exercise of discretion by the trial court and this Court is slow to interfere with the exercise of that discretion, unless it is satisfied that it was not exercised judiciously. In **Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 (Nakuru)** the Court of Appeal stated its approach thus:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

96. The trial court was told that the appellant was a first offender. The appellant mitigated before he was sentenced to serve ten years imprisonment.

97. The sentence meted out was lawful as the maximum is life imprisonment upon conviction for manslaughter. However, having considered the circumstances under which the offence was committed

with the deceased being an aggressor, despite the unfortunate loss of life, I exercise discretion and order for a pre resentencing report to be filed by Siaya County Probation Officer, on the appellant's antecedents to guide the court on whether this court should interfere with the sentence imposed on the appellant who pleaded for leniency in his mitigation saying:

> ***"The appellant is remorseful and he is genuinely sorry for the unfortunate result of his conduct. It is unfortunate that a life was lost and he is genuinely sorry both to the court and the family of the deceased. The appellant is aged 33 years. He is married with 3 children. He is a young family and he is the sole bread winner the youngest child is 6 months old. May you consider that this young family deserves a chance to be looked after? The appellant has been very compliant with attending court and he has personally undertaken to be a good citizen. As you met out your sentence may you consider a non-custodial sentence? Because even as much as he deserves to be punished as an offender his well-being and future should be considered.***

98. Resentencing on 18/2/2020

Orders accordingly.

Dated, signed and delivered at Siaya this 20th Day of January, 2020

R.E.ABURILI

JUDGE

In the presence of:

Mr. Onyango Counsel for the appellant

Mr. Okachi SPPC for the Respondent

CA: Brenda and Modestar.