**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 78 OF 2019**

**NWO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the sentence of Siaya Principal Magistrate at Siaya, Criminal Case Number 323 of 2018, by Hon. James Ong'ondo, on 25th day of October, 2019)**

**JUDGMENT VIA SKYPE**

1. The appellant herein **NELSON WAFULA OUMA** was convicted and sentenced to serve life imprisonment on the 25th day of October, 2019 for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, Laws of Kenya.

2. Particulars of the offence are that on the 14th day of January 2018 at around 5.00pm at [particulars withheld], Ndere Sub Location, and Gem Sub County within Siaya County he murdered one EON.

3. The appellant pleaded guilty and the prosecution called eight witnesses who proved the case against the appellant beyond reasonable doubt. The appellant was convicted of the offence charged and sentenced to serve life imprisonment.

4. Aggrieved by the sentence imposed on him, the appellant filed this appeal through his advocate Mr. Oduol Achar setting out the following grounds of appeal:

> **1. That the Learned Trial Magistrate totally misunderstood and or failed to appreciate the accused person's mitigation and facts thereof and hence thereby coming to a wrong conclusion on the same.**
>
> **2. That the sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances.**

5. The appeal was canvassed by way of written submissions with oral highlights by Mr. Oduol counsel for the appellant. The Respondent represented by Mr. Okachi Senior Principal Prosecution Counsel left it to the court to make a determination.

6. On 2/3/2020 after the hearing of the appeal, I ordered for a social inquiry report on the appellant but owing to the Covid-19 situation in the country, the probation officers were unable to reach the appellant in prison and to interview his relatives and the relatives of the deceased. I shall therefore proceed to determine the appeal on its own merits noting that it is an appeal against sentence only.

7. In support of the appeal, in both the written and oral submissions, the appellant's counsel submitted that at pages 25 and 26 of the record of appeal, the accused, (now appellant) candidly told the court the manner in which the unlawful unfortunate event occurred that led to the death of the accused person.it was submitted that in his defense the appellant was remorseful and acknowledged that he was linked with the deceased person's death. That he also explained his condition, and elaborated to the court that he is sick and even suffering from HIV Aids.

8. Further submissions were that at page 35 of the record of appeal there lies the mitigation of the appellant in line with his resourceful defence which the court inadvertently overlooked. It was submitted that the appellant made candid mitigation although he was unrepresented.

9. Reliance was placed on **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR where the Supreme Court** held that the mandatory death sentence prescribed by Section 204 of the Penal Code was unconstitutional. Counsel urged this court to be guided by the spirit and letter espoused in the above case and reduce the sentence for the appellant contending that life imprisonment was too harsh for a first offender.

10. It was further submitted that arising from the decision of Muruatetu, it is clear that the emerging jurisprudence is that court's hands should no longer be tied by mandatory nature of a prescribed sentence; and that Courts should be guided by Sentencing Policy Guidelines, 2016.

11. Counsel further submitted that before considering which appropriate sentence to impose guided by the sentencing guidelines, courts must also consider mitigating circumstances and that the decision in Muruatetu considers mitigating factors to constitute an element of fair trial enshrined in Articles 25 and 50 of the Constitution.

12. Counsel submitted that if courts were to continue being bound by prescriptive nature of minimum sentences, mitigation would be rendered superfluous because at the end of the day, it would matter less if a convicted person spends a whole hour giving mitigating circumstances or just 30 seconds to simply pray for leniency. Invariably a court would record the mitigating circumstances and hand in the minimum sentence even if it feels that the prescribed minimum is way too harsh in some given circumstances such as the circumstances obtaining in this case.

13. On the second ground of appeal, counsel for the appellant submitted that the trial court imposed on the appellant sentence that is manifestly harsh and excessive in the circumstances. Reliance was placed on **Ogolla s/o Owuor vs R, (1954) EACA 270**, on the principles that an appellate court will apply in exercising discretion to review or alter a sentence imposed by a trial court.

14. In the instant appeal, counsel submitted that at pages 25 and 26 of the record of appeal, the appellant at paragraph 2 informed the court that the deceased person accosted him and inquired why he was walking with his wife and as such he began a fight that ultimately led to the unjustified death. Most importantly, that the appellant was hit by the deceased and in self-defence, he acted in excessive force that was unlawful and later the deceased died. That from the scuffle, the appellant also sustained serious injuries and that he was not in good health as his jaw was broken, his back had a serious injury and most unfortunate he is a HIV Aids victim.

15. Counsel therefor submitted that had the court considered critically the defence of the appellant herein, the genesis of the scuffle that led to the deceased death, his mitigation, his cooperation in attending the court throughout the whole trial, his health status during trial; and the fact that he was truthful to state that he was the one linked directly with the death of the deceased, the court would not have arrived at the decision, that is the sentence it meted out on him.

16. Counsel urged this court to allow this appeal, set aside the judgment of the Subordinate Court on sentence and make any other orders as it deems fit to meet the ends of justice.

**DETERMINATION**

17. I have considered the appellant's appeal against life sentence imposed on him upon conviction for the offence of manslaughter. I have also considered the trial court record where albeit the appellant denied committing the offence when he took the plea, in his defence he readily admitted that indeed he unlawfully killed the deceased after a fist fight only that the deceased is the one who initiated the fight by attacking the appellant claiming that the appellant was having an affair with the wife of the deceased *"(walking with his wife);"*and that the appellant was only acting in self-defence as a result of which he also sustained serious injuries including a broken jaw.

18. I have also considered the mitigations by the appellant before the trial court where he appeared unrepresented, and the submissions by his counsel in support of this appeal against the sentence imposed on him.

19. Section 202 of the Penal Code provides creates the offence of Manslaughter and provides:

> **Manslaughter:**
>
> **(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed 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 an intention to cause death or bodily harm.**

20. Punishment for the offence of manslaughter is stipulated in section 205 of the Penal Code and it provides: **Any person who commits the felony of manslaughter is liable to imprisonment for life.**

21. This being a first appeal against the sentence only, it is important to determine the circumstances under which a first appellate court interferes with the sentence by the trial court. The principles guiding interference with sentencing by the appellate Court were set out in **S vs. Malgas 2001 (1) SACR 469 (SCA**) at para 12 where it was held:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

22. Further in **Mokela vs. The State (135/11) [2011] ZASCA 166,** the Supreme Court of South Africa held:

**"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

23. In **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, the Court of Appeal for Eastern Africa held:

**"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

24. In **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated:

**"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

25. In **Bernard Kimani Gacheru v Republic [2002] e KLR** the Court of Appeal further stated:

**"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 states is shown to exist."**

26. Further in **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** it was stated:

**"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.**

27. The life sentence imposed on the appellant is lawful as it is stipulated in section 205 of the Penal Code, being the maximum penalty where one is convicted for the offence of manslaughter.

28. The question therefore is whether this court should interfere with the said sentence taking into account the authorities cited above on the jurisdiction of the appellate court in matters sentence. The Supreme Court of Kenya (SCK) held as follows concerning mandatory death sentence in a conviction for murder, in the **Francis Karioko Muruatetu &Another v Republic [2017] e KLR**:

**"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case.**

**Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution, an absolute right… Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the penal code, it becomes clear that the section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically in Articles 25(c) 27, 28, 48 and 50(1) and 2(9)."**

29. The objectives of sentencing as stipulated in the Sentencing Policy Guidelines, 2016 are:

**i. Retribution***: To punish the offender for his/her criminal conduct in a just manner.*

**ii. Deterrence***: To deter the offender for his/her criminal conduct in a just manner.*

**iii. Rehabilitation***: To enable the offender reform and discourage or prevent him from committing similar offences.*

**iv. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Further to promote sense of responsibility through the offender's contribution towards meeting the victims' needs.**

**v. Community protection***: To protect the community by incapacitating the offender.*

**vi. Denunciation:** ***To communicate the community's condemnation of the criminal conduct.***

30. It is true that section 205 of the Penal Code applies the phrase ***"is liable upon conviction to imprisonment for life."*** **Sir Henry Webb**

**C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words ***"liable to:"***

> **"The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

31. In **Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement De Lestang V.P.** stated:

> **"It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

32. Similarly, in **D W M vs. Republic** the Court held:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

33. In the instant case, upon conviction, the prosecutor stated that accused was a first offender. In mitigation, the appellant stated:

> **"Iam very sick, I cannot bend my back. My lower jaw was broken. I cannot eat. Iam HIV positive"**

34. The trial magistrate then remarked:

> **"Mitigation is noted. But the accused ought to know that somebody lost his life as a result of his action. The accused in mitigation is just talking about himself He is not remorseful or even show any regret for the death of the deceased. I sentence the accused to life imprisonment. 14 days right of appeal."**

35. Examining the circumstances under which the deceased lost his life, following a fight with the accused as testified by the prosecution witnesses who saw what happened, and as stated by the accused in his defence, the cause of the fight was an allegation by the accused that the deceased attacked him asking him why he was walking with his wife meaning he was having an affair with the wife of the deceased.

36. As correctly pointed out by the trial magistrate, a reasonable person should have left the scene without fighting the deceased. It would have been a defence to the accused if he ran away and the deceased followed him to the place he would have sought refuge.

37. The learned trial magistrate then proceeded to sentence the appellant to life imprisonment which is the maximum sentence for manslaughter. However, the appellant was a first offender, and although he concentrated on his own health at the time of mitigating, this court appreciates the fact that he was unrepresented and having accepted in his defence that he was involved in the death of the deceased via a physical fight, he may not have understood clearly that mitigation also involved. The evidence on record does not show that the appellant used any weapon to injure the deceased, apart from the fist fight and the fact that the appellant overwhelmed the deceased and hit his head on the ground thereby causing blood clot in the brain. The deceased died almost immediately after the fight. He never reached the hospital. There is no contrary evidence that he was the aggressor leading to a fight.

38. In **Charo Ngumbao Gugudu vs. Republic [2011] eKLR,** the Court of Appeal held:

> **"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was "completely mentally disabled."**

39. In my humble view, the life sentence meted out to the appellant was clearly excessive in light of the circumstances under which the offence was committed and the mitigations by the appellant which were reiterated in the submissions in support of the appeal.

40. The appellant was also attacked by a mob who administered mob injustice on him injuring him seriously as per the treatment notes on record. He suffered a broken jaw and a painful back. He also stated that he was HIV positive. That is no excuse to get a lenient sentence. However, having considered the circumstances of this case it is my view that 7 years imprisonment is sufficient punishment and deterrence.

41. In the end, I hereby set aside the life sentence imposed on the appellant herein and substitute the same with prison term of seven years imprisonment. The said period will include the days he was in custody before he was released on bail, upon his arrest on 15/1/2018.

42. Orders accordingly.

**Dated, signed and Delivered in Siaya this 5th Day of May, 2020 via Skype due to the Covid 19 situation.**

**R.E.ABURILI**

**JUDGE**