REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 9 OF 2018

JOSEPH WAINAINA KURIA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the original conviction and sentence of Hon. A. Mwangi – SRM

dated 14th February, 2018 at the Senior Principal Magistrate's Court

at Kigumo in Criminal Case No. 1101 of 2016)

JUDGEMENT

1. Joseph Wainaina Kuria (appellant) was charged with **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. That on the 16.12.2012 at about 1400hrs at Kirere Trading Centre in Kigumo Sub County within Murang'a County, he unlawfully killed Peter Kamau Irungu.

2. In a judgement dated 14.2.2018, the appellant was found guilty, convicted and sentenced to life imprisonment.

3. Aggrieved by conviction and sentence, the appellant lodged this appeal raising the following grounds in his Petition of Appeal;

> **1. That I pleaded not guilty to the charge.**
>
> **2. That the initial charge was Murder and the matter was before the High Court Murang'a and a nolle prosequi was entered after about 4 years in capital remand.**
>
> **3. That the key witnesses who claimed to be near the scene of the alleged incident gave their evidence which differed mostly on what was on before and after the alleged incident.**
>
> **4. That the two key witnesses testified before the court and each of them testified contrary to what was in his "witness statement" and it is my prayer that the High Court be pleased to order for a copy of the witnesses statement for confirmation.**
>
> **5. That the arresting officer's evidence was doubtful as he was the only officer in the post and could not leave the post alone to arrest a suspect and yet it was not booked in the OB since the same was not brought before the court.**
>
> **6. That the arresting officer claimed that he received the death report of the deceased at 1400hrs and there is evidence in record showing that the deceased was referred to Githumu at around 1600 hrs.**

4. The appeal was canvassed by way of written submissions by the appellant with an oral response by Mr. Waweru for the DPP.

5. This being a first appeal, I am alive to the duty of this Court to re-evaluate the evidence adduced at the trial court and reach my own findings all the while aware that I neither saw nor heard the witnesses. This is in line with the legal principle now entrenched in our Law found in **Okeno –vs- Republic (1972) EA 32** where at page 36 the court stated;

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975] E.A 336). 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 courts finding 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 –vs- Sunday Post (1958) E.A 424."*

6. To that end, a recap of the evidence at the trial court becomes necessary.

7. In a nutshell the prosecution's case is that the deceased was stabbed by the appellant on 16.12.2012 at 1.00 p.m at Kirere Market. Peter M. Mwangi and Ronald Kamau saw the appellant in the act. The deceased fell and bled. He died before reaching Githumu hospital. APC Raphael Kinuthia saw the deceased bleeding when the deceased approached him at AP Post. He went to the scene. He found the appellant who had a knife. He disarmed him and arrested him. He identified the knife in Court. A report from government chemist confirmed that blood on the recovered knife marched that of the deceased.

8. In defence the appellant testified that he was only arrested by a police officer called Kingori with whom he had differed before over a girl friend. He denied the offence.

9. My re-evaluation of the evidence leads me to only one conclusion that the case against the appellant was watertight and the conviction by the trial court was thus based on cogent, reliable and corroborated evidence.

The appellant was seen in the act by PW 2 and PW 3. He was arrested near the scene. The knife recovered from him had blood which matched the deceased's blood as per the report from government chemist.

10. The defence put up by the appellant is hollow. He alleges a grudge against the arresting officer over a girl friend – a grudge he never raised when the officer was testifying. He does not address the evidence of the eye witnesses PW 2 and PW 3. The prosecution's evidence remains firm even on cross examination.

11. Am satisfied that the appellant's conviction was safe.

The appeal on conviction has no merit and is dismissed.

12. The appellant was sentenced to life imprisonment.

> **Section 205 of the Penal Code provides;**
>
> **"S 205**: *Any person who commits the felony of manslaughter is liable to imprisonment for life.*

In sentencing the appellant, the Court observed he acted out of no provocation. It was the court's view that the appellant should be held to account for taking away the deceased's life.

13. The approach of the court regarding appeals against sentence was well expressed in **Benard Kimani Gacheru v Republic Cr. App No. 188 of 2000** where the court stated;

> *"It is now settled law following several authorities by this Court and 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 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."*

14. Bearing these principles in mind, it is my finding that the sentence herein is manifestly excessive in the circumstances. I am however persuaded that a deterrent sentence is appropriate.

15. Consequently, I will set aside the sentence of imprisonment for life imposed by the trial court and substitute thereof a sentence of 25 years imprisonment to run from the date plea was taken at the trial court being 21.7.2016.

Dated, Signed and delivered at Murang'a this 11th day of November, 2020.

A.K NDUNG'U

JUDGE