



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 86 OF 2017

(FORMERLY ELDORET HCCRA NO. 107 OF 2016)

ABABULAS CHRISTOPHER KOSGEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in criminal case no. 721 of 2016 in the Principal Magistrate's Court at Kabarnet delivered on the 19th day of September, 2016 by Hon. S.O. Temu (PM)]

JUDGMENT

1. The appellant pleaded guilty to the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code. He, therefore, appeals from the sentence of 10 years imprisonment only.
2. The appellant states that he regrets the death of the deceased; that he was drunk when the incident happened; and that he had disagreed with the deceased.
3. The DPP urged that the killing was intentional as the appellant had hit the deceased with a mattock on the head and not on any other part of the body, and that there had been no provocation from the appellant to hit the deceased and it was the deceased who had given his mattock to the appellant after the latter had asked for it.
4. Provocation is only a defence in the circumstances set out in section 207 and 208 of the Penal Code as follows:

207. Killing on provocation

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, is guilty of manslaughter only.

208. Provocation defined

(1) 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 a 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.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who

knows of the illegality.

5. Intoxication, to which the appellant alleges, may be used to establish whether there was intention as prescribed in section 13(4) of the Penal Code as follows:

6. Upon review of the evidence presented by the prosecution and admitted by the Defence before the trial Court, it is not clear that it was a case of murder as the defences of provocation and intoxication may apply in any event. The facts as presented by the prosecution and admitted by the appellant were in material part as follows:

“On the 3.8.16 the deceased had gone to his farm and note that some animals had grazed on it. He went to accused’s home to inquire while in company of his children.

They had found the accused digging a hole to his animals and the deceased asked the accused for the mattock he was using.

When he looked at the mattock he found that it was his.

The deceased left with the mattock and the accused followed him and he requested for the mattock.

As the deceased walked away the accused followed him and informed him that he wanted to return the mattock.

The accused instead to giving the deceased the mattock, he hit him on the head and the deceased fell down and the accused picked a stone and threatened to hit one of the deceased’s son.

The accused sensed danger and he ran away. The deceased’s sons ran after him and they arrested him.

An alarm was raised and the area chief visited the same and look the body and the accused was arrested.”

7. In any event, the DPP did not seek to enhance the sentence and the appellant was, consequently, not warned of the possibility of enhancement of sentence and put to election as to the pursuit of the application. The Court does not, therefore, find it proper to exercise powers under section 354(3) (b) of the Criminal Procedure Code to enhance the sentence.

8. In accordance with **Wanjema v. R** (1971) EA 493, 494 the appellate Court may only interfere with the sentence passed by the trial Court in circumstances set out as follows:

A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court’s interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449.

I do not find that the trial Court erred in any way.

ORDERS

9. Accordingly, for the reasons set out above, the Court does not find any merit in the appeal and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF JANUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Assistant DPP for the Respondent.