REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 185 OF 2017

PAUL EYANAI NAKWANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 109 of 2016 delivered on the 29th day of July, 2016 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for 8 years for offence of manslaughter contrary to section 202 as read with 205 of the Penal Code. On 29/7/16 at the time of this judgment, the appellant has therefore served 2 years and six months of the sentence. With remission under Section 46 of the Prison Act, the accused 8 years sentence becomes 5 years 3 months. At the time of the sentence, the appellant had been in 6 months of pre-trial detention since his arrest on 23/1/2016. He has cumulatively been in custody for a period of 3 years and 2 weeks now.

2. The appellant did not challenge the conviction and by written submission filed in this court, he only prayed that the court *"allow me a non-custodial sentence"* and a *"lesser sentence"*. The DPP opposed the appeal stating that the trial court had been lenient in sentencing the appellant to imprisonment for 8 years when he was liable for manslaughter to imprisonment for life, and urged that the trial court had taken due consideration of the negative probation officer's presentence report filed before the trial court.

3. Consistently with the duty of the 1st appellate court (See ***Okeno v. R (1972***) EA 32). The court has considered the evidence presented before the trial court and found that the appellant was guilty of unlawful killing of the deceased following a quarrel after a drinking spree. While intoxication is only a defence in the circumstances set out in section 13 of the penal code, the fact that the appellant and the deceased were drunk when quarreled and fighting ensued did diminish the appellant's blameworthiness and responsibility.

4. The eye-witness account of PW1 at whose home the deceased and the appellant had been drinking demonstrated lack of intention to kill and the diminished responsibility in the circumstances of a fighting driven by drinking as follows:

> *I know the accused herein Paul as he is my neighbor. Samuel Lebon the deceased was my neighbor.*
>
> *On 20.1.16 at 7 I was at home when I heard noise outside. I went to see and I found Paul and Samuel quarrelling.*
>
> *The two held each other and they fell down.*
>
> *I separated the two. The deceased took a stick and he attempted to hit Paul and Paul had taken the stick. The accused took the stick and hit the deceased on the stomach.*
>
> *The deceased had then fallen down. The accused had then left the deceased stated that he had felt pain on the area that he was hit. I asked the deceased whether he had been injured and he stated that he had.*
>
> *The deceased started to carry but he stated that he could walk and he stood up and he walked to his home.*
>
> *On 24.1.16 I was arrested by Police Officers and they asked me to go and record statement as the said Samuel had died.*

5. On cross-examination, PW1 admitted that he did not expect that the stick could kill the deceased, that the two had been drinking Busaa at his home as there was celebration for his child.

6. On the principles for appellate reconsideration of sentences in criminal trial as set out in ***Wanjema v. R*** (1971) EA 493, I consider that the trial court's sentence was manifestly excessive in the particular circumstances of this case where the deceased and the appellant, who had been drinking, quarreled, as testified by PW1 and PW2, and deceased himself being said by PW1 to have started the fight by attempting to hit the appellant with a stick, which the latter took and inflicted fatal blows to the deceased.

7. I consider that an imprisonment term of 5 years meets the justice of the case in terms of retribution, reformation and deterrence. With remission, a sentence of imprisonment for 5 years practically becomes a term of 40 months **(3 years and 4 months).** However, as the appellant has been in custody before trial and upon sentence for an aggregate period of slightly over 3 years, there should be an order that the appellant be released on time already served.

Orders

8. Accordingly, for the reasons set out above, while upholding the finding of guilty for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code, and noting that the appellant has been in custody for a period of slightly over 3 years, the court reduces the sentence, pursuant to section 354 (3) (b) of the Criminal Procedure Code, to such imprisonment term as shall enable the appellant to be released from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Onkoba, Prosecution Counsel.