



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 105 OF 2017

DANIEL KIPLIMO TUITOEK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against conviction and sentence of fifteen (15) years imprisonment meted against the Appellant herein by Hon. John Tamar Senior Resident Magistrate on 26th September, 2016 in Eldama Ravine CMCR NO. 1035 of 2012]

JUDGMENT.

1. Although the appellant had initially appealed from both conviction and sentence by Petition of Appeal dated 3/2/17 drawn and filed by M/S Kiplenge and Kurgat, Advocates for the appellant, he at the hearing of the appeal on 19/7/17 abandoned the appeal for conviction and appealed only for reduction of the sentence of 15 years herein imposed for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code and prayed for a non-custodial sentence.

2. The appellant was convicted by Kasera, PM on 15/9/2016 when she found that the accused had killed the deceased when they were involved in a fight. The accused and the deceased were brothers-in-law and the accused had gone to his in-laws home to try and persuade his wife who had gone back to her relatives home to get back to him.

3. The DPP did not support the sentence, the Prosecution Counsel submitting as follows:

“ [The] appellant was charged with the offence of manslaughter under section 202 and 205 of the Penal Code, whose punishment is life imprisonment. The Prosecutor indicated to the trial court that the appellant was a first offender. The trial court called for Probation Officer’s Report. The same indicated that the appellant did not have a favorable past, before proceeding to sentence him for 15 years imprisonment.

We submit that the sentence was harsh and excessive, the trial court having been notified that the appellant was a first offender. We also do not oppose the review of the sentence. The request for non-custodial sentence. We pray that the court orders a fresh report from the Probation Officers to be able to consider the same. That is all.”

4. The Probation Officer’s Report dated 23/8/17 ordered by the court recommended as follows:

“Family members from accused and deceased person’s family were interviewed. There is suspicion between them as divergent views touching on reconciliation and compensation was given by each side. Family members from accused person’s side claim they have ironed out issues with the family of deceased and all is well. They are to take their sons married from accused person’s clan for a cleansing ceremony on 9th at the deceased person’s homestead and to address any issues if they arise on that day.

However, the family members of deceased are not happy with this statement as to them no meeting has ever taken place. They read contempt towards them by the other family who to them are only interested in having their son shown sympathy.

The relationship between the two families is lukewarm as no clear status on reconciliation was established.

Your Lordship, I leave it to honourable Court to determine the case as it deems it fit.”

Isabella Tengkyon,

Probation Officer,

Baringo County.

23/08/2017.

5. In sentencing the accused/appellant to 15 years imprisonment the trial court (Tamar, PM) on 26/9/2016 ruled as follows:

The accused person now sentenced, was charged and tried with the offence of manslaughter under section 202 (1) as read together with section 205 of the Penal Code. He was subsequently after trial found guilty and convicted. I sought a pre-sentence report on the accused to enable me determine a suitable sentence taking into account all the circumstances.

I have therefore, considered the pre-sentence report on the accused who does not seem from the report to have had a favorable past. I have also taken into account the nature of the offence and the circumstances under which it was committed. The maximum sentence provided for the offence of manslaughter is life imprisonment. The prosecution has no previous record of the accused.

In the circumstances I sentence the accused person to 15 years imprisonment.

Right of appeal within 14 days.

Dated this 26th day September, 2016

Hon. John L. Tamar - SRM

6. In what was entitled Rebuttal of Probation Officer's Report on pre-sentence dated 24/8/17, the appellant responded to the Probation Officer's Report dated 23/8/17 challenging the officer's report on "what actually transpired and agreed upon by the two families", being a "Reconciliation Agreement on 9/8/2017 whereby the father of the deceased and the mother with Chepkurui (old man) and Cheserem Tuitoek unanimously reconciled and agreed upon ironing any differences that may have occurred during the unfortunate demise of the deceased" and that a traditional cleaning ceremony had been agreed to be performed to the "sons of the two families upon release or being placed on probation to the appellant subject to the court; verdict, since the two families have inter-married and, are very close relatives. "The appellant's comments on the Probation Officer's Report was also, obviously, not subjected to cross-examination."

7. Of course, the Probation Officer's Report and the appellant's rebuttal thereto are not being on the court. The Court of Appeal in **Kyalo v. R** [2009] KLR 325 has, in fact, counselled caution with regard to acceptance of Probation Officer's Report as the sole basis of sentencing, highlighting the fact that the statements in the Probation Officer's Report have not been tested on cross-examination and the accused had not had opportunity to comment on the matters in the Report. The appellant's written submissions in rebuttal, noting that the appellant who is serving prison term and could not have been at the reconciliation meetings, cannot be relied on to positively state the correctness of any agreements or otherwise.

8. While the appellant's and the deceased's families at liberty at all times to seek reconciliation from their own sakes in the interests of harmonious living in the future as neighbors and close relatives as alleged, the Court of Law must ensure that justice is served both in terms of the particular case before it and the social objectives of deterrence, rehabilitation and retribution.

9. Reconciliation which serves the families of the victim and the accused is not the sole objectives of criminal justice.

10. The court will consider this case in the context of the prevalence of killings in circumstances of domestic disagreements, many times fueled by illicit drinking, which is common in the area. There is a felt need for deterrent measures to curb the deadly sport. In previous cases of similar nature the court has passed a sentence of imprisonment for 8 years for manslaughter cases initially brought as murder trials and later reduced to manslaughter by plea bargain agreements. I do not see in this case any reason to depart from this position, as I have done with respect to cases where there was extreme provocation. See **R v. Richard Chemjor Kakuko** KBT HCCR NO. 24 OF 2017 of 2nd November, 2017 and **R v. Philip Kiprop Kigen** KBT HCCR NO. 64 OF 2017 of 19th April, 2017.

11. I would, consequently, agree with the DPP that the sentence of 15 years imprisonment for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code for a first offender is excessive.

12. Pursuant to **Wanjema v. R.** [1971] EA 493, 494, I would interfere with the excessive sentence and reduce it to one of imprisonment for 8 years

Orders

13. Accordingly, for reasons set out above the appellants' appeal for the sentence is allowed and the sentence is reduced pursuant to section 354 (3) (b) of the Criminal Procedure Code to imprisonment for 8 years from 26/9/2016 when the appellant was sentenced by the trial court.

DATED AND DELIVERED ON THIS 2ND DAY OF MAY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Kenei, Prosecution Counsel for the Respondent.