REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 70 OF 2017

PETER KIPTUM KEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Hon. H. M. Nyaberi (SPM) in Iten Senior Principal Magistrates' Court

Criminal Case No. 1382 of 2015 on 19th June, 2017)

JUDGEMENT

1. The appellant was convicted of manslaughter contrary to section 202 as read with section 205 of the Penal Code and sentenced to seven years imprisonment. Aggrieved by the same he lodged this appeal seeking the revision of the sentence. He stated that he had no intention to kill the deceased as the same was not pre-conceived. He cited section 33 (2) of the Criminal Procedure Code and stated that the trial court ought to consider the period spent in remand while sentencing. That he was in remand for three (3) years awaiting trial but that the trial court overlooked the same. He further stated that the probation report was largely in his favour and that it showed that there was no bad blood between the family of the deceased and his. He further stated that he was the sole breadwinner his wife having been involved in a road traffic accident and he has four children. The respondent opposed the same and argued the sentence meted was unlawful and ought to be enhanced.

2. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself as follows:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
>
> ***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)"***

The said principle was reiterated in **Kenneth Kimani Kamunyu v. R. (2006) eKLR,** where it was stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

3. Before the trial court could sentence the appellant, it considered the fact on record that the deceased was a child of tender age whose act would have not attracted severe beating. That the maximum sentence for manslaughter is life. That in the case at hand, the appellant had been in custody for a period of less than 3 years. He further considered the appellant's mitigation and that the victim family members cultural rituals in cleansing had arisen out of the appellant's actions and sentenced him to seven years imprisonment. In view of the cited cases and the trial court's consideration, I find no error in principle to warrant interference with the sentence meted by the trial court. This appeal fails and the trial court sentence is affirmed.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this **22nd** day of **November**, **2018.**

STEPHEN GITHINJI

JUDGE