



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 58 OF 2016

HENRY ODHIAMBO OJWANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence by Hon. P. K. Rugut, Senior

Resident Magistrate in Rongo Senior Resident Magistrate's Court

Criminal Case No. 519 of 2013 delivered on 21/10/2016)

JUDGMENT

1. **HENRY ODHIAMBO OJWANG**, the appellant herein, was charged with the offence of Manslaughter contrary to **Section 202** of the **Penal Code**, Chapter 63 of the Laws of Kenya. The particulars of the offence were that on 17th day of December 2013 at 01:00pm at Kitere village in South Kamagambo Location within Migori County of the Republic of Kenya he unlawfully killed **PETER ODONGO OGOLLA**. (hereinafter referred to as **'the deceased'**).

2. The appellant denied the offence and the trial followed. The prosecution called a total of six witnesses **PW1** was one **MONICA ACHIENG ODONGO** who was the wife to the deceased. A cousin to the deceased one **VICTOR ODONGO ASIGO** testified as **PW2**. **PW3** was one **PHINEAS OWINO OGINGA** who was a neighbour to the deceased and the appellant herein. **KENNEDY OUMA ODONGO**, a cousin to the appellant and a Man of God testified as **PW4**. The Investigating Officer **No. 68292 PC DANIEL CHOGE** testified as **PW5**. **DR. DENNIS NYABERA OMARI**, a Medical Officer who conducted the post mortem examination on the body of the deceased and also who assessed the mental status of the appellant testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except otherwise stated

3. The appellant and the deceased were close relatives and immediate neighbours whose homes were separated by a footpath. Both the appellant and the deceased were farmers and they kept cows. The deceased had planted nappier grass by the footpath near the appellant's home whereas the appellant on his part had planted maize on the portion adjacent to the nappier grass. On 17/12/2013 at around midday both the appellant and the deceased went to their said respective portions of their parcels of land to work. The appellant was cutting the maize using a slasher that had been nipped on the end whereas the deceased was cutting the nappier grass using a panga.

4. PW4 who had visited the appellant's family to be assisted with a cellphone to call his brother who worked in Mombasa took tea inside the appellant's house and went out where he saw the appellant then feeding his cows as he had already finished cutting the maize. The appellant's wife (not a witness) was just chatting with the appellant and they talked something about Rongo University employees. PW4 could hear their conversation as he was about 5 metres away. The deceased then passed with his children leading his cows back home. On seeing the deceased, the appellant loudly said that the fool who was passing should take the message to Rongo University. The deceased knew that he was the subject of the foolishness and asked the appellant why he always abused him whenever he saw him and even at the deceased's home. The deceased then asked the appellant to go and have a rest if he was drunk. The deceased then proceeded to his home.

5. The appellant then enraged and while armed with his slasher jumped over the fence and followed the deceased. On PW4 sensing danger, he ran and got hold of the appellant and pulled him back to his home while he asked the appellant's wife to lead the deceased to his home as well. Amid that state of affairs, the family members of the appellant and the deceased (both their wives and children) joined the fray and exchanged shouts from either sides. The appellant, determined to attack the deceased, wrestled himself free from PW4 and charged towards the deceased. In a split of a second the appellant cut the deceased with his slasher on the head and as the deceased turned to face the assailant, the appellant again cut the deceased still on the head. As the appellant wanted to cut the deceased a third time on the head, the deceased shielded himself using his hand which was then severely injured. By a chance the appellant slipped and fell down and the deceased, who was holding a panga cut the appellant while he was on the ground. The appellant then stood up and PW4 moved into and kicked the appellant's hand that had the slasher and the slasher fell down. The appellant picked a stone but before he threw it towards the deceased PW4 held and restrained him. The appellant's wife was by then leading the deceased to his home and the appellant got an opportunity and hailed the stone to the deceased and hit him on the head; the deceased fell down. The deceased was then carried by PW4 and the others who were at the scene into his house. PW4 organized for a motor cycle and rushed the deceased to the Royal Hospital in Rongo before the deceased was transferred to Tabaka Hospital where he passed on the following day.

6. As the fracas went on PW3 heard noises from his home and rushed to the scene. He also witnessed the fight. He saw the appellant cut the deceased severally using a slasher and the deceased also cut the appellant. The deceased however was seriously injured. He then took the appellant to Royal Hospital as well.

7. The matter was then reported to the police and a post mortem examination on the body of the deceased was conducted by PW6 after the body had been identified by PW1 and PW2. PW5 carried out the investigations. He recorded statements from potential witnesses and referred the appellant for mental assessment which was conducted by PW6. He then preferred the charge against the appellant.

8. At the close of the prosecution's case the accused person was placed on his defence. He opted to give an unsworn statement. The appellant denied assaulting the deceased at all and stated that he only saw the deceased, who was accompanied by his wife and who was blood-stained, approach him and asked him why the appellant had bothered the deceased for the past ten years and before the appellant could answer the deceased cut him with a panga on his head twice. As he tried to run away he fell down and as he tried to get up he was again cut on the back and the neck. It was the appellant's evidence that by that time PW4 surfaced at the scene armed with a panga and told the appellant that they were going to kill him. He then got an opportunity and started running away and PW4 raised his panga to cut him. Luckily, the appellant fell down and the panga cut the deceased. The deceased was rushed to hospital as well as the appellant. The appellant was later on arrested by the police while in hospital and learnt later that the deceased had died. He was then wrongly charged.

9. By a judgment rendered on 21/10/2016 the trial court found the appellant guilty and convicted him as charged. He was sentenced to 7 years' imprisonment.

10. The appellant then lodged an appeal against sentence only. By a Petition of Appeal filed on 08/11/2016 and the submissions filed thereto the appellant contended that the sentence was too excessive

being a first offender with a family and children. He prayed for a non-custodial sentence instead.

11. The State conceded to the appeal and likewise submitted that since both the appellant and the deceased were armed and whereas the deceased had a more dangerous weapon, then a non-custodial sentence would suffice.

12. This is an appeal on sentence. This Court is thereby called upon to act within some clearly laid down principles since sentencing is a matter of exercise of discretion on the part of the sentencing court and as such the sentence can only be varied on the clearest cases. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

13. I have taken the burden to go through the evidence so as to satisfy myself of the circumstances under which the offence occurred. It is not in doubt that the appellant was the one who initiated the fight and was determined to injure the deceased. The deceased took every step to avoid the fight but not for the appellant. The appellant's intention was manifested in the number of cuts he inflicted on the deceased and if anything it was the deceased who acted in self-defense and not the appellant. The appellant's unwarranted acts led to the death of the deceased. Likewise, the deceased had a wife and children who are now left widowed and orphaned.

14. The appellant tendered his mitigations before the sentencing court which were taken into consideration. The appellant was liable to life imprisonment but instead he was sentenced to 7 years' imprisonment. Having addressed my mind to this matter carefully I am not satisfied that the appellant has demonstrated the principles laid down in the case of **Wanjema v. Republic** (supra) to warrant the interference of the sentence. This Court hence declines to exercise its discretion in favour of the appellant.

15. Consequently, the appeal is unsuccessful and is hereby dismissed. The appellant shall continue serving the remainder of the sentence.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of April 2017.

A. C. MRIMA

JUDGE