REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 13 OF 2013

VINCENT CHERUIYOT KOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. M.O.Okuche Principal Magistrate in Sotik Criminal Case No.768 of 2011)

JUDGMENT

VINCENT CHERUIYOT KOECH, the Appellant herein, was tried on a charge of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. After undergoing a full trial, the appellant was sentenced to serve fifteen (15) years imprisonment. The appellant was aggrieved by that decision hence this appeal.

When the appeal came up for hearing, Mr. Motanya learned advocate for the Appellant informed this court that he had instructions to abandon the appeal as against conviction. This appeal therefore is one against the order on the sentence.

The history behind this appeal is short and straightforward. The Prosecution's case was supported by the evidence of five witnesses. It is the evidence of **Richard Rotich** (P.W.1), that Samuel Kipkoech Tanui, the deceased was his watchman at his Pub situated Getarwet Trading Centre. On 7th July 2011 at about 7.30pm, P.W.1 said, he witnessed the appellant hold and lift the deceased twice before letting him fall down. P.W.1 said he left after being assured by the deceased that he was alright. P.W.1 made arrangements for the deceased to be taken for medical treatment when he was told that he was ill. The deceased was taken to Kapkatet District Hospital where he was treated and discharged. He again said the deceased became sick and was taken to Litein Mission Hospital but died while on his way to hospital on 10th July 2011. A postmortem was done on 11th July 2011 and the cause of death was stated to be cardiac arrest following acute peritonitis due to perforated intestine and ruptured spleen following blunt abdominal injury inflicted with a blunt object. The appellant testified and summoned two independent witnesses to buttress his defence. He basically stated that he had no intention of hurting the deceased. He claimed he was drunk at the time of the offence. The appellant admitted holding the deceased before letting him fall. The appellant said he gave the deceased Kshs.500 when he learnt he was ailing. The learned Principal Magistrate found the appellant guilty for manslaughter and sentenced him to serve fifteen (15) years imprisonment thus precipitating this appeal.

It is the submission of Mr. Motanya that the sentence is harsh and excessive for a first offender. It is his further submission that the learned Principal erred when he failed to consider the fact that the offence was committed while the appellant was under the influence of alcohol. Miss. Kivali, learned Prosecution Counsel conceded the appeal. She urged this court to revise the sentence with a view of reducing the same or in the alternative substitute it with a non-custodial one. The principles to be considered in an appeal as against sentence were restated by **Trevelyan J in Wanjema =Vs= R (1971) E.A 494** *inter-alia* as follows:

> ***"A sentence must in the end depend upon the facts of its own particular case.....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 factors, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

Let me now apply the above principles to this case. The record shows that the learned Principal Magistrate took into account the Appellant's facts in Mitigation. It would appear he did not consider the fact that he was a first offender. This was clearly stated by the prosecution but it would appear the learned Principal Magistrate merely gave it lip-service. With respect, I think that is an apparent error which entitles this court to interfere with the order on sentence. The sentence meted out against the appellant is harsh and excessive in the circumstances. Miss. Kivali, has urged this court to substitute the custodial sentence with a non-custodial one. I think that it is possible under **Section 354** of the **Criminal Procedure Code**. The Appellant has so far served one (1) year four (4) months. I hereby set aside the order sentence and substitute it with an order directing the appellant to be set free and thereafter to serve two (2) years on Probation under the supervision of the Probation Officer, Bomet County.

Dated, signed and delivered in open court this 11th day of July, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Miss. Kivali for Director of Public Prosecutions

Mr. Motanya for the Appellant