



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
(Coram: Kneller, J A, Chesoni and Platt, Ag JJ.A)
CRIMINAL APPEAL 7 OF 1983

BETWEEN

PATRICK NYAGUNDIOBEGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a sentence of the High Court of Kenya at Kisumu (Schofield, J.) dated June 13th 1983
in Criminal Case 17 of 1983**

JUDGEMENT OF THE COURT

Patrick Nyagundi Obege, the appellant, was convicted of June 13, 1983 by the High Court (Schofield, J.) in Kisumu.

The appellant has asked this court to reduce the sentence. The former Court of Appeal for Eastern African declared it might alter a sentence imposed by the trial court only if it were evident that it acted on a wrong principle or overlooked some material factor or if the sentence were manifestly excessive in all the circumstances of the case. *Ogalo Owuora v. R.* (1954), 21 EACA 270. This court follows the same rule.

He was charged on June 13, 1983 with murdering Dominic Olaga Ombima (Olaga) on June 13, 1980 at Reru, a village in the Kisumu District of the Province of Nyanza and he pleaded not guilty.

He offered a plea of guilty to the lesser offence of manslaughter and this was accepted by the learned senior state counsel and the Judge (it seems) and the lesser charge was then substituted, read to him and his plea recorded. The facts of the case, according to the outline narrated by the senior state counsel and the mitigation preferred by the appellant's advocate, were these. Olaga, the victim, was about 70 and the appellant 31 when this happened. They were related and were neighbours (whose lands were divided by a stream). Olaga and his brother-in-law Odero Owak (Odero), armed with mattocks, went down to an area near the stream at 8 am and while Odero began turning over a small area Olaga followed planting onions in it.

The appellant, who claimed that patch was his, crossed the stream and told Odero to leave it but Odero did not reply and remained where he was. The appellant then asked Olaga why he was cultivating his land? Olaga, according to the appellant's version, laid down his jembe and told him to report him to the chief if he thought he was doing anything wrong. The appellant said he did not fear death and picked up the mattock and smote Olaga on the head with it who collapsed and then the appellant dropped the mattock and fled. He reported the incident to the chief and took him and his constable to the scene. The

blow on the head fractured Olaga's skull and a subdural haematoma over the left and back of his head compressed his brain. He was taken to his home and then to a clinic at Kombewa and on the New Nyanza General Hospital where he died on July 2, 1980 after an unsuccessful operation.

Meanwhile, the Appellant went to Taveta where he was employed on a sisal estate and later to a farm at Naivasha where he was arrested on July 31, 1981. The appellant's advocate stated Olaga went for the appellant with the mattock first and the appellant repeats this in his memorandum of appeal. Otherwise the facts were agreed.

The appellant is married and has five children. He had a previous conviction in mid-May 1978 for an assault for which he was sentenced to pay a fine of Kshs 600 or spend 2 months in goal. It was relevant and two years old when he unlawfully killed Olaga. He was in remand for two years.

The judge made some notes on why he selected this sentence and in them he covered all that has gone before save for the appellant's plea of guilty for which he should have been given due credit (but he must have been) and whether or not Olaga aimed a blow with the mattock at the appellant first which is the sort of matter we would like cleared up before sentence is passed.

If Olaga did not aim any blow at the appellant then the facts are nearer to the offence of murder but if he did then the provocation was the greater and the proportion of the retaliation had to be considered. This is a material factor, which might have been overlooked. Odera died on March 4, 1981 and his statement to the police was produced at the Preliminary Inquiry. He does not mention in it any assault by Olaga on the appellant. On August 4, 1981 the appellant did not refer to it in his statement in answer to the charge and caution. He did in his reply to the charge at the preliminary inquiry on September 9, 1981 over a year after the event. It was an afterthought. Consequently, this sentence was not based on any wrong principle and is not manifestly excessive so the appeal is dismissed.

Delivered at Kisumu this 5th day of December, 1983.

A A KNELLER

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

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H G PLATT

AG JUDGE OF APPEAL