REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HCCRA NO. E041OF 2024

(BEING AN APPEAL FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.26 OF 2021 OF THE MAGISTRATE'S COURT AT KISII)

JOB MATARA OMWOYO…… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

JUDGEMENT

1.**INTRODUCTION**

The appellant herein was charged with the offence of manslaughter contrary to section 205 of the penal code and was convicted under section 215 of the criminal procedure code before Hon.C.A. Ogweno in the Magistrate's Court at Kisii.

The particulars of the offence was that on the 11th of January 2023 at Nyamesocho sublocation, Geteri location within Kisii County the accused person without malice aforethought killed Boaz Orina Mogaka. He was convicted on circumstantial evidence as no witnesses saw him attack and kill the accused and the prosecution proved beyond reasonable doubt the charge against the accused.

The accused however denied killing the deceased and was tried. After a full trial he was convicted and sentenced to 4 years imprisonment and 3 years' probation.

2. **APPEAL**

The appellant moved this court by way of a petition of appeal dated 5th March 2024 being dissatisfied with the judgement of Hon. C.A. OGWENO in The Magistrates Court at Kisii relying on the following grounds:

a) That the learned magistrate erred in law and in fact by convicting the appellant on insufficient evidence.

b) The learned magistrate erred in law and in fact and fact by shifting the burden of proof to the appellant.

c) The learned magistrate ‘s decision is against the weight of evidence

d) The sentence is excessive

3.**APPELLANT'S WRITTEN SUBMISSIONS**

The appellant submits two issues for determination:

i)That the evidence on record disclosed the offence of provocation which would have reduced the culpability of the offence.

The appellant submitted that he established his defence of provocation as early as when he went to record his statement of assault therefore it was on the prosecution to mount evidence to displace the defence.He relies of the case of R v Juliana Wanza Mulei [2020] eKLR case 21 of 2017 which was a case with similar facts as the case before this court it was revealed that the accused and the deceased had some tumultuous relationship punctuated with numerous fights fueled by alcohol. The court adopted a starting point of two years imprisonment but applied 333(2) of the criminal Procedure Code by taking into account the time spent in remand custody. She was set free accordingly.

ii)That the sentence is excessive in the circumstances.

He relies on Supreme court petition no. 15 and 16 (consolidated) of 2015 Francis Karioko Muruatetu and Another v Republic (2017) eKLR where the guidelines to be followed when sentencing were stated to be:

i)age of the offender

ii) being a first offender

iii) Whether the offender pleaded guilty

iv) Character and record of the offender

v) Commission of the offence in response to gender-based violence

vi)Remorsefulness of the offender

vii)The possibility of reform and social re adaptation of the offender

viii) Any other factor the court considers relevant

He further submitted that he is pleading for a non-custodial sentence and that his presentence report shows that the accused family and community are not opposed to the accused being granted a non-custodial sentence and that he is a first offender and remorseful and that in the view of the circumstance of his case the appropriate sentence should be an acquittal or at worse a non-custodial sentence. He further points out that in the exercise of its appellate discretion a court is duty bound to take into consideration certain guiding principles interalia the aggravating nature of the offence committed, the mitigating factors, presentence report previous criminal record of the accused and victim assessment report as per the Judiciary Sentencing Policy Guidelines clause 44.5 of 2023.

4.**RESPONDENT'S WRITTEN SUBMISSIONS**

The respondent opposes the appeal on the grounds that;

a) No grounds 1, 2 and 3 the respondent submitted that the offence of manslaughter was proved to the required standard.

The prosecution highlights that the offence of manslaughter has 2 ingredients;

a) That the death of the deceased occurred.

The doctor who performed the autopsy on the body of the deceased formed the opinion on the cause of death to be cardiac arrest secondary to hemorrhagic shock due to severing of the vein on the right thigh.

b) That the accused committed the unlawful act which caused the death of the deceased.

The witnesses from the prosecution led evidence implicating the appellant and that from the evidence, it is evident that the appellant was seen at the scene of fatal assault and that the evidence points to the appellant as the person who caused the injuries to the deceased. Furthermore, the evidence of the doctor PW5 he testified that the injuries were caused by an object with two sharp edges and it penetrated through the 3 trousers and severed a vein. PW1 and PW2 saw the appellant moving away from the scene while carrying a slasher which was the weapon of the fatal assault.

Thus, the prosecution relies on the case of R v Abisaye Odhiambo Ombija [2014] eKLR as the facts above taken formed a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the appellant.

b) That the sentence is manifestly excessive in the circumstances.

Under the provisions of section 205 of the Penal Code the maximum sentence for manslaughter is life imprisonment. The prosecution submitted that the sentence given was very lenient considering the circumstances of this case and urges the

court to make a finding that the conviction was safe and to uphold the decision of the trial court on conviction and sentencing and dismiss the appeal accordingly.

5.**ANALYSIS AND DETERMINATION**

A) **WHETHER THE ACCUSED WAS CONVICTED ON INSUFFICIENT EVIDENCE**

This being a first appeal, this court has a duty to revisit the evidence that was adduced before the trial court, re-evaluate and analyze it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See Okeno v R [1972] EA 32, Eric Onyango Odeng' v R [2014] eKLR.

i)**EVIDENCE BEFORE THE TRIAL COURT**

The accused was convicted on circumstantial evidence which linked him to the cause of the death of the deceased. PW 1 Agnes Kwamboka who was the mother-in-law of the deceased and testified that she saw Job the accused with a short slasher and a rungu (nut) and Job boarding a motorbike.

PW2 Nicholas Omwoyo Mochama also saw the accused with a short slasher

PW3 Susan Nyaboke(minor)saw Job, Boaz and Nicholas who later came to give her money. She saw Job the accused, walking away in a hurry with a slasher and a nut sticker. She then saw Boaz lying on the ground with blood oozing from the leg.

PW4 Joseph Ondieki saw the deceased assaulting a man who had been found with stolen shoes and he took his phone and smashed it claiming he was aiding thieves and, on his way, home he saw the deceased the accused and PW2 who were

according to him not drunk and the decreased offered to replace his damaged phone

On his way back home, he heard screams from across his home and saw a crowd gathered at Agnes, house. He moved closer and saw Boaz lying on the ground dead. He also stated that he accused had a sharp slasher.

PW5 Dr Charles Ogachi is a medical superintendent at Keroka Hospital Who in his autopsy report formed the opinion that the cause of death was due to cardiac failure secondary to hemorrhagic shock due to the severing of the vein on the right thigh and that the injuries were caused by an object with 2 sharp edges it penetrated through 3 trousers and severed a vein.

PW6 the assistant chief Nyamasocho location, Makori Geoffrey Nyakundi, stated that he established from the crowd that the suspect was the accused and not Agnes and he later learnt that the accused had been arrested. He further stated that the 1st caller identified Agnes who was previously married to the deceased as the suspect.

PW7 Paul Nyamache Nyamamba, the assistant chief of Engoro sublocation testified that he was called that a suspect was hiding in his area following the murder incident the suspect was Job Matara. They proceeded to Job's grandfather's place where they found him and he surrendered himself to the police officers he said he had been involved in a physical altercation with someone.

PW8 Sergeant Micharl Otieno testified that he was on duty when Job came to report a case of assault. He had a rungu with a fixed bolt head. His clothes were dirty and blood stained and he had bruises on his hands.He later in was informed that the accused had been arrested.

He did not record the incident in the OB as the accused had injuries on his fingers but sent hm to the hospital and first waited for the doctor's report.

PW9 PC Erick Ogeto attached to DCI Masaba South the investigating partner in the matter. Found the deceased lying in a pool of blood he produced the rungu as exhibit and managed to take photos at the scene. He prepared a sketch map of the scene. He further states that the accused was advised to go to hospital as he had injuries but failed to return and was later arrested. He also testified that he was not aware that the accused had initially married Agnes before marrying her daughter Susan Nyaboke.

PW10 CIP Leyrce Nigaka Mweutsi certified the photographs and produced them in the trial court

On being placed on his defence the appellant Job Matara opted to adduce sworn testimony the accused as Dw1 and states that he went to Agnes, home to collect his money from the deceased who then sent his uncle to withdraw the money from Mpesa. They later on went outside the compound where the deceased told him that he does not want to see him again. He removed a belt from his trouser and tried to attack him. He overpowered him and took away the slasher he had. The accused sustained cuts on his left small and ring finger and the deceased fell down. He went and reported the matter and later on learnt that Boaz had died. He admits that the slasher was his but asserts that he does not know where it went and that he had no ill motive towards the accused. In his re-examination he states that the deceased fell down with the slasher.

II)**THE ACCUSED'S GUILT OR INNOCENCE BASED ON THE ABOVE FACTS**

Based on the above facts one can indeed ascertain that none of the witnesses saw the accused attack and kill the deceased. prosecution thus relied on circumstantial evidence.

The Court of Appeal in the case of Musii Tulo (supra) in expounding the above principles expressed itself as follows:- "In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

In the case of **R v Agunja Lawrence Orago (Criminal case number 13 of 2016) [2018] KEHC 3318(KLR**) it was stated that; On the second ingredient as to whether the accused person caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

The deceased was last seen with two people Job Matara the accused and Nicholas PW2. Among the two the accused was the only one with a slasher and in addition to this PW3 the deceased's wife testified that Nicholas left the two and went to give her some money. PW1, PW2 and PW3 said they saw the appellant with a slasher,

PW8 Sergeant Michael testified that the accused came to the police station with multiple injuries and reported a case of assault to which we told him to go to the hospital first as he was injured but did not record this occurrence book as he was waiting for the doctor's report first.

PW5 conducted the autopsy and was of the opinion that the death of the deceased was caused by a sharp object which severed his vein causing him to have hemorrhagic shock.

DW1 the accused testified that the slasher was his but he stated that he had left the deceased on the ground with it after they had an altercation and the deceased overpowered him.

From the evidence submitted above it is evident that the evidence from the witnesses are not contradictory as they all state they saw him with a slasher leaving in a hurry. The slasher has been established to belong to the accused and is the murder weapon according to the autopsy report thus the chain of events leading to the arrest and arraignment of the accused person before this Court came from the ten witnesses who testified in this case and their testimonies all point towards the

accused being the only person who could have inflicted injuries to the deceased which caused his death. Thus, it is evident that the accused was the one who injured the accused and this led to his death.

B) **WHETHER THE EVIDENCE ON RECORD DISCLOSED THE DEFENCE OF PROVOCATION WHICH WOULD HAVE REDUCED THE CULPABILITY OF THE OFFENCE**

The appellant argues that if the learned trial Magistrate had properly assessed the defense, she would have come to the conclusion that a proper defense of provocation had been established.

In the case of VMK vs. Republic (2015) eKLR where the Court of Appeal sitting in Mombasa discussed the defence of provocation in great detail and as follows: -"Provocation was defined in the case of Duffy {1949} 1ALL ER 932 as: -

“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind...”

In **Peter King'ori Mwangi & 2 others v Republic [2014] eKLR** the above definition requires that two conditions be satisfied for the defence to be made out, namely: -

a. The “subjective” condition that the accused was actually provoked so as to lose his self-control; and

b. The “objective” conductivity that a reasonable man would have been so provoked.

The applicant submitted that he was provoked and drunk and annoyed. However, it is imminent to know that intoxication as a defense to a criminal charge is provided for under **Section 13 of the Penal Code** which states as follows:

"13. (1) Save as provided in this section; intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

Thus, as seen above the appellant's submission is not substantial as he does not fall into any of the exceptions provided for. Thus, it is quite evident that the appellant's defense of being drunk and provoked does not hold any water. I proceed to uphold the conviction.

C) **WHETHER THE SENTENCE WAS EXCESSIVE**

This being a first appeal on the appeal against the sentence, the High Court in Wanjema v Republic (1971) EA 493 laid down the general principles upon which the first appellate court may act on when 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 consider a relevant fact or that it considered 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 if the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.

Further in the case of Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

Under section 205 of the penal code the maximum punishment for manslaughter is life imprisonment.

The appellant was sentenced to 4 years imprisonment to run from 17/01/2023 and 3 years in probation.

i)Pre sentence reports

The presentence report dated 26/9/2023 provides that the accused is a first offender who attributes the offence to an unfortunate incident which was orchestrated by a

physical confrontation with the deceased who had attacked him with a metallic object while he was carrying a slasher which accidentally pierced the deceased on his thigh. Members of his family pleaded for a non-custodial sentence and stated that they harbor intentions of relocating him to Nanyuki where his younger brother is.

Members of the community do not object his placement to a non -custodial sentence but are concerned that the home environment is hostile thus it will be necessary for him to relocate.

This Court called for another pre-sentence report in this appeal and report dated 3.11.25 was filed herein. The same is not different from the one filed in the lower court. I have considered the general circumstances of this case the fact that appellant served part of the sentence, his age, the sentencing policy and the fact that he has expressed remorse and all the relevant factors. I find that a non -custodial sentence would be appropriate. I set aside the custodial sentence and I replace it with 2 years probation.

T.A ODERA
JUDGE
5.11.25

Delivered Virtually on this 5th day of November 2025 in the Presence of: -

Mr. Nyariki for Mr. Mosota for Accused

Court Assistant - Kipchirchir