**IN THE COURT OF APPEAL AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)**

**CRIMINAL APPEAL NO. 79 OF**

**2020 BETWEEN**

**GODFREY NDIWA MASAFU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 21st November, 2017*

***in***

***HCCRA No. 10 of 2016)***

**********

**JUDGMENT OF THE COURT**

**1.** The appellant, **Dismas Musudi Tindi**, was initially charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence alleged that on 22nd March, 2016, at Minyali Village, in Bungoma Central, within Bungoma County, the appellant murdered **Richard Juma Masafu.**

**2.** The appellant denied the charges. However, after successful plea bargain, the appellant pleaded guilty to the lesser charge of **manslaughter** contrary to **Section 202** as read

with **Section**

**205** of the **Penal Code**. He was upon conviction sentenced to serve twenty (20) years imprisonment.

3. The appellant has lodged the instant appeal challenging the sentence awarded by the trial court. He argues that the sentence of twenty (20) years was harsh and manifestly excessive. He relied on **Articles 165(3)(a)&(b)**, **159(2)(a)&(b)** and **22(4)** of the **Constitution** of Kenya. He also cited the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*** in support of his appeal.

4. It was his submission that he was a first offender, and was remorseful. He stated that he has been in custody since 22nd March, 2016, during which period he had reformed. The appellant faulted the trial Judge for failing to take into account his age, mental capacity at the time of commission of the offence, the circumstances of the case, that he was remorseful, and the fact that he entered into a plea agreement, and therefore saved the trial court's precious time. He suggested that a sentence of ten (10) years, to be computed from the time he was placed in custody on 22nd March, 2016, was sufficient punishment in the

circumstances.

5. The appeal was opposed. **Ms. Kibet,** Learned Prosecution Counsel, while citing **Section 137L** of the **Criminal Procedure Code**, submitted that since the appellant's conviction and sentence was pursuant to a plea agreement, the appellant's appeal was limited only to the extent or legality of the sentence imposed. It was her submission that the facts of the case read out to the appellant during the trial revealed that the appellant was the aggressor, and he therefore deserved a deterrent sentence. She pointed out that the twenty-year custodial sentence meted by the trial court was a lesser and lenient sentence from the prescribed maximum sentence of life imprisonment. She urged that the said sentence was neither unlawful nor excessive in the circumstances.

6. We have considered the record of appeal, the grounds on which it is anchored, rival submissions by the parties, and the applicable law. We are also alive to our mandate on a first appeal as stipulated in **Rule 31(1) (a)** of the Rules of this Court, namely to reappraise the evidence and draw our own conclusions.

7. **Section 137L** of the **Criminal Procedure Code** speaks to the finality of judgment upon conviction, following a plea bargain agreement as follows;

> ***(1) "Subject to subsection (2), the sentence passed by a court under this Part shall be final, and no appeal shall lie therefrom, except as to the extent or legality of the sentence imposed.***
>
> ***(2) Notwithstanding subsection (1), the Director of Public Prosecutions, in the public interest and the orderly administration of justice, or the accused person, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation.***
>
> ***(3) Where a conviction or sentence has been set aside, under subsection (2), the provisions of section 137J shall apply mutatis mutandis."***

8. The conditions upon which the appellate court may interfere with the sentence of a trial court were elaborated in the case of ***Bernard Kimani Gacheru v. Republic [2002] eKLR*** where this

Court held as follows:

> ***"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 states is shown to exist."***

9. **Section 205** of the **Penal Code** prescribes a maximum penalty of life imprisonment, upon conviction of the offence of manslaughter. A perusal of the trial court's sentencing notes shows that the learned Judge took into account the appellant's mitigation, namely that he was remorseful, and that he had a family that was dependent on him. The appellant further stated that he was provoked by the deceased. The trial court noted that the appellant was not provoked, and that he was in fact the aggressor, and that the circumstances of the case necessitated a deterrent sentence.

10. The facts of the case read out to the appellant revealed that the appellant and the deceased were brothers, and that they got into a heated argument revolving around a family land dispute. The argument degenerated into a fist fight. The

deceased armed himself with a tree branch, while the appellant had a *panga*.

When the deceased was overpowered, he retreated back to his house. However, the appellant followed him there. The deceased's wife raised alarm. The appellant left the scene. The deceased settled down to have dinner. Shortly after, the appellant came back to the deceased's house, armed with a *panga*, and this time, the attack resulted into the death of the deceased. These facts were confirmed to be correct by the appellant.

11. After examining the circumstances surrounding the case, the penalty prescribed by **Section 205** of the **Penal Code**, with the **Judiciary Sentencing Guidelines** in mind, we are satisfied that the twenty-year custodial sentence imposed by the trial court was sound in law, and that it is neither harsh nor excessive in the circumstances. The learned Judge considered all relevant factors, including the appellant's mitigation, *vis-a- vis* the seriousness of the offence, and the fact that the appellant pleaded guilty to the lesser charge of manslaughter.

12. The appellant was in custody during the pendency of his trial. He is entitled to have the period spent in custody be computed in his sentence, pursuant to **Section 333 (2)** of

the **Criminal Procedure Code**.

13. The upshot of the above is that the appellant's appeal lacks merit. It is hereby dismissed, save for the fact that the appellant's sentence shall be computed from the date of his arrest, namely 22nd March, 2016.

**Dated and delivered at Kisumu this 19th day of December,2025.**

**ASIKE-MAKHANDIA**

**.....**
**JUDGE OF APPEAL**

**H.A. OMONDI**

**.....**
**JUDGE OF APPEAL**

**L. KIMARU**

**.....**
**JUDGE OF APPEAL**

**I certify that this is a true copy of original.**

**DEPUTY REGISTRAR.**