**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)**

**CRIMINAL APPEAL NO. 61 OF 2017**

**BETWEEN**

**ABRAHAM KIBET CHEBUKWA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Kitale, (J. R. Karanja, J.) dated 16th June, 2015)***

***in***

**H.C.CR. C. NO. 12 OF 2013)**

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**JUDGMENT OF THE COURT**

**1.** This is a first appeal from the judgment of the High Court, **(J. R. Karanja J.)** delivered on 16th June, 2015 convicting **Abraham Kibet Chebukwa** (the appellant) for the offence of manslaughter contrary to **Section 202** as read with **Section 205 of the Penal Code** and sentencing him to serve a term of 15 years imprisonment.

**2.** The appellant was on 11th April, 2013 charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on the 7th day of April, 2013 at Kamaram Village in Chepsiro location within Trans Nzoia County the appellant murdered **James Kibor Kibet** (the deceased).

**3**.The appellant pleaded not guilty to the charge and the matter proceeded to full trial. During the trial, the prosecution called five (5) witnesses.

4. The brief facts leading to the appellant's conviction were that on 7th April, 2013 **Samson Koech Kemboi (Samson)** was working on the land which he had leased from the appellant. **Samson** testified that at about 6.00pm on the material day, he heard the deceased approaching the said land while shouting that he would shoot somebody with an arrow. **Samson** left the scene. It was **Samson's** further testimony that when he returned to the scene, he found the appellant holding an axe which he used to slash the deceased. **Samson** further testified that he screamed for help and people appeared at the scene whereupon the appellant left while the deceased lay on the ground with injuries.

**5. Lilian Tenai (Lilian)** testified that the appellant and the deceased are her brothers in law; that on the material day, she arrived home and heard shouts and noises. It was **Lilian's** further testimony that the deceased was shouting at the appellant as they had a disagreement over land; that the appellant threatened to kill the deceased; that the appellant was holding an axe; that she saw the appellant running away from the scene with the axe; that she met the appellant on her way to the scene and that he was running away and saying that "he had killed" whereupon he dropped the axe. It was **Lilian's** further testimony that she arrived at the scene and found the deceased on the ground with a head injury with blood coming out of his head; and that the deceased was already dead and she screamed for help and neighbours responded to her call and arrived at the scene.

**6. Maurine Chepkoech (Maurine)** the deceased's widow testified that on the material day at about 6.00pm, she arrived home and found her husband, in a very low mood and that he appeared annoyed; that she left her home and went to a nearby trading centre and that upon her return, she did not find the deceased in their house. It was **Maurine's** further testimony that a few minutes after arriving home, she heard **Lilian** screaming and rushed to the farm area where she found the deceased lying on the ground with a serious head injury; that the deceased

appeared dead; that the appellant was not at the scene and they later took the body of the deceased to the hospital.

**7. Benjamin Kipchumba (Benjamin),** who is the deceased's and appellant's nephew testified that he identified the deceased's body at the Moi Teaching and Referral Hospital for purposes of post mortem examination.

**8. Cpl. John Maelo**, **(Cpl Maelo),** the investigating officer, testified that he gathered from statements by **Lilian** and **Samson** that the appellant and the deceased fought because of a land dispute and that the appellant slashed the deceased with an axe; that he visited the scene of the incident where he recovered the said axe behind a kitchen, pointed out by the appellant's mother; that he therefore preferred the charge against the appellant; and that he attended the post mortem examination of the deceased on 20th August, 2013. He produced the post mortem report and the axe which was allegedly used by the appellant to injure the deceased.

9. In his defence, the appellant gave sworn testimony that he had leased 2 acres of land to **Samson**; that on the material day, he went to assist **Samson** to prepare the land for farming; that on orabout 6.00pm, the deceased, who was angry because **Samson** had leased the said land, went towards the appellant armed with a bow and arrow; that, sensing danger, the appellant ran away and left the deceased arguing with **Samson**; that after a few minutes, he heard **Lilian** screaming but did not find out why she was screaming; and that he went to his home and was arrested the following day on allegations that he had killed the deceased.

10. The learned trial Judge, relying on the evidence of **Lilian** and **Samson**, which discredited the appellant's defence, found that the appellant was the person who inflicted the fatal injuries onto the deceased; that the element of a quarrel followed by a fight between the appellant and the deceased was a clear indication that the intent to kill was lacking in the appellant's unlawful act even though he had used a dangerous weapon and excessive force in the fight; that the appellant's defence was an afterthought and a pack of lies; that the prosecution proved beyond reasonable doubt that the accused was indeed the person who assaulted the deceased and caused him fatal injuries; and that the appellant was guilty of manslaughter contrary to **section 202 (1) of the Penal Code**. The learned Judge convicted the appellant and sentenced him to fifteen (15) years imprisonment.

11. Aggrieved by that decision, the appellant preferred an appeal to this Court through a homegrown memorandum of appeal dated 13th May, 2016 raising 7 grounds of appeal and an amended version dated 5th November, 2018. The appellant, through his counsel, further filed a supplementary memorandum of appeal dated 28th January, 2019 raising grounds that the learned trial Judge erred in convicting and sentencing the appellant for the charge of manslaughter without having regard to the fact that the deceased was the assailant and the appellant acted in self defence, and that the learned trial Judge erred in law in imposing a stiff sentence disregarding the age of the appellant and the circumstances under which the crime was committed.

**Submissions by counsel**

12. Both parties filed written submissions and made oral highlights at the hearing of the appeal. **Mr. Angu Kitigin**, for the appellant, relied on the supplementary memorandum of appeal and the written submissions and authorities that had been filed. Counsel urged the Court to allow the appeal on conviction as the appellant was acting in self defence. He also contended that considering the circumstances leading to the death of the deceased, the sentence of 15 years imprisonment was harsh and excessive.

**13. Ms. R. N. Karanja,** the **Prosecution Counsel** appeared for the State and opposed the appeal. **Ms. Karanja** pointed out that the amended grounds differed from the supplementary memorandum of appeal. She expounded that in the amended grounds of appeal, the appellant denies causing the death of the deceased while in the supplementary grounds he states that he was acting in self defence. Counsel submitted that there was sufficient evidence that the appellant caused the deceased's death; and that if acting in self defence, the force used by the appellant was excessive in the circumstances. Counsel also contended that the sentence meted out on the appellant was lawful and was not manifestly harsh or excessive to warrant the intervention of this Court. Finally, counsel urged this Court to uphold the conviction and sentence and dismiss the appeal.

14. In response, **Mr. Kitigin** elected to withdraw the amended grounds filed by the appellant on 5th November, 2018 and consequently relied fully on the supplementary memorandum of appeal.

**Determination**

15. As the first appellate Court determining the matter, we must bear in mind this Court's duty as enunciated by this Court in the case of ***Okeno v. Republic [1972] EA 32*** as follows:-

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424." See also Kariuki Karanja –vs- Republic 1986 KLR 190"***

16. Accordingly, guided by the foregoing principles, we have considered the record, the submissions, the authorities cited and the applicable law.

17. The appellant has relied on the defence of self defence. By implication, the appellant is not denying inflicting the fatal blow on the

deceased but pleads that he did so in self defence. The question that arises for our determination is whether the appellant's conviction for the offence of manslaughter contrary to ***section 202 as read with section 205 of the Penal Code*** was right in view of the appellant's defence of self defence. It is trite law that self defence is an absolute defence on a charge of murder provided that, the accused person did not in the circumstances of the case apply excessive force. This was reiterated by this Court, in the case of ***Mokwa vs Republic, [1976-80] 1 KLR 1337 where the Court rendered*** itself as follows:-

> ***"…the judge correctly directed himself that where a person in the legitimate right of self-defence of person or property uses excessive force or more force than was necessary in the circumstances (always providing that all other elements of self-defence are present) he should not be convicted of murder but of manslaughter;*** **Manzi Mengi v R** ***[1964] EA 289,292."***

18. Applying the foregoing principles to the instant matter, it is clear to us that the learned Judge considered the appellant's defence of self defence but rejected this defence when he observed that ***"The defence by the accused portrayed him as a person who was the victim rather than the villain but the evidence by the prosecution indicated otherwise and rendered the defence nothing more than an afterthought and a pack of lies."*** (Emphasis added)

19. In addition, the learned Judge found that the force that was used by the appellant was excessive in the circumstances. The reason for the substitution of the charge of murder with that of manslaughter is apparent from the following extract from the judgment of the trial court:

> ***"The element of a quarrel followed by a fight between the deceased and the accused was a clear indication that the intent to kill was lacking in the accused's unlawful act even though he used a dangerous weapon and excessive force in the fight."*** (Emphasis added)

20. Malice aforethought is a necessary ingredient for the offence of murder. The learned judge was of the view that the appellant acted on the spur of the moment and that his action was not premeditated. Given the circumstances we cannot fault this finding. From the above, it is clear to us that the learned Judge in convicting the appellant for the lesser charge of manslaughter took full consideration of the appellant's defence of self defence and the circumstances leading to the death of the deceased. In the circumstances, we are satisfied that the learned Judge did not err in convicting the appellant for the offence of manslaughter.

21. In regard to the appeal against sentence, the issue for our determination is whether the sentence meted out on the appellant was manifestly harsh or excessive, and if so, whether the said sentence is amenable to reduction and /or variation by this Court. The appellant maintains that the sentence of 15 years imprisonment for the offence of manslaughter was harsh and manifestly excessive given the circumstances of this case.

22. This Court, in the case of ***Ogolla s/o Owuor vs Republic, (1954) EACA 270,*** outlined as follows the principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***

23. The Court reiterated the same principles regarding interference with sentencing in ***Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 (Nakuru)*** 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."***

24. The appellant was convicted of the offence of manslaughter which attracts a maximum sentence of life imprisonment as,

> **Section 205 of the Penal Code** provides that **"any person who commits the felony of manslaughter is liable to imprisonment for life".**

25. From the sentencing notes on record, it is clear to us that the learned Judge took into account the prescribed sentence, the appellant's mitigation that he was a first offender as well as the appellant's personal circumstances (that he has a wife and two children and was the sole bread winner). Accordingly, we are satisfied that the learned Judge considered all the relevant factors in meting out the sentence and properly exercised his discretion. We find that in the circumstances of the case the sentence was neither harsh nor excessive and we have no reason to interfere.

26. Accordingly, we dismiss this appeal as it is devoid of merit.

27. This judgment has been delivered in accordance with Rule 32(2) of the Court of Appeal Rules, Githinji JA having ceased to hold office by virtue of retirement.

**Dated and delivered at Nairobi this 24th day of April, 2020.**

**HANNAH OKWENGU**

**…….**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**……..**

**JUDGE OF APPEAL**

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

*Signed*

***DEPTY REGISTRAR***