



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 184 OF 2018

BETWEEN

EWOI EBENYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction/Judgment/Decree/Order of the High Court of Kenya

at Lodwar (S. N. Riech, J.) delivered on 13th, June 2017

in

H.C. Cr. C. No. 5 of 2016)

JUDGMENT OF THE COURT

[1] The appellant was charged with the offence of murder contrary to **section 203 as read with section 204** of the **Penal code**. However, after trial he was convicted of the offence of manslaughter contrary to **section 205** of the **Penal Code** and sentenced to 15 years imprisonment. He now appeals against the conviction and sentence.

[2] The particulars of the offence were that on 14th April, 2016 at Kakuma Refugee camp the appellant murdered **Elim Kapua alias Lour**. The prosecution called five witnesses, two of them eye-witnesses. According to the evidence of **Paul Lotienga (PW2)** and **Lopeyo Emont (PW4)**, on the morning of 14th April 2016, the appellant took a camel that he had bought to the livestock market at Kakuma Refugee Camp for sale. The deceased who was at the market started quarrelling of the camel using a mobile phone. The appellant was angered by the act of photographing his camel and the two started quarrelling. The quarrel led to a fight. The appellant hit the deceased with a stick three times. The deceased also hit the appellant with a stick three times. The fight lasted for about three minutes. After the fight, both of them sat at a different place. The appellant then went to where his camel was, took a sword, went to where the deceased was seated and stabbed him on the right shoulder. Thereafter, the appellant threw the knife away and ran to the police station. The deceased fell down. He was taken to the hospital where he died while undergoing treatment.

[3] **Cpl. Isaac Ngugi** recovered the knife and re-arrested the appellant. **Dr. Tony Oyoo** conducted a postmortem on the body of the deceased. He found that the deceased had a cut on the right auxiliary artery and formed the opinion that the cause of death was due to severe bleeding from the cut on the right auxiliary artery.

[4] The appellant stated in his defence that while he was selling his camel which he had bought previously, two people went to where he was. One of them asked him where he got the camel from. He replied that he buys and sells camels. One of them hit him on the head and he hit him on the legs. The other person started beating him and he ran to the police station. He further stated that a family member later told him that the family of the deceased had been compensated for the death with animals. He called two witnesses who testified that the family of the deceased demanded Shs. 380,000/- as compensation which was paid.

[5] The High Court considered the evidence and made a finding thus:

“In the present case there is evidence that the deceased and accused engaged in a fight where each hit the other with a stick.

There is also evidence that the accused at or soon after the confrontation picked a knife with which he stabbed the deceased causing the injuries sustained. In my view, the picking of the knife and stabbing the deceased occurred after being hit with a stick by the deceased. ...”

In addition, the High Court made a finding that the acts of the deceased deprived the appellant of the power of self-control and that he acted in the heat of passion.

[6] The memorandum of appeal filed by the appellant in person shows that the appellant only appealed against the sentence. However, **Vincent Mutai**, learned counsel for the appellant filed supplementary grounds of appeal. The appellant states in the first ground that the High Court erred in law by failing to appreciate that the appellant acted in self defence in the context of a violent altercation. In the second supplementary ground of appeal, the appellant complains that the sentence is manifestly excessive in the circumstances of the case.

[7] While not disputing the evidence regarding the circumstances under which the appellant stabbed the deceased, the appellant’s counsel submitted that the appellant’s defence disclosed that the appellant acted in self defence. He submitted that in the peculiar circumstances of the fight between the deceased and the appellant in which the appellant sustained injuries on the head, the force used was reasonable. **Ms. Karanja**, learned prosecution counsel opposed the appeal. Counsel submitted that although *mens rea* for murder was lacking, the appellant’s act was unlawful and the force used by the appellant excessive in the circumstances.

[8] We have considered the evidence. The evidence of **Paul Lolienga** and **Lopeyo Emont** was consistent that after the deceased and appellant fought using sticks, the fight stopped and each went and sat at different places, but the appellant rose up went to where his camel was, removed a sword, went to where the deceased was seated and stabbed him on the right shoulder. In these circumstances, the appellant was not in imminent danger. Furthermore, the appellant stabbed the deceased after the fight had ended and while the deceased was seated down. In the circumstances, the stabbing of the deceased was not only disproportionate but also excessive use of force. Accordingly, the defence of self defence was not available to the appellant. Accordingly, the appeal against the conviction has no merit.

[9] However, we appreciate that the appellant stabbed the deceased with the sword once on the shoulder. The conduct of the deceased which infuriated the appellant implied that the appellant was a suspected thief of the camel. We are satisfied that the sentence of 15 years imprisonment was manifestly excessive in the circumstances.

[10] In the result the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of 15 years imprisonment is set aside and substituted with a sentence of 5 years imprisonment with effect from 19th June 2017 when he was sentenced.

We so order.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR