



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 108 OF 2014

BETWEEN

DENNIS ANTARO ONSAREAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii, (Makhandia, J.) dated 17th January, 201 in HCCRC NO. 194 OF 2009)

JUDGMENT OF THE COURT

Background

[1] This is a second appeal from the judgment of the High Court (**Makhandia, J.**) (as he then was), in which the appellant's appeal against sentence was dismissed.

[2] **Dennis Antaro Onsare** (the appellant) was charged before the Resident Magistrate's Court at Kisii with the offence of manslaughter contrary to **section 202 as read with section 205** of the **Penal Code**. The particulars of the offence were that on 9th July, 2008 at Gekano sub location in Masaba District within Nyanza province he unlawfully killed **Evans Angwenyi Omiti** (the deceased).

[3] The prosecution case was that on the material day, a fight ensued between the appellant and the deceased. They were separated and the deceased walked away. The appellant followed him and challenged him to another fight, but the deceased declined. The appellant drew a knife and stabbed the deceased on the chest and on the back. The deceased sustained injuries on the chest and back. The deceased fell down and good Samaritans took him to hospital but he died on the way there. A post mortem examination was performed on the body of the deceased on 17th July, 2008 and the report revealed cardiopulmonary arrest as the cause of death. The appellant was arrested on 23rd July, 2008 and a charge of manslaughter was preferred against him.

[4] The appellant initially pleaded not guilty to the charge but on 14th August, 2008, he changed his plea to one of guilty. Consequently, upon his own plea of guilty, a conviction was entered whereupon he was sentenced to twenty (20) years imprisonment.

[5] Aggrieved by the conviction and sentence imposed, the appellant preferred an appeal to the High Court as the first appellate court on the grounds that he had pleaded guilty to the charge; that the trial magistrate had not warned him of the dangers of pleading guilty to the charge; that the sentence imposed was harsh and excessive and that the trial magistrate failed to note that the appellant did not participate in the proceedings. At the hearing, the appellant abandoned the appeal on conviction and pursued the appeal only on sentence. It was his submission that the sentence imposed of twenty (20) years imprisonment was harsh and excessive.

Mr Mutuku, the learned Senior Principal State Counsel represented the State and submitted that the sentence of twenty (20) years imprisonment was neither harsh nor excessive; that it was deserved, given the facts as led by the prosecution.

[6] In his judgment, the learned Judge noted that the offence of manslaughter attracts a maximum sentence of life imprisonment and stated as follows:

“From the facts on the record, the sentence imposed by the trial magistrate was perfectly well deserved... The attack by the appellant on the deceased was vicious, uncalled for and unprovoked. It led to the loss unnecessarily of an innocent life. Given these facts, I do not think that the sentence imposed by the learned magistrate was manifestly harsh nor excessive as to call for my intervention. It was richly deserved...the sentence imposed was within the law...The appeal on sentence lacks merit and is accordingly dismissed.”

[7] Dissatisfied with the decision of the High Court, the appellant filed this appeal based on the grounds set out in the memorandum of appeal. The grounds were mainly in the nature of mitigating factors: that the appellant was remorseful; that he was a first offender; he was a youth in his prime age and a long incarceration would prejudice his future; that he had displayed a change of character and behaviour while in prison and engaged in positive activities and was qualified as a skilled mason; and that given a second chance out of prison, he would become a productive and law abiding citizen.

Submissions

[8] When the matter came for hearing, the appellant was acting in person while **Ms. Nyamosi**, Senior Assistant Director of Public Prosecution was present for the State.

[9] The appellant submitted that the sentence meted out against him was manifestly excessive and that he was young and has now reformed; that he was ready to reconcile and work with his family and community; and that he was now a trained mason, carpenter and plumber.

[10] **Ms. Nyamosi**, counsel for the State submitted that in the circumstances of the appeal and the anger exhibited by the appellant against the deceased, the sentence of twenty (20) years imprisonment was fair and sufficient, and that this Court had no jurisdiction to interfere with the sentence as severity of sentence is a matter of fact.

[11] In reply, the appellant urged the Court to give him an opportunity to make use of the training he had undertaken while in prison to build the nation.

Determination

[12] We have carefully considered the record of appeal, the written submissions by counsel, the authorities cited and the law. This being a second appeal, under **Section 361(1) of the Criminal Procedure Code**, the appeal lies only on matters of law. The said provision states as follows:

(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence. [Emphasis added].

[13] It is evident from the quoted provision that severity of sentence is a question of fact and only becomes a matter of law there the sentence imposed by the trial court was either illegal or enhanced by the first appellate Court. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court have been laid down in many authorities.

[14] The appellant herein was charged and convicted for the offence of manslaughter. Section 205 of the Penal Code provides for a maximum sentence of life imprisonment for the offence of manslaughter. The trial court convicted and sentenced the appellant to twenty (20) years imprisonment. In the first appeal, the learned judge stated as follows;

“The attack by the appellant on the deceased was vicious, uncalled for and unprovoked. It led to the loss unnecessarily of an innocent life. Given the facts, I do not think that the sentence imposed by the learned magistrate was manifestly harsh nor excessively as to call for my intervention. It was richly deserved.”

[15] The appeal herein is on the severity of the sentence. This is a matter of fact and not an issue of law. Pursuant to Section 361(1) (a), of the Criminal Procedure Code, we find that this Court has no jurisdiction to interfere with the lawful sentence of the courts below.

[16] Accordingly, this appeal is devoid of merit and is dismissed.

Dated and delivered at KISUMU this 19th 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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR