



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: R. NAMBUYE, ASIKE-MAKHANDIA, & ODEK, J.J.A)

CRIMINAL APPEAL NO. 73 OF 2018

BETWEEN

BENJAMIN KOSGEI KIPKEU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Sentencing of the High Court of Kenya at Eldoret (J.R Karanja J.) dated 3rd of October, 2011

in

HC.CRC No. 24 of 2009)

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JUDGMENT OF THE COURT

The appellant was charged with the offence of manslaughter contrary to Section 202 as read together with Section 205 of the Penal Code. The particulars of the offence were that on 16<sup>th</sup> April, 2009 at Kamogo village in Kaitamoi Sub-location of Embolot Location, Marakwet District within Rift Valley Province, the appellant unlawfully killed Evans Kimaiyo Kipkeu.

Initially the appellant had been arraigned before the High Court at Eldoret on an information charging him with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The appellant denied the information and the case proceeded to trial. However after **Isaac Kosgei Kirotych, (PW1)** and **Kipkorir Bethwell, (PW2)** had testified and pursuant to a plea bargain agreement between the appellant and the respondent, the information was reduced to one of manslaughter.

The appellant pleaded guilty to the charge of manslaughter. The facts led by the prosecution with regard to the offence were that on 16<sup>th</sup> April, 2009 at 8.00pm, **Evans Kimaiyo Kipkeu** “the deceased” was at home together with his old father. The deceased was preparing supper for his father. The appellant was away at the time. He soon arrived and when questioned by the deceased on his habit of selling family maize without consultation, the appellant got worked up, picked a hoe handle and hit the deceased on the head. The deceased suffered serious head injuries and died on the way to hospital. The incident was reported to Kapsowar Police Station and the appellant was subsequently arrested. The post mortem examination revealed that the cause of death was intro-cerebral hemorrhage due to head injury. After thorough investigations, the appellant was charged accordingly.

Upon the appellant admitting the facts as laid by the prosecution, the trial court convicted the appellant on his own plea of guilty and sentenced him to 15 years imprisonment having considered mitigation proffered.

Dissatisfied with the sentence, the appellant filed this appeal on a single ground that the sentence imposed was manifestly harsh and excessive considering that he was aged 26 years old.

When the appeal came up for hearing, **Mr. Kitigin**, learned counsel appeared for the appellant while **Mr. Chacha**, learned prosecution counsel appeared for the State. Both counsel had filed written submissions which they briefly highlighted.

Mr. Kitigin submitted that the appeal was limited to sentence. That the appellant was a first offender aged 26 years and therefore the 15 years imprisonment imposed was excessive.

Mr. Chacha in turn submitted that the sentence was not excessive nor illegal. He therefore urged us not to interfere with the same.

We have been invited to interfere with the sentence meted out against the appellant by the High Court. We note that the maximum sentence for an accused found guilty for the offence of manslaughter is up to imprisonment for life pursuant to **Section 205** of the **Penal Code**. It is common ground that the appellant was not handed the maximum sentence. The law on interference of sentences by an Appellate Court was stated in the case of **Bernard Kimani Gacheru V Republic [2002] eKLR**, 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.”*

For us to interfere with the sentence imposed by the trial court therefore, we must be satisfied that the sentence was manifestly excessive in the circumstances of the case; the learned judge overlooked some material factor, took into account, some wrong material, or acted on a wrong principle of law.

From the record, it is not in dispute that the learned judge in considering the appropriate sentence to impose took into consideration the age of the appellant. He stated that the appellant was a young man charged with the responsibility of looking after his younger siblings as well as the ageing father. The learned judge also took account of the rehabilitative nature of sentences. He also considered that he was a first offender.

However, the Judge was not oblivious to the fact that the appellant had used unreasonable and excessive force on the deceased and for that he surmised that the appellant ought to be prepared to meet the consequences of his unlawful and most undeserving act.

It is obvious to us that the Judge reverted to proper considerations when assessing the appropriate punishment to mete out on the appellant. We discern no misdirection at all on the part of the learned Judge.

We are therefore satisfied that the learned Judge exercised his discretion properly in sentencing the appellant based on the facts before him. The sentence meted out was deserved and was neither harsh nor manifestly excessive. We therefore have no reason to interfere with it. It is for this reason that we order that this appeal be and is hereby dismissed.

Orders accordingly.

**Dated and delivered at Eldoret this 17<sup>th</sup> day of October, 2019.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**