



IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 86 OF 2016

BETWEEN

PASCAL KIPLIMO KIPLAGAT.....1<sup>ST</sup> APPELLANT

DANIEL KIPKOECH KIPCHUMBA.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Eldoret, (P.M. Mwilu, J.) dated 23<sup>rd</sup> December, 2010)*

*in*

H.C.C.R.A. NO. 50 OF 2009)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the judgment of the High Court (*Mwilu, J.*) which dismissed the appellants' appeal against conviction and sentence by the Chief Magistrate's Court in Eldoret for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code and sentenced to serve a term of imprisonment of twenty years.

[2] The particulars of the offence were that on 20<sup>th</sup> August, 2008 at **Kapindani Village** in Uasin Gishu District of the Rift Valley Province, **Pascal Kiplimo Kiplagat** (the 1<sup>st</sup> appellant) and **Daniel Kipkoech Kipchumba** (the 2<sup>nd</sup> appellant) jointly and unlawfully killed **Brian Kipchumba Cheruiyot** (the deceased).

[3] The appellants pleaded not guilty to the charge and the matter proceeded to full hearing. During the trial the State called a total of nine witnesses, while the appellants did not call any witnesses. The 1<sup>st</sup> appellant gave an unsworn statement of defence and the 2<sup>nd</sup> appellant made a sworn statement of defence.

[4] The brief facts leading to the appellants' conviction were that on 20<sup>th</sup> August, 2008 at about 11.00p.m., **Edwin Koech Cheruiyot** (Edwin) heard screams from the 1<sup>st</sup> appellant's house and on arrival at the 1<sup>st</sup> appellant's house, he found the deceased lying down on the ground and one Kiprop was sitting next to the deceased; that the 1<sup>st</sup> appellant was unarmed while the 2<sup>nd</sup> appellant had a stick; and that the deceased was bleeding from the scalp and died the next days.

[5] **Musa Kiplimo Chepkonga** (Musa), testified that he went to the 1<sup>st</sup> appellant's house upon hearing screams and found the deceased on the ground; that the 1<sup>st</sup> appellant was armed with a stick while the 2<sup>nd</sup> appellant was unarmed; that both appellants were hitting the deceased; and that the next day he learnt that the deceased had died.

[6] **Francis Cheruiyot Cherutich, (Francis)** was the village elder to whom the killing of the deceased was reported. He testified that he went to the 1<sup>st</sup> appellant's house and found the deceased's body on the floor and one Kiprop (whom Francis testified was the deceased's brother) crying in pain. Francis further testified that the 1<sup>st</sup> appellant informed him that he (the 1<sup>st</sup> appellant) had killed the deceased.

[7] **Dr. Joseph Embenzi**, (Dr. Embenzi) produced the post mortem report on the deceased; and stated that the deceased had among other injuries a laceration on the head and bleeding under the skin; and that the cause of death was multiple injuries due to assault.

[8] **PC Stephen Ngela**, (PC Ngela), the investigating officer testified that he and other police officers went to the scene and found the naked body of the deceased; that they found a panga, a metal bar, a belt and piece of wood in the 1<sup>st</sup> appellant's house and arrested the 1<sup>st</sup> appellant.

[9] **Derrick Kiprop Cheruiyot**, (Kiprop), testified that on the night of 19<sup>th</sup> August, 2008 at about 9.00 p.m. were on their way home while in the company of his brother (the deceased); that the 1<sup>st</sup> appellant who was in the company of the 2<sup>nd</sup> appellant accosted him (Kiprop) with a stick; that the appellants dragged the deceased to the 1<sup>st</sup> appellant's home; that the 1<sup>st</sup> appellant beat the deceased with a piece of wood while the 2<sup>nd</sup> appellant beat the deceased with a panga; that the 1<sup>st</sup> appellant stated that he had been looking for the deceased for a long time; that the appellants beat him (Kiprop) and the deceased and locked them in the 1<sup>st</sup> appellant's house; that he (Kiprop) lost consciousness and when he regained consciousness the next day he found the body of the deceased lying next to him; and that he screamed and neighbours took him to the hospital for medical treatment where he was admitted for six days.

[10] In his defence, the 1<sup>st</sup> appellant in an unsworn statement testified that he was in his house at about 10.00 p.m. on 19<sup>th</sup> August, 2008 when he heard a knock on his door; that the door was broken and two people who were naked entered and attacked him; that in the ensuing struggle he was able to grab one of the assailants; that he screamed which attracted many people who came to his rescue and attacked his assailants; that the 1<sup>st</sup> appellant participated in apprehending and tying the deceased inside his house and in calling the area chief who called the police; that the police took the body of the deceased to the mortuary and the 1<sup>st</sup> appellant was thereafter arrested and charged.

[11] The 2<sup>nd</sup> appellant in a sworn statement testified that he was a watchman and that on the material night, a neighbour called and informed him that thieves had attacked their neighbour; that upon reaching his neighbour's house he found that the deceased had been injured; that he went back to work until about 6.30 p.m., the next day; and that he was thereafter arrested and charged.

[12] The trial magistrate found as follows:-

***“The evidence by the prosecution witnesses is consistent and corroborated. The defence by the accused persons does not shake the prosecution's case. The accused persons are well known to PW7 (Derrick Kiprop Cheruiyot, who was the deceased's brother) who was an eye witness. It was an issue of recognition. The accused persons acting in concert unlawfully killed the deceased.***

***I find the prosecution has proved its case against both accused persons beyond any reasonable doubt and I convict them of the offence charged under section 215 CPC.”***

The trial magistrate sentenced both appellants to 20 years imprisonment.

[13] Aggrieved by that decision, the appellants preferred an appeal to the High Court on the grounds that there was insufficient and fabricated evidence which could not sustain a conviction; that the evidence adduced by the prosecution witnesses was contradictory and the post mortem report was inconsistent and contradictory.

[14] The High Court (Mwilu, J.) (*as she then was*) heard the appeal and found that the evidence of the prosecution regarding whether it was the 1<sup>st</sup> appellant or the 2<sup>nd</sup> appellant who was holding a stick ***“is dislodged by the fact that nowhere in evidence was it said that both PW1 and PW2 got to the scene at the same time ... what is quite clear is that the evidence of PW2 and that of PW7 corroborated each other sufficiently.”***

[15] Regarding the contradiction in the post mortem report, in respect of the date the post mortem was carried out on the deceased's body, the learned Judge found the inconsistency to be minor and that it did not affect the validity of the report. The learned Judge considered the appellants' defences and found the 1<sup>st</sup> appellant's defence to be unbelievable and inconsistent with Cheruiyot's testimony. The learned Judge also found that the 2<sup>nd</sup> appellant's alibi defence was successfully dislodged by the evidence of Edwin, Musa and Kiprop who all testified that at about 11pm on 19<sup>th</sup> August, 2008, the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant assaulted the deceased and Kiprop. The learned Judge found no merit in the appeal and dismissed it.

[16] Aggrieved by that decision, the appellants preferred an appeal to this Court against conviction and sentence. The appellants filed very similar Memorandum of Appeal. The appellants raised the following grounds *inter alia*; that the learned Judge erred in law by misinterpreting provisions of Section 215 of the Criminal Procedure Code; and that the sentence of 20 years imprisonment is manifestly harsh and excessive. The appellants urged the court to allow their appeal.

### **Submissions**

[17] At the hearing of the appeal, the appellants were both unrepresented. **Ms Oduor**, the Public Prosecuting Counsel, represented the State.

The 1<sup>st</sup> appellant submitted that his appeal is only against sentence; that in the circumstances of this case the sentence of 20 years imprisonment is harsh and manifestly excessive; that he is remorseful as he, the 2<sup>nd</sup> appellant and the deceased were all drunk on the material day and the death of the deceased was accidental and not intended.

The 2<sup>nd</sup> appellant submitted that he is appealing only against sentence; that the death of the deceased was not intended as it occurred as a result of a fight when the deceased was accidentally and fatally injured. The appellant filed identical Supplementary grounds of appeal on

14<sup>th</sup> February, 2018 and stated that the two courts below erred in law in misapplying, misinterpreting and misdirecting provisions of **section 215** of the Criminal Procedure Code instead of **section 211** of the Criminal Procedure Code.

[18] **Ms Oduor**, opposed the appeal and submitted that the appellants caused the death of the deceased and the sentence meted out of 20 years imprisonment was commensurate with the offence committed; that **Section 205** of the Penal Code is clear that where a person is found guilty of manslaughter, the maximum sentence is life imprisonment; that the learned Judge did not impose the maximum sentence of life imprisonment; that the sentence was lawful and consideration should be made that an innocent life was lost at the hands of the appellants. Counsel urged the Court to disallow the appeal for lack of merit.

**Determination**

[19] We have considered the record, the submissions and the applicable law. This is a second appeal and our mandate is limited under **Section 361** of the Criminal Procedure Code to consideration of matters of law only. (See **Chemagong V Republic [1984] KLR 213 and Reuben Karari s/o Karanja v Republic [1950] 17 EACA 146**).

[20] The appellants herein have appealed only against the sentence meted out on the ground that the sentence of 20 years imprisonment for the offence of manslaughter was harsh and manifestly excessive in the circumstances of this case.

**Section 361(1)** of the Criminal Procedure Code provides 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...**” (Emphasis added)

[21] Accordingly, severity of sentence is a question of fact. 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 by this Court in many authorities.

[22] Relying on this provision, in the case of **Paul Tanui v Republic (2010) eKLR**, this Court stated:-

***“Second appeals to this Court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361 (1) (a) of the Criminal Procedure Code. It is clear that an appeal against the severity of the sentence as opposed to the legality of the sentence is not maintainable.”***

[23] The appellants herein were 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 appellants to twenty (20) years. On first appeal, the High Court stated that the sentence of 20 years imprisonment ***“was light, although a correct sentence in law”***.

[24] The appeal herein concerns 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 we have no jurisdiction to interfere with the lawful sentence of the courts below.

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

**Dated and delivered at Eldoret this 8<sup>th</sup> day of November, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**