IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KIHARA KARIUKI, GATEMBU KAIRU & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL NO. 183 OF 2008

BETWEEN

CLEMENT KIPTARUS KIPKURUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Koome, J) dated 24th October, 2008

in

H. C. Cr. C. No. 43 of 2005)

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JUDGMENT OF THE COURT

1. By a memorandum of appeal dated 29th October, 2008 the appellant, ***Clement Kiptarus Kipkurui*** appealed against the conviction for the offence of manslaughter and sentence of 15 years imprisonment imposed by the High Court of Kenya at Nakuru (Koome, J) (as she then was) on 24th October, 2008. The grounds of appeal as set out in the memorandum of appeal filed on 29th October, 2008 are that:

"(a) The appellant did not plead guilty at the trial.

(b) The learned trial judge erred in imposing an excessively harsh sentence given the circumstance of this case.

(c) The trial judge erred in failing to consider the appellants reasonable explanation in Defence of how he unwillingly caused the death of his beloved wife.

(d) The death was as a result of one shot fired unintentionally."

2. Based on those grounds, the explanation given by the appellant (who was not represented by counsel) and the mitigating factors, the appellant prays that that sentence be reduced to the minimum.

3. Although the appellant in his memorandum of appeal indicated that his appeal is against the conviction and sentence, at the hearing of appeal on 11th February, 2013, the appellant informed the Court that he was restricting his appeal against sentence only. We are accordingly proceeding on the basis that the appeal is against sentence only.

4. In his address before this Court, the appellant stated that in sentencing him, the learned trial judge ought to have considered that the appellant did not intend to commit the offence. That the firearm went off by accident. That he was inside the house when, while unloading the firearm, it went off, the stray bullet went through the wall and caught his wife who was outside the house.

5. The appellant stated that the learned trial judge ought also to have considered that the appellant and the deceased were husband and wife and that they had not parted ways as was alleged in evidence and that they had a six months old baby who is now destitute.

6. Mr. Chirchir, learned counsel for the respondent, opposed the appeal. He submitted that the appeal is against sentence and that the 15 years sentence is legal. Mr. Chirchir went on to say that having regard to the circumstances, including the fact that the appellant had 17 years experience in handling fire arms and considering that the maximum sentence for the offence is life imprisonment, the sentence imposed by the learned trial judge cannot be said to be excessive. Learned counsel submitted that the learned trial Judge correctly considered the matter and correctly considered a 15 years sentence sufficient. He accordingly urged the court to uphold the sentence and to dismiss the appeal.

7. In his brief reply, the appellant stated that considering the circumstances under which the gun went off, his experience in handling ammunition and firearms, which the learned trial judge took into account in sentencing, was an irrelevant consideration.

8. We have carefully considered the appeal. In the case of ***Cecilia Mwelu Kyalo vs. Republic Criminal Appeal No. 166 of 2008*** this Court stated:

"…In law, sentence is essentially a discretionary matter for the trial court but again in law, in exercising that discretion a trial judge has a duty to take into account all the relevant factors and leave out all irrelevant ones. An appellate Court would only be entitled to interfere with that exercise of discretion where it is shown that the court whose exercise of the discretion is impugned, has either not taken into account a relevant factor or has taken into account an irrelevant factor, or that short of those two, the exercise of the discretion is plainly wrong – see Felix Nthiwa Munyao vs. Republic (Criminal Appeal No. 187 of 2000), or that the sentence itself is, in all the circumstances of the case manifestly harsh and excessive."

9. Applying those principles to the present case, the issue before us, therefore, is whether the learned trial judge in exercising her discretion failed to take into account a relevant factor, or whether she took into account an irrelevant factor or whether the sentence of 15 years is manifestly harsh and excessive.
10. The learned trial judge accepted the evidence of the appellant that he killed the deceased accidentally. She however noted that the appellant, a trained police officer, had a wealth of experience of seventeen years handling ammunition and firearms. The learned judge then went on to say that on the material day the appellant must have been negligent in handling the gun and the life of an innocent Kenyan was lost. The learned Judge expressed herself thus:

"Did the accused person lure the deceased to return with the intention of killing her, or did the gun explode accidentally? Since the first question cannot be answered with clear affirmation, I will take the defence by the accused person that he killed the deceased accidentally. However the accused person is a trained police officer to boot. He has a wealth of experience of seventeen years, all spent

while of** (sic) **handling ammunition and firearms. On the material day he must have been negligent in handling the gun and thus the life of an innocent Kenyan was lost. It is for that reason I convict the accused person of the offence of manslaughter."

11. On sentencing, the learned trial judge stated that she had taken into account the mitigation offered by the appellant and the seriousness of the offence and that the offence was prevalent and that a deterrent sentence was called for before sentencing the appellant to 15 years imprisonment. The learned trial judge was thereby influenced by the consideration that the offence is "*prevalent and a deterrent sentence*" was called for. In so doing and bearing in mind that the judge accepted that the shooting was accidental, we think the learned trial judge took into account a matter that she should not have with the result that she fell into error in sentencing the appellant to 15 years imprisonment. There is also the consideration that the appellant and the deceased have a young child who was six months at the time. The trial judge does not appear to have given this factor due consideration along other circumstances.

12. In the case of ***Cecilia Mwelu Kyalo vs. Republic* Criminal Appeal No. 166 of 2008** to which we have referred, this Court stated that the trial judge in that case ought to have had regard to the fact that the accused in that case had young children. Equally, we think that the fact that the appellant has a young child to provide for is a relevant consideration.

13. In the case of ***Gideon Kenga Maita vs. Republic, Criminal Appeal No. 35 of 1997 (unreported)***, this Court stated:-

"……..We are not saying that a court has no power to impose a sentence of life, a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was committed; the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature."

14. Had the learned trial judge taken into account the circumstances under which the offence was committed, the fact that there was no evidence that the appellant was a repeat offender, the fact that the appellant remained in custody between the period he was charged in May 2005 until the conclusion of trial and delivery of judgment in October 2008, we think that the learned trial judge would have imposed a lower sentence.

15. In the case of ***Felix Nthiwa Munyao vs. Republic Criminal Appeal Number 187 of 2000*** this Court stated as follows: -

"But a Court is also under a duty to take into account the matters in favour of an accused person. In this case the appellant was admittedly, a first offender. The learned Judge does not mention this factor at all in his elaborate notes on sentence. This was, however, a factor which the learned Judge was bound to take into account in favour of the appellant …….

We think he was bound by law to consider the two factors which were in favour of the appellant and weigh them against those which supported severe penalty."

16. In our view, the sentence given as a result of non-consideration of the matters to which we have referred and the consideration of matters that should not have been considered resulted in a sentence that was manifestly harsh and excessive. The sentence of 15 years imprisonment was not merited in our view.

17. Accordingly, we allow the appeal against sentence. We set aside the sentence of 15 years imprisonment and substitute it with a sentence of the term so far served with the result that the appellant is **set free forthwith unless** otherwise lawfully held.

Dated and delivered at Nakuru this 12th day of April, 2013.

P. KIHARA KARIUKI

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU
.....
JUDGE OF APPEAL

J. OTIENO-ODEK
.....
JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR