IN THE COURT OF APPEAL
AT NAKURU

(CORAM: WAKI & ONYANGO OTIENO & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 28 OF 2008

BETWEEN

FRANCIS OLELA OMUOMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Koome, J.) dated 8th February, 2008
in
H.C.CR.C. No. 56 of 2005)
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JUDGMENT OF THE COURT

The appellant was tried before the High Court (Koome, J. as she then was) for the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. It had been alleged in the Information filed by the Attorney General that on the *8th* day of *June, 2005* at ***Olpopong Estate, Narok District*** within Rift Valley Province, he murdered ***Douglas Matoke***. The prosecution established beyond reasonable doubt, through five witnesses, that indeed the appellant had caused the death of the deceased. It failed, however, to prove that the offence was committed out of malice aforethought and it therefore amounted to unlawful killing or manslaughter contrary to ***section 202*** as read with ***section 205***.

On the facts as found by the trial Court, there was a quarrel between the deceased and the appellant over a small debt, a change of Shs.40, which the appellant had gone to collect from the deceased who was a shopkeeper. The deceased refused to refund the said change and he pulled out a rungu with which he hit the appellant. The appellant retreated towards his house, but the deceased followed him there. The appellant took a knife and fatally stabbed the deceased. He pleaded that he was provoked by the deceased and was acting in self defence. In convicting the appellant, the Court stated thus:-

"Taking into account the totality of the evidence adduced in this case I unhesitantly accept that the accused person was provoked by the deceased and he stabbed the deceased in self defence. The deceased was a partially disabled person. He used to walk with the help of a walking stick and considering his condition it is clear that although the accused person was provoked he used excessive force. I find the accused person criminally responsible for the death of the deceased and convict him of the offence of manslaughter. It is so ordered."

The deceased was a young disabled person, while the appellant was aged 74 years.

On sentence, the trial Court considered the mitigation advanced on behalf of the appellant, that he was fairly aged; remorseful, and had been in custody since 2005. The Judge also considered the circumstances surrounding the commission of the offence and meted out a sentence of **seven (7) years** imprisonment.

The appellant does not challenge the conviction. But he comes before us in this appeal seeking reduction of the sentence on the ground that the sentence was harsh and excessive since he was sorry and remorseful for his actions; he was now aged 78 years; his house was burnt during the post election violence causing the death of his wife and two children; and that his health had deteriorated after imprisonment leading to loss of parts of his toes and fingers. Evidently, the adverse events that occurred to the appellant after the conclusion of his case could not have been considered by the trial Court. We think for ourselves, that they would form a good basis for the exercise of the powers donated to the President under ***Sections 27*** and ***28*** of the former Constitution and now under ***Article 133*** of the current Constitution. We draw the attention of the relevant authorities to these provisions of the law.

The jurisdiction we must exercise in this first appeal on sentence is to examine whether the trial Court, which had a discretion to impose the sentence, acted on some wrong principle or did not act on some correct one or that it imposed a sentence which is manifestly excessive. – See ***Ogalo Owuor v. R. (1954) 21 EACA 270*** and ***Muoki v. Republic [1985] KLR 323.*** Learned State Counsel, Ms. Idagwa, submitted that the sentence of seven years for the offence of manslaughter which attracts a maximum sentence of life imprisonment was lenient in the circumstances of this case. She further observed that the mitigating factors now raised, save for those that arose after imprisonment, were the same ones raised before the trial Court and were properly considered before sentence. She urged us not to interfere with the sentence.

We have considered the appeal on sentence and we think there is no valid basis laid for us to interfere with the discretion of the trial Court. There was no error in principle. The mitigating factors advanced by the appellant did not outweigh the seriousness of the offence in which human life was lost. At all events, we are informed that the appellant has substantially served the sentence and with remission, he should be released by ***October, 2012***. For those reasons, we reject the appeal and order that it be and is hereby dismissed.

Dated and delivered at Nakuru this 23rd day of February, 2012.

P.N. WAKI
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JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR