



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A.)

CRIMINAL APPEAL NO. 4 OF 2010

BETWEEN

JOHN ONYANGO OBALAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J.) dated 3rd December, 2009

in

H.C.C.R.A. NO. 187 OF 2007)

JUDGMENT OF THE COURT

JOHN ONYANGO OBALA, the appellant, was on 15th November, 2007 convicted by the Senior Resident Magistrate, Nyando, of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and sentenced to life imprisonment. Being aggrieved he preferred an appeal against both conviction and sentence. Karanja, J. on 3rd December, 2009 dismissed the appeal by upholding the conviction but reduced the sentence to 30 years imprisonment. Hence this appeal.

On 8th December, 2006 the appellant reported to Koru Police Station that on the previous night his wife, **Rose Adhiambo** (the deceased) had come home drunk. After a brief quarrel he locked her in the house and went to sleep in the first wife’s house. In the morning of the following day, the deceased was found dead. The appellant denied beating her at all or causing her death. He maintained that she could have found injury due to an epileptic episode.

In the course of investigation, the police and the local assistant chief proceeded to the house of the appellant and found the dead body of the deceased lying on a mattress. It had facial injuries and bruises all over. The body was later removed from the scene and taken to New Nyanza General Hospital where **Dr. James Agunde** (PW7) performed a post mortem on 14th December, 2006. His opinion was that the cause of death was cardio-respiratory arrest due to severe head and multiple body trauma with internal bleeding due to assault with a blunt object.

After trial the learned magistrate held that the deceased was killed inside her own house by means of an unlawful act perpetrated by the appellant. He convicted the appellant and as stated earlier on in this judgment he jailed the appellant for life.

The record of 15th November, 2007 shows the following as having been recorded:-

“Court prosecutor: *Accused is a first offender as I have no..... records.*

Accused: *I pray for mercy. I have children who depend on me.*

Order: *Court has considered accused’s mitigation. However, Court finds that accused was extremely merciless and violent when he was killing his wife Rose. He deserves no mercy. A deterrent sentence is called for. Accused is hereby sentenced to serve life imprisonment.*

Right of Appeal 14 days”

In dismissing the first appeal Karanja, J. held:-

“This court finds no reason to interfere with the conviction of the appellant by the learned trial magistrate. However, on sentence, considering that the appellant was a first offender and that the deceased was his wife with whom they had two children and although the attack on the deceased was brutal, the sentence of life imprisonment was lawful but rather harsh. Undoubtedly, the appellant will remain haunted by the death of his younger wife for the rest of his life.”

The learned judge concluded:-

“In the end result, this appeal is dismissed with alteration to the sentence in that the life imprisonment imposed by the trial court is hereby substituted for thirty (30) years imprisonment.

Ordered accordingly.”

Once again being aggrieved by this decision the appellant now comes to this Court by way of a second appeal. The appellant acting in person stated that he was only appealing against the sentence. He categorically admitted that he killed the deceased after a quarrel which had been brought about by her errant ways. He had been greatly provoked leading to beating her with a stick which he picked nearby. He was remorseful and regretted the incident.

Under **section 205** of the Penal Code, the maximum sentence for manslaughter is life imprisonment. It has long been a principle of sentencing that a maximum **sentence** should only be meted out to the worst offender under the particular section that the offender is charged. See ***Charo Ngumbao Gugudu V. R Criminal Appeal No. 358 of 2008 [Nairobi] (unreported)***.

In this appeal, the appellant was a first offender aged about 30 years at the time of the offence. No doubt the injuries to which the deceased succumbed were serious but it is equally true that the appellant was provoked when he assaulted the deceased.

Under **section 361(1)** of the Criminal Procedure Code, this Court has no jurisdiction to entertain appeals on severity of sentence. But the issue before us now in this appeal is not severity of sentence but the legality of it.

As was said in **Gugudu’s** case (*ibid*), we think that it is within the mandate of this Court to correct the failure by the two courts below to take into account the normal circumstances to be considered in deciding the appropriate sentence. These are, for example, that the appellant was a first offender, circumstances leading to the killing, the age of the appellant and whether or not the appellant was remorseful. These were not considered by the two courts below.

In our view, having considered the circumstances leading to the killing of the deceased and the

submissions of both the appellant and *Mr. Gumo*, the learned Assistant Deputy Public Prosecutor, we are satisfied that the two courts below did not apply the correct principles of sentencing in which case the appellant was entitled to challenge the legality of the sentence imposed on him.

Accordingly and for the foregoing reasons, we allow this appeal to the extent that we set aside the sentence of **thirty (30) years** imprisonment imposed by the superior court and substitute the same with the sentence of **fifteen (15) years** imprisonment which sentence is to be served from the date of conviction by the trial Court that is from **15th November, 2007**.

Dated and delivered at Kisumu this 17th day of March, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR