



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 200 of 2009

BETWEEN

STEPHEN ONYANGO OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from a conviction, judgment of the High Court of Kenya at Kisumu (Gacheche, J.) dated 5th February, 2004

in

H.C.CR.C.NO.31 OF 2002)

JUDGMENT OF THE COURT

The appellant, **STEPHERN ONYANGO OTIENO**, was originally charged with murder contrary to **section 203** as read with **section 204** of the Penal Code but the charge was reduced to manslaughter contrary to **section 205** to which the appellant pleaded guilty, was convicted and sentenced to twenty years imprisonment.

The facts as narrated by the learned State Counsel (Mr Mutai) were as follows: The appellant and the deceased were living together as man and wife in their home in Usenge, West Yimbo Location, Bondo District, Nyanza Province. On 26th December, 2001 the deceased went to visit her neighbour at about 8.00 a.m. and upon her return, she told the appellant that she wanted to take her neighbour (Caroline) to a dispensary. The appellant did not assent to this on the ground that 26th December being a public holiday the said dispensary was not functioning. The appellant was also preparing to go fishing as he was a fisherman. The couple had a child who was one year old.

After the appellant went fishing, the deceased decided to go to her neighbour so that when the appellant came back at 1.00 p.m. he found the deceased absent, the door locked and the one year old child outside the house. When the appellant made enquiries, he found that the deceased had left with the neighbour and that she had left the keys at the neighbour's house. When the deceased came back at 4.30 p.m., a quarrel ensued between the two and the appellant assaulted the deceased. She fell down, became unconscious and eventually died. Her body was taken to Siaya District Hospital where a postmortem was conducted by doctor **Kalendi** who formed the opinion that cause of death was severe haemorrhage.

The appellant was subsequently arrested, taken for a medical examination and found mentally fit to stand trial. He was then charged

with murder which was then reduced to manslaughter.

The appellant admitted the foregoing facts to be correct and true.

The learned Judge of the superior court (Gacheche, J.) considered the foregoing and in sentencing the appellant stated:-

“Stephen Onyango Otieno, was initially charged with the offence of the murder of his wife but he pleaded guilty to the reduced charge of manslaughter and was convicted accordingly.

The court is now called upon to pass the sentence.

I have taken into account the mitigation by the counsel for the accused, who urges the court to treat the accused leniently, as he is remorseful.

I do note that the deceased succumbed to injuries that she sustained to her liver, spleen, and the spine due to several fractures, all of which led to severe internal haemorrhage. Admittedly, she had left the home against his wishes, but I do not in my mind believe that her action called for such a brutal attack. She was only twenty (20) years old then. There were better ways of reprimanding her especially in view of the fact that as a husband, he was obligated to love, guide her and forgive her for her actions. He acted with excessive force and for which offence he shall serve a jail term of twenty (20) years imprisonment.”

Being aggrieved by the sentence, the appellant now comes to this Court by way of first appeal. This is the appeal that came up for hearing on 22nd June, 2010 when the appellant appeared in person while the State was represented by Miss M.C. Oundo (Principal State Counsel). The appellant handed in a one page document entitled “MITIGATION GROUNDS.” In that document the appellant pleads:-

“I, the appellant prays that my sentence or sentence metted (sic) upon me of 20 years imprisonment be reviewed downwards.”

When we asked the appellant to address us, he said that he had nothing to add to what he had written in the document apart from informing us that he was 35 years old.

On her part, Miss Oundo reminded us that the appellant had been convicted on his own plea of guilty and sentenced to 20 years imprisonment. In her view, the sentence was neither harsh nor excessive in the circumstances of the case.

Having considered the facts of the case and mitigating circumstances, can it be said that the sentence of 20 years imprisonment was harsh and excessive? The learned Principal State Counsel was of the view that the sentence was appropriate.

On our part we would say that each case must be considered on its own peculiar circumstances. In this appeal we are concerned with the sentence only. The appellant was a first offender who assaulted his wife after a quarrel arising from the facts as stated by the prosecution before the High Court. There is the question of whether a first offender who has readily admitted the offence should be sentenced to such a sentence when the maximum sentence is life imprisonment. In our view once the appellant readily pleaded guilty to the lesser offence of manslaughter it meant that the court would take a lenient view of the matter bearing in mind the circumstances under which the offence was committed. It is our view that taking the circumstances of this case into account the sentence of 20 years imprisonment, was certainly harsh and excessive. We therefore reduce the sentence to that of ten (10) years imprisonment which sentence shall run from the date he was sentenced by the High Court, i.e. 5th February 2004. The appeal succeeds to that limited extent.

DATED and delivered at Kisumu this 25th day of June, 2010.

E.O. O’KUBASU
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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR