



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 359 of 2006

EDWIN OTIENO ODHIAMBOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu

(Mr. Justice M. Warsame) dated 26th September, 2006

in

H.C.CR. C. NO. 3 OF 2004)

JUDGMENT OF THE COURT

The appellant *Edwin Otieno Odhiambo* was charged with murder contrary to *section 203* of the Penal Code as read with *section 204* of the same code. The particulars of the charge are that on 20th day of December, 2003 at Nyamasaria area within Kisumu District of Nyanza Province jointly with another not before the court, he murdered *Victor Joab Odhiambo*, the deceased.

After a full trial in the superior court, the court reduced the charge of murder to manslaughter and convicted the appellant to the new charge and sentenced him to fifteen (15) years imprisonment. Aggrieved by the conviction and sentence he filed a memorandum of appeal to this Court on 31st July, 2009 which raises the following grounds:-

- “1. The superior court erred in law in failing to appreciate that the failure of prosecution to call Kevin Otieno as a witness was fatal to the case.***
- 2. The superior court erred in failing to appreciate that failure of the prosecution to hold an identification parade for the appellant was fatal to his case.***
- 3. The superior court erred in law in finding that it was the appellant and not any of the other two, who stabbed the deceased.***
- 4. The superior court erred in law in making the inference that the similarity of the blood group***

found on the t-shirt of the appellant and the blood group of the deceased was further evidence of guilt of the appellant.

5. The sentence imposed by the superior court is so manifestly harsh and excessive as to amount to misdirection.”

Ordinarily as the first appellate court our obligation would have been to review the entire evidence given in the matter in order to determine whether the conclusion reached upon the evidence should stand – see the case of ***KIMEU V. REPUBLIC*** [2002] KLR 756. However, we are not obliged to do so in the special circumstances of this appeal except on the issue of sentence. The first reason is that when the appeal came up for hearing the learned counsel for the appellant, Mr. Aringo, abandoned grounds 1 – 4 of the memorandum of appeal and confined himself to ground five (5) only. The second reason is that it has been submitted by the appellant’s counsel that the superior court did not give the appellant an opportunity to mitigate before the sentence was imposed as stipulated in ***sections 215*** and ***216*** of the Criminal Procedure Code. ***Section 215*** and ***216*** respectively state:-

“215 The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”

216 The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.”

In his submissions the learned counsel for the appellant Mr. Aringo contended that it was not clear what considerations the trial court took into account in coming up with sentence of 15 years. On this point, counsel added that while he concedes that the issue of sentence is one of discretion, the Court appears not to have taken into consideration that the deceased and his assailants were drunk and the offence could have happened due to intoxication.

Mr. Aringo further urged the Court to note that it had in the past interfered with severity of sentence by reducing them in similar circumstances. For example, in the case of ***GEDION KENGA MAITA V. REPUBLIC*** Criminal Appeal No.35 of 1997 the Court reduced the sentence of life imprisonment to five years and in the case of ***BENARD SENEYO LETIKIRICH V. REPUBLIC*** (KLR 2006) Criminal Appeal No. 2 of 2005 the Court reduced the sentence of ten (10) years for manslaughter to seven (7) years. In both cases the court held that the circumstances under which the offence itself was committed; the circumstances of the accused person such as to whether he is a first offender; how long he has been in prison awaiting trial; must be taken into account. In this case, the learned counsel added, the superior court does not appear to have directed itself on these factors before imposing the sentence of fifteen (15) years. He urged us to find that if the trial court had properly directed itself by taking into account the issue of intoxication and provocation as required under ***section 216***, such a direction might have in turn had an impact on the length of the sentence.

He concluded by inviting us to follow the case of ***LETIKIRICH*** (above) and find that the trial court was harsh in imposing a manifestly excessive sentence and reduce it accordingly.

Miss Oundo, the learned Senior State Counsel, opposed the appeal and submitted that the defence of intoxication was never raised at all and that, it is being raised now as an afterthought. She invited the Court to take into account that the law provides for life imprisonment for the offence of manslaughter and that the international standard is 30 years. The learned counsel further submitted that it was apparent from the judgment of the trial court that it had properly addressed both the issue of intoxication and provocation.

On the issue of the sentence, it is clear to us that the trial court did not offer the appellant an opportunity to mitigate and on this we are in agreement with the appellant counsel’s submission. Although we appreciate that ***section 216*** of the Criminal Procedure Code is worded in permissive terms,

we are certain that on matters of sentencing if a court disregards the provision and therefore fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence are enhanced. We are also concerned that, in this matter the court went on to impose a sentence of 15 years without taking into account that the appellant had been held in custody for 3 years before the commencement of the trial. We think the court ought to have taken this into account when imposing the sentence. On the issue of intoxication and provocation, while we note that the court did address this in the judgment and consequently reduced the charge of murder to manslaughter, nevertheless, on the issue of the sentence there is nothing to show that the court considered these factors at all. We are equally of the view that the court should have separately recorded any mitigating circumstances.

We are of the view that the superior court had a duty to record the mitigation after a conviction and before sentencing. This statement is not a reinvention of the wheel. In the case of JOHN MUOKI MBATHYA V. REPUBLIC Criminal Appeal No. 72 of 2007 (unreported) the principle was stated in these words:-

“As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentence should be reserved and be pronounced only after the court receives mitigating circumstances if any are offered.”

This Court followed the same path in the case of FRED MICHAEL BWAYO V. REPUBLIC Criminal Appeal No. 130 of 2007 (unreported) and came to the conclusion because the principles of sentencing were erroneously applied in the case, reduction of the sentence was justified.

For those reasons, we are in the circumstances entitled to interfere with the sentence. We think the sentence was harsh and excessive and we accordingly reduce the sentence of fifteen (15) years to one of ten (10) years to run from the date when the appellant was sentenced by the High Court. We so order.

Dated and delivered at Kisumu this 7th day of August, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR