IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 78 OF 2009

BETHWEL WILSON KIBOR……APPELLANT

AND

REPUBLIC……..…….RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kitale (W. Karanja, J) dated 16th October, 2008

in

H.C.Cr.C. No. 2 of 2001)

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JUDGMENT OF THE COURT

This appeal has a long and rather unfortunate history. The incident giving rise to the appellant's arrest and his subsequent arraignment in court is alleged to have taken place at the end of the last century more specifically on 18th July, 1999.

The appellant herein *BETHWEL WILSON KIBOR* was arraigned before the superior court on an information in which he was charged with the offence of murder contrary to *Section 203* as read with *section 204* of the Penal Code. The particulars of the offence were as follows:-

"*BETHWEL WILSON KIBOR: ON the 18th day of July, 1999 at Sinoko Farm in Cherangani Division, Trans Nzoia District within the Rift Valley Province murdered BENJAMIN KIPKOSGEI*".

It has to be pointed out that the appellant underwent committal proceedings before the Senior Principal Magistrate's Court at Kitale before he was formally charged before the High Court at Kitale on 25th April, 2001 when his plea was taken. The State indicated its willingness to reduce the charge of murder to manslaughter but *Mr. Nyakundi*, the learned counsel appearing for the appellant stated that his client would not accept to plead guilty to the lesser charge of manslaughter. The case then proceeded for hearing before *Omondi Tunya J.* (*as he then was*) as from 11th July, 2001. The learned Judge heard the case up to the close of prosecution case on 25th September, 2002. The learned Judge took time to deliver a ruling which he did on 28th February, 2003. In a short ruling the learned Judge stated:-

"*Upon assessment of the evidence so far adduced by the prosecution and the respective submission on it by counsel for the State and for the accused, I am satisfied that the accused has a case to answer and is now put on his defence. I so order.*"

Having been put on his defence the appellant had to wait until 18th December, 2003 when he was produced before *Dulu J.* on 17th March, 2004 but nothing substantial took place on that day since the court merely ordered that the case be mentioned on a future date to determine how to proceed as the trial judge *(Tunya J.)* was no longer in service. The matter was then placed before *Gacheche J.* on 23rd March, 2004 when the court made the following order:-

"*Case to be heard de novo on 28th & 29th July, 2004. Accused remanded in custody until then. Witnesses summons to issue to all the prosecution witnesses. Assessors to be selected on 28/7/2004.*

The case was finally placed before *W. Karanja J*. for hearing *de novo o*n 29th July, 2004. The learned Judge took the evidence of five prosecution witnesses and on 26th October, 2006 prosecution closed its case. On 7th December, 2006 the learned Judge made the following ruling:-

"*I have carefully gone through the entire evidence on record. I am satisfied that the same is sufficient to warrant the accused to be placed on to his defence. He is accordingly placed on to his defence pursuant to section 306(2) of the Criminal Procedure Code.*

Although the appellant was ready to defend himself in a sworn statement, he also applied for the O.B. *(Occurrence Book)* for 18th July, 1999 for Cherangani Police Station. That application by the appellant necessitated further adjournment. The matter dragged on until 30th July, 2007 when the appellant defended himself. Judgment was reserved to a future date. In the end *Karanja J*. prepared a judgment which was read by *Ombija J*. on 16th November, 2008. In concluding her judgment *Karanja J.* stated:-

"*I am satisfied from the evidence on record that the deceased and the accused person fought and injured each other.*

Unfortunately, the deceased sustained more serious injuries to which he succumbed. Though injured, the accused person survived and he was subsequently charged with this offence. Although my finding is that the accused person was responsible for the injuries that culminated into the death of the deceased, he and the deceased fought. There was no mens rea or malice aforethought and the accused person may have been fighting back in self defence or on provocation. I agree with counsel for the accused that the offence disclosed in these circumstances is that of manslaughter and not murder as charged. Accordingly, I invoke the provisions of section 179(2) of the Criminal Procedure Code and find the accused person guilty of the lesser but cognate charge of manslaughter contrary to section 202 as read with section 205 of the Criminal Procedure Code and convict him accordingly."

In sentencing the appellant *Ombija J*. stated:-

"*Having taken into consideration the totality of the mitigating circumstances of this case, I sentence the accused to serve 5 years imprisonment*."

It is from the foregoing that the appellant now comes to this Court by way of appeal against both conviction and sentence. But when this appeal came up for hearing on 22nd September, 2009 the appellant abandoned the appeal against conviction and only sought to appeal against the sentence.

Although the appellant has abandoned his appeal against conviction, nevertheless, this being a first appeal the Court must re-evaluate the evidence and make its own findings as was stated in *OKENO v. R. [1972] E.A. 32* and subsequent judgments of this Court. Since the appellant did not raise any defence of intoxication or self defence as a result of the fight between him and the deceased we think the learned Judge was entitled to convict the appellant on a lesser charge of manslaughter. In any case the appellant

now appeals against sentence only.

We have deliberately gone into the history of this matter to show that the appellant was right in complaining that he had been in custody for a considerable period before he was sentenced by *Ombija J.* on 16th November, 2008. As already indicated the appellant's case was affected by the fact that the hearing of his murder trial commenced before *Tunya J.* (*as he then was*) and just after the close of prosecution case, the hearing had to start afresh before *Dulu J.* and then *Karanja J.* who delivered the final judgment.

In addressing us the appellant said that the learned Judge who sentenced him did not take into account the surrounding circumstances of the case.

On his part *Mr. Chirchir* who appeared for the State opposed the appeal against sentence stating that the appellant was properly sentenced.

We have considered this appeal and it is our view that the appellant who told us that he was a qualified Animal Health Assistant, was made to remain in custody for a long time for no fault of his own. The incident took place way back in 1999. The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J.* who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody.

The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.

Dated and delivered at ELDORET this 25th day of September, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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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