IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 126 OF 2009

JOSEA KIBET KOECH ……..……. APPELLANT

AND

REPUBLIC …… RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Eldoret (Ibrahim, J) dated 5th February, 2009*

In

H.C. Cr. A. No. 125 of 2007

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JUDGMENT OF THE COURT

The appellant, JOSEA KIBET KOECH, was arraigned before the Principal Magistrate's Court at Kapsabet in Criminal Case No. 1879 of 2007 on a charge of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. The particulars of the offence were that on the 14th day of April, 2005 at Chepkomia location in Nandi North District of the Rift Valley Province, the appellant unlawfully killed ZEDI CHEROP KOECH. The appellant readily admitted the offence when the charge was read to him on 20th June, 2007 by the Senior Resident Magistrate (J.M. Njoroge, Esq.). The matter was adjourned to 25th June, 2007 when the court prosecutor Inspector Sitati gave the facts. The prosecutor is recorded as having told the court as follows:-

"***The accused is a brother in law to the deceased's mother. On 14th April, 2005 the deceased was walking with his mother. The accused went armed with jembe, and started to quarrel with deceased's mother at 9.40 a.m. She ran away and left the deceased. Then accused hit the deceased with a jembe and killed her instantly. The deceased's mother screamed for help and reported to Area Chief. The (sic) reported at Kapsabet Police Station and they visited the scene and took the body to Kapsabet District mortuary. A post mortem was done and cause of death was shock/excessive bleeding and brain damage, with multiple fractures to the head. The accused was arrested and a mental assessment done, and it was registered he was of sound mind. The deceased (sic) was charged with the offence. I wish to produce post mortem report – Exh. No. 1***

P3 form – Exh. No.2"

The appellant admitted these facts to be true and the learned Senior Resident Magistrate entered a plea of

guilty and convicted the appellant. In mitigation the appellant simply said:-

"***I didn't intend to kill. I pray for forgiveness."***

The learned Senior Resident Magistrate then proceeded to sentence the appellant as follows:-

"***Though the accused is 1st offender. The offence committed is of serious nature, and should be discouraged within the community. I shall order that the accused person be sentenced to serve a period of seven (7) years imprisonment."***

Being dissatisfied by the foregoing the appellant, through his counsel, preferred an appeal to the High Court on the following three grounds:-

"***1. The learned trial magistrate erred in law and fact by convicting the appellant based on a plea that was equivocal.***

2. The learned trial Magistrate erred both in law and fact by convicting the appellant without taking into account the fact that his mental condition could not allow him to plead to this charge.

3. The learned trial Magistrate erred in law and fact by putting to trial and convicting the appellant in the absence of his Counsel in breach of his fundamental right to legal representation since the Eldoret High Court in Criminal Case No. 50 of 2005, Republic vs. Josea Kibet Koech had found that the appellant's mental condition was unstable and a lesser charge of manslaughter preferred.

The appeal in the superior court came up for hearing before Ibrahim, J. on 15th January, 2009. The appellant was represented by his counsel, Mr. Miyienda who addressed the learned Judge on those three grounds of appeal. The learned Judge considered the submissions before him and he not only dismissed all the three grounds but enhanced the appellant's sentence from seven years imprisonment to thirty years (30) imprisonment! In concluding his judgment delivered on 5th February, 2009 the learned Judge said:-

"***This vicious and foul attack snuffed out the life of an innocent girl child. It was a reprehensible and callous conduct on the part of the Appellant. He did not hit once if it was impulsive. He hit the girl several times considering the injuries and the post-mortem report.***

In view of the foregoing, I think that the sentence of seven (7) years was a mockery of justice. The courts ought not allow such leniency in view of the grave circumstances. The Appellant is a danger to society and must be removed and kept away from it as this is possible.

I therefore do hereby enhance his sentence to thirty (30) years. Right of Appeal 14 days."

Still dissatisfied by the foregoing the appellant now comes to this Court by way of second and final appeal citing the following grounds of appeal:-

"***1. The Honourable Judge of the High Court erred both in law and fact by failing to consider the fact that the appellant was suffering from mental illness.***

2. The Honourable Judge of the High Court erred both in law and fact by upholding the conviction and enhancing the sentence of the trial Magistrate of the subordinate court at Kapsabet.

3. The Honourable trial Judge of the High Court erred both in law and fact by meting down against the appellant a sentence of thirty (30) years imprisonment which is excessive in the circumstances.

4. The Honourable trial Judge of the High Court erred both in law and fact by holding that the appellant was not represented by counsel at Kapsabet during plea taking when the truth is that he was actually represented on 21st May, 2007 but the appellant was not produced before court as had been

directed by the Honourable Judge."

That is the appeal that came up for hearing before us on the 25th September, 2009 when Mr. R.W. Kigamwa appeared for the appellant and Mr. Andrew, J Omutelema (Senior Principal State Counsel) appeared for the State.

Mr. Kigamwa argued grounds 1 and 4 together and then dealt with grounds 2 and 3 as one ground. As regards grounds 1 and 4 Mr. Kigamwa submitted that the plea was not properly taken as the exact words were not stated. As regards grounds 2 and 3 Mr. Kigamwa submitted that as the appeal to the High Court was not against sentence and there having been no notice of enhancement, the learned Judge was not entitled to enhance the sentence of 7 years imprisonment.

On his part, Mr. Omutelema opposed the appeal against conviction but conceded that the Judge had no jurisdiction to enhance the sentence.

We have given a brief background to this appeal tracing the journey of the appellant from the Senior Magistrate's Court to this Court via the High Court. We set out the three grounds of appeal that were argued before the High Court and it is to be noted that the appellant did not appeal against the sentence. Similarly, the State did not give any notice of enhancement of the sentence. In his submissions before us Mr. Omutelema conceded that the learned Judge of the superior court had no jurisdiction to enhance the sentence.

The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submission that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction. In the circumstances, this appeal is allowed to the extent that the sentence of 30 years imprisonment imposed by the High Court is set aside and in its place we reinstate the sentence of seven (7) years imprisonment to commence from the date the appellant was sentenced by the Senior Resident Magistrate i.e. ***25th June, 2007***. Those shall be our orders in this appeal.

Dated and delivered at ELDORET this 23rd day of October, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR