



**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Criminal Appeal 26 of 2007**

**KUPELE OLE KITAIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a sentence and conviction of the High Court of Kenya at Nakuru (Kimaru, J)*

*dated 19<sup>th</sup> October, 2006*

**In**

**H.C. Cr. C. No. 29 of 2003)**

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**JUDGMENT OF THE COURT**

On the 19<sup>th</sup> day of October 2006, the Attorney General informed the superior court that KUPELE OLE KITAIGA was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It was alleged that Kupele Ole Kitaiga, who is the appellant before us, did, “*on the 2<sup>nd</sup> day of March 2003 at Eor ekule Trading Centre, within Narok District of Rift Valley Province unlawfully (sic) murder Sarom Kitaiga*”. Sarom Kitaiga (the deceased) was the appellant’s 6 days old son.

The appellant pleaded “*not guilty*” to that charge before Kimaru, J and the prosecution proceeded to call witnesses to prove the offence charged. The prosecution called four witnesses, among them the medical officer who conducted the post mortem on the deceased’s body, the mother of the deceased, the grandmother of the deceased, and the step-mother of the appellant, before the hearing was adjourned for further evidence to be tendered. However, when the hearing resumed, the appellant offered to plead to a lesser charge of manslaughter and the prosecution accepted that offer. The Information for murder was substituted with one for Manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and the appellant readily pleaded guilty to that charge. He also unequivocally accepted the facts as put forward by the prosecution as follows:-

*“On 25/2/2003, the mother of the deceased gave birth to the deceased. The dispute arose between the mother of the accused and his wife over the new born child. The accused claimed the newborn child was not his, the dispute (sic) continued until 2/3/2003 when the accused went on a drinking spree. He left the house from 8.00 a.m. to 2.30 p.m. when he returned home. He was drunk. The accused entered the bedroom when the deceased was sleeping. The wife was taking a bath. When he entered the house*

he started talking to other children. In a short while, the accused sat near the bed where the deceased was sleeping. When the wife came to check the deceased she saw that the accused was sitting next to the bed while holding a bolted rungu. The wife went back to the bath (sic) to wash her legs. While there, she heard a noise as if some thing was being beaten. She came back and found the accused hitting the deceased with the nutted rungu. She screamed. Neighbour's came. They entered the bedroom and found that the deceased had been killed. The APs were informed. Narok police were informed. They came to the scene and arrested the accused. They took the body of the deceased to Narok District Hospital mortuary. Postmortem done – cause of death was found to be severe internal haemorrhage caused by blunt trauma (sic). Post mortem produced as an exhibit, produced as pros exhibit No. 1. I do not have his P3 form and his mental examination.”

Upon his conviction, the appellant was sentenced to serve 12 years in prison. He now appeals against the sentence only which he asserts is harsh and excessive in all the circumstances . He further pleads that he has 5 children who are dependent on him and that he has learned his lesson in the last four years in prison. He blamed his actions in committing the offence on drunkenness.

The sentence imposed by the superior court was informed by the law and the mitigating circumstances placed before the learned Judge by counsel representing the appellant at the trial. He pleaded for light sentence on the grounds that the appellant was remorseful and repentant; that he was a father of five children (including the deceased!), and a wife, all of whom were being taken care of by his father; that he was 40 years of age; and that he had stayed in custody for 7 months. The learned Judge then stated:-

***“ The accused killed the deceased because he was of the opinion that the deceased was not his child. He had complained previously that the child was not his – in this regard he was encouraged by his mother. On the fateful day, he took alcohol to gain “dutch courage”. He then assaulted the deceased cause it (sic) to sustain fatal injuries. it is clear that the accused formed the intention to harm the deceased. It is lucky that he is being convicted of the lesser charge of manslaughter. He shall serve twelve (12) years imprisonment.”***

We have considered the fresh plea made before us by the appellant for a lenient sentence, the mitigation advanced before the superior court, the reasons given by the learned trial Judge for the sentence, and the law governing the offence. We agree with the learned Judge that the appellant was capable of forming the intention and did form one, to harm the deceased and it was fortunate for him that his offer of plea to a lesser charge was accepted by the prosecution . That the appellant did not find it appropriate to make the offer of plea at an early stage and had to wait until four prosecution witnesses testified, did not help to mitigate the punishment. A clear message must also go out to those of the appellants ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of **section 13** of the Penal Code it will not avail an accused and does not avail the appellant in this particular case. The infant did not deserve to die even if it was not sired by the appellant as he agreed he had claimed. The maximum punishment for the offence is imprisonment for life but the appellant would serve only 12 years. In all the circumstances, it was an appropriate sentence and we reject the appeal on sentence.

The appeal is dismissed. It is so ordered.

Dated and delivered at Nakuru this 2<sup>nd</sup> day of October, 2009.

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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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.**