**IN THE COURT OF APPEAL OF KENYA**
**AT NYERI**
**Criminal Appeal 83 of 2006**

**SILAS MWITI GIKUNDA ……...……..… APPELLANT**

**AND**

**REPUBLIC ……..…… RESPONDENT**

***(Appeal from a sentence of the High Court of Kenya ru (Sitati, J.) dated 28th March, 2006***

**In H.C.CR.C. NO. 54 OF 2005)**

*******************************

**JUDGMENT OF THE COURT**

*SILAS MWITI GIKUNDA*, the appellant, was on *28th March, 2006* convicted by the *High Court of Kenya at Meru (Sitati, J.)* on his own plea of guilty to manslaughter contrary to *section 202* as read with *section 205* of the *Penal Code* and sentenced to *fifteen (15) years imprisonment*.

In his appeal lodged on his behalf by Mrs. Ntarangwi, Advocate, the appellant complains before us that the sentence was manifestly excessive in the circumstances of the case and that the learned trial judge had erred in imposing the sentence when it took into account his previous conviction which was contained in the *Probation Officers Report* whereas the record of the proceedings before the trial court had indicated that he was a first offender.

The facts presented before the trial Court and which were fully accepted by the appellant were very brief. The appellant and the deceased were seen fighting at Makutano centre within Meru Town. The cause of the fight was unknown and was never told to the trial court by the appellant. During the course of the fight, the appellant picked a stone and hit the deceased on the head inflicting upon him serious injuries to which he succumbed four or so days afterwards after having been rushed to *Meru General Hospital*. The post mortem report showed the cause of death as cardio-pulmonary arrest due to head injuries.

According to the Probation Officer's Report which was submitted to the learned trial Judge before sentencing, the appellant was *27 years old* and was married with one child. His local community had a very negative view of him in that he had wronged it severally by often being involved in myriad petty offences, especially of theft. The killing, the subject matter of this appeal occurred just within the same month in which the appellant was released from jail after having served a prison term of two years for an offence of theft from his aunt. The Probation Officer had recommended that as the community was hostile towards him:-

"***The climate is not outright (sic) conducive for his immediate release back to the society.***"

It is common ground that the learned trial judge was greatly influenced by the Probation Officer's Report before sentencing the appellant.

It is trite law that sentence is a matter that rests in the discretion of the trial court; and that on appeal, the appellate Court will not easily interfere with the sentence, unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some irrelevant material, or acted on a wrong principle. See ***OGOLA S/O OWUOR V. R. (1954) 21 EACA 270***, ***WANJEMA V. R. [1971] EA 493*** and ***BERNARD GACHERU V. R.*** (Nakuru) *Criminal Appeal No. 188 of 2000* (unreported).

The deceased was said to be a friend to the appellant and had been in custody for about a year. Though no lethal weapon was used, it was obvious that great force was used to injure the deceased.

In our view, the sentence is indeed stiff but it cannot be said in the particular circumstances of this case to be manifestly excessive. We think that it was only awarded by the learned Judge while observing correct principles of sentencing. We have found no reason to interfere with it and for these reasons, this appeal fails and is dismissed in its entirety.

***Dated and delivered at Nyeri this 11th day of May, 2007.***

***P.K. TUNOI***

……..

***JUDGE OF APPEAL***

***S.E.O. BOSIRE***

…….……

***JUDGE OF APPEAL***

***P.N. WAKI***

……..

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***