IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & SICHALE, JJ.A)

CRIMINAL APPEAL NO 78 OF 2015

BETWEEN

SAMUEL MUCHIRI …….……APPELLANT

AND

REPUBLIC…….....……RESPONDENT

(An appeal from original conviction and sentence in the High Court of Kenya at Machakos (Dulu J.)

in

HC.CR.C. NO. 22 OF 2013)

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JUDGMENT OF THE COURT

[1] Samuel Muchiri, the appellant in this appeal was arraigned before the High Court at Machakos on a charge of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code. The particulars of the offence stated that on 18th day of June, 2012 at Kitengela Township in Kajiado District within Kajiado County, the appellant unlawfully killed Magdalene Muthoni Kimani. The appellant pleaded guilty to the charge upon confirmation of the facts constituting the offence which were narrated to the Court by Mr. Mwenda the learned state counsel for the prosecution.

[2] The facts were simple and straight forward; Magdalene Muthoni Kimani (deceased) and the appellant were both living in a rented house in Kitengela. They were lovers. On the material day, that is on 17th June 2012, the deceased visited her cousin by the name of Simon Mwangi Ngugi in Kitengela area. While there, the appellant came and requested to speak to the deceased; they were engaged in an argument after which the appellant stormed out of the house, saying he had gone to pack his belongings from the house they occupied with the deceased. The deceased followed him, and the arguments continued while in their rented apartment. This time the quarrel was witnessed by the caretaker, John Gizan and a watchman by the name of Brian Otieno, who tried unsuccessfully to calm the two.

[3] After John and Brian left, the quarrel between the appellant and deceased degenerated into a fight, the deceased grabbed a kitchen knife and as the appellant wrestled with her, he took the knife and stabbed her in the chest. The deceased sustained a fatal injury from which she bled to death. Upon realizing what he had done, the appellant attempted to flee from the area but he was arrested by members of the public who administered mob justice on him but his life was saved by police officers who arrived shortly thereafter.

The body of the deceased was taken by the police to city mortuary and a post mortem examination was conducted by Dr. Oduor. The cause of death was identified as chest and neck injury due to a penetrating stab wound. The appellant was taken for mental assessment and was found fit to stand trial.

[4] Mr. Kimeu, learned counsel for the appellant, addressed the court in mitigation on behalf of the appellant pointing out that the appellant was a first offender, aged 46 years, married with two minor children and the sole bread winner of the family; he had not wasted court's time, as he pleaded guilty to manslaughter; was remorseful and that he had no intention of killing the deceased; that it is the deceased who provoked him by following him to his house; the deceased also wielded a panga which he snatched in self defence.

[5] The learned Judge – Dulu J., considered the facts as narrated by the State Counsel and the mitigation by the appellant's counsel and before sentencing, he ordered for a probation report. It would seem the probation report made in court was not conclusive as the family of the deceased declined to co-operate and be interviewed and the Judge proceeded to pronounce himself as follows in sentencing the appellant;-

> "**I have considered the facts and circumstances of the case. The accused and the deceased were a man and a mistress. They lived together. They disagreed over money and the locking by the deceased of the rented residence where they lived together. The accused stabbed the deceased once in the neck.**
>
> **I appreciate and have taken into account the mitigating factors. The accused is age 41 years. A first offender, married with children. He is remorseful. The family members of the deceased were not cooperative to the probation officer. This might, in my view, be because of their sense of loss of their daughter.**
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> **Though the probation officer recommends a non-custodial sentence, my view is that a non-custodial sentence is not appropriate. The accused used a weapon with excessive force. A young life has been lost. The deceased also had one child. In the circumstances of this case, I sentence the accused to serve eight (8) years imprisonment…"**

[6] The appellant's appeal is against sentence; as a matter of fact his memorandum of appeal is titled "**mitigation**". During the hearing of this appeal he pleaded for leniency, claiming that the deceased was his girlfriend and she sustained fatal injuries by accident; he did not intend to kill her. After killing her, he too was savagely attacked and injured by members of public, and sustained severe injuries. He pleaded the sentence of eight (8) years is excessive and urged us to reduce it so that he can get a chance to attend to the injuries he sustained and to look after his children.

[7] On the part of the prosecution, this appeal was opposed; Mr. Charles Orinda learned Assistant Director of Public Prosecution referred us to the provisions of **Section 379 (3)** of the Criminal Procedure Code which provide that a plea of guilt which was unequivocal such as the one entered into by the appellant is not appealable except if the sentence is illegal. Sentencing is an exercise of discretion by a Judge, and unless the sentence is illegal, a Court of Appeal will not readily interfere with the same. In this case the Judge had discretion to sentence the appellant up to life imprisonment but sentenced him only to eight years. Counsel urged us to dismiss the appeal.

[8] We have carefully considered what the appellant has stated in his brief address to the Court in presenting his appeal and we must point out that this appeal is against sentence only as the appellant pleaded guilty to the charge of manslaughter. We have noted the facts as narrated by the State Counsel in the trial court. In our view, we would agree with Mr. Orinda that the appellant used excessive force during the scuffle that ensued following a quarrel and after pleas were made to him by John and Brian urging them to stop quarreling. Had the appellant heeded to the request to stop quarrelling, a fight would not have arisen and an innocent life would never have been lost. In the circumstances it cannot be said that the sentence of 8 years imprisonment was harsh or excessive in view of the facts of this case.

Section 379 (3) of the Criminal Procedure Code provides:-

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by the High Court, except as to the extent or legality of his sentence."

[9] Also see the case of; -***MACHARIA V. R. [2003] 2 E.A. 559*** where this Court stated:-

"The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor (1954) EACA 270 wherein the predecessor of this Court stated:-

"The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES VS. R. (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. VS. SHERSHAWSKY (1912) CCA 28 TLR 263."

[10] Clearly, the sentence imposed on the appellant is lawful, and the learned Judge had the jurisdiction and the power to impose a life sentence as provided for in ***section 205*** of the Penal Code. However, the appellant was sentenced to 8 years imprisonment. Although we have the power to interfere with the "***extent***" of the sentence, we could only do so where special circumstances are shown to exist or where it is clear that there was an error in principle in arriving at the sentence.

None was pointed out, nor do we find any to justify interfering with the sentence imposed. Accordingly and for the reasons stated above, we find no merit in this appeal and dismiss the same. It is so ordered.

Dated and delivered at Nairobi this 29th day of July, 2016.

M.K. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR