REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 30 OF 2013

BETWEEN

JAMES OTACHI BOGONKO …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Being appeal from the conviction and sentence of Hon. M.N. Gicheru, CM,dated

30th August, 2010 in the original Kisii CM's Court Criminal case No.1021 of 2009).

JUDGMENT

1. The appellant JAMES OTACHI BOGONKO was charged with manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The particulars of which were that on the 12th day of March 2009 at about 5.30 p.m at Monyerero village Matongo sub location in Kisii Central District within Nyanza Province jointly with others not before court unlawfully killed ISAAC BOGONKO NYAURA.
2. He pleaded not guilty, was tried, convicted and sentenced to 10 years imprisonment. Being aggrieved by the said conviction and sentence he lodged the present appeal and raised the following grounds in his petition of appeal:-

   a)His identification by recognition was not safe.

   b)There was contradiction and inconsistency in the prosecution case.

   c)His defence was rejected without reason.

   When this appeal came up for hearing before me, the appellant who was unrepresented filed written submissions which he relied upon while Miss Boyon appeared for the state and opposed the appeal.

3. I must state that the appellant's submission herein did not help the court at all since the same only analyzed the evidence of the prosecution witnesses. It was stated that PW1 testified that the appellant and two other young men namely Charles Bogonko and Peter Nyagaka assaulted the deceased and that there was no bad blood between them.
4. It was further submitted that there was contradiction as to the date of the death of the deceased and that what killed the deceased was not established. It was further submitted that the offence occurred on 12th March 2009 while report thereon was made on 17th April 2009. The appellant therefore urged the court to allow the appeal on conviction and set him free or in the alternative

reduce the sentence.

5. Miss Boyon for the state submitted that the prosecution case against the appellant was proved beyond reasonable doubt and that PW1 and 2 testified on how they found the appellant assaulting the deceased and that the cause of death of the deceased was established by the evidence of PW8 Dr. Kipyegon.
6. This being a first appeal the court is required to re-evaluate the evidence tendered and to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.
7. On behalf of the prosecution PW1 Samwel Mosomi on the material day at 5.00 p.m heard screams from the home of the deceased on rushing there he found the accused and two other young men, Charles Bogonko and Peter Nyagaka assaulting the deceased and upon seeing the witness they ran away. Under cross examination he stated that the accused had a stick while Peter Nyagaka had hoe handle.
8. It was PW2 CATHERINE MONARI's evidence that the appellant was an uncle to the deceased and that while she was away at the market she was told by her daughter DIANA that the appellant together with Charles Bogonko and Peter Nyakundi Nyagaka had gone to the home, took the deceased from the house and assaulted him. She rushed home and found him lying on the ground. He was taken to Kisii Level 5 Hospital where he was admitted. On 23rd April 2009 he died as a result of the injuries. This evidence was corroborated by PW8 a child of tender age.
9. PW5 JACKSON MORAUNI stated that on 17th April 2009 he received the deceased then aged 45 years who had been issued with P3 form from Rioma police station. He was unconscious and x-rays revealed a compound fracture of the tabia and fibula and the degree of injury was classified as grievous harm. PW6 Samwel Ombai Meshack confirmed the arrest of the appellant.
10. PW7 Sgt. Harrison Muli confirmed initially charging the appellant with assault which charges were later on withdrawn and substituted by the charges appealed against. PW8 Dr. Cheruiyot Kipyegon Robert produced postmortem report confirming that the deceased died of meningitis secondary to the fracture. Under cross examination he stated that the fracture is what caused the infection.
11. When put on his defence the appellant gave unsworn evidence and denied killing the deceased while DW2 Shadrack Bogonko testified that the deceased told him he had been injured and the wife of the deceased said that he had been injured on a fight with somebody.
12. The following issues have been identified for determination:-

a. *Whether there was enough evidence to convict the appellant of the offence charged.*
b. *Whether the sentence passed was excessive.*

1. The appellant was positively identified by PW1 and PW3 to have been together with two others who assaulted the deceased leading to the injuries from which he died. The postmortem report confirmed that the deceased died as a result of the injuries inflicted by the appellant and his group thereby bringing the same to the ambit of **Section 20** of the **Penal Code** as held by the trial magistrate. I therefore find that the conviction of the appellant was safe and would dismiss the appeal on conviction.
2. On the issue of sentence, the same is at the discretion of the trial court and can only be interfered with if material factors were overlooked or if the sentence was founded on erroneous principles.
3. **Section 205** of the **Penal Code** provides that any person who commits the felony of manslaughter is liable to imprisonment for life. In sentencing the appellant the trial court had this to say:-

> **"I find that the offence was committed deliberately and in a vicious manner. It resulted in the death of a man whose family depended upon."**

4. Taking into account the above factors the sentence of ten (10) years is within law. I however has noted the mitigation of the appellant and the fact that whereas his two accomplishes disappeared and have not faced the consequences of their action, the appellant remained within the locality and there is evidence that he did not carry the hoe handle at the time of the assault.
5. Taking into account the principle in the case of **Macharia -vs- R[2003]2 EA 559** where the Court of Appeal held that the sentence imposed on the accused person must be commensurate to the

blame worthness, I will allow the appeal on sentence and reduce the same to five years from the date of the judgment of the lower court and it is so ordered.

Delivered, signed and dated at Kisii this 28th day of May 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Miss. Boyon for the State

In person for Appellant