



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, SICHALE & KANTAL, J.J.A.)**

**CRIMINAL APPEAL NO. 27 OF 2016**

**BETWEEN**

**JOSEPHAT LUMUZI SHITABACHI .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 25th June, 2015*

**in**

**HC. CR.A. No. 46 of 2010)**

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**JUDGMENT OF THE COURT**

When this appeal came up for virtual hearing before us on 5th May, 2021 learned counsel **Mr. Byron Menezes** appeared for the appellant while learned **State Counsel Mr. Shitsama** appeared for the Director of Public Prosecutions. Both counsel had filed written submissions.

The Notice of Appeal on record dated 3rd November, 2015 with a thumb print of the appellant and signed by the Officer in Charge, G.K. Prison, Kakamega Main, indicates that the appeal is against sentence. Counsels' submissions are on both conviction and sentence but the appellant (**Joseph Lumuzi Shitabachi** addressing us directly from Kibos Maximum Security Prison), confirmed that the appeal is against sentence only.

The circumstances in which the deceased (the late **Benedicto Lukhaye Shitachi**) died were unfortunate. According to the witnesses who testified before the trial Judge the deceased and the appellant engaged in a fight on the morning of 16th November, 2010. The appellant had a stick which he used to repeatedly assault the deceased on the head and the deceased died at Kakamega Provincial Hospital where he had been rushed to by prosecution witnesses for treatment. The appellant and the deceased were brothers and were fighting over a dispute involving boundary to land. None of the witnesses testified on who started the fight but there was direct evidence that the appellant was seen by prosecution witnesses repeatedly hitting the deceased on the head using a stick which was produced in Court as part of the evidence. The doctor who performed post mortem testified that the deceased died

after suffering cerebral oedema secondary to blunt force trauma following assault.

The appellant upon conviction for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** was sentenced to death by **Sitati, J.**

The offence of murder provided in **Section 203** of the **Penal Code** carries a sentence of death under **Section 204** of the said **Code**.

The learned Judge who sentenced the appellant considered a Probation Officer's Report dated 22nd July, 2015 where it was indicated that the appellant was not a first offender as he had earlier been sentenced to a 3 year probation after assaulting the deceased's wife on 14th April, 2004. The appellant filed before us what he calls "Mitigation Grounds of Appeal" on 20th February, 2020. He asks us to be kind to him and award him an appropriate sentence.

The Supreme Court of Kenya was asked to answer the question whether it was constitutional for Parliament to provide mandatory death sentence in an offence of murder – *Francis Karioko Muruatetu & Others v Republic [2017] eKLR*. The Court returned an answer that it was unconstitutional for Parliament to do that. The decision in that case has freed courts from the earlier strictures – the Court will award a sentence proportionate to the offence and consider any particular peculiar circumstances of a case.

In *Daniel Kipyegon Toroitich v Republic [2021] eKLR* where the appellant had been sentenced to life imprisonment the sentence was reduced to imprisonment for 25 years from the date of conviction.

In *Eliphas Toili v Republic [2009] eKLR* the appellant who had been sentenced to death for the offence of murder had the sentence reduced to 10 years on appeal.

We have considered the circumstances of this case where the appellant killed his brother as they fought over a dispute on boundary to land. It is not known who started the fight but it is known that the appellant was armed with a stick which he used to beat his brother the deceased who suffered injuries leading to death. In the circumstances we consider that an appropriate sentence of imprisonment is called for in this case. We set aside the sentence of death awarded by the trial court and substitute thereof a sentence of twenty-five years' imprisonment from the date of conviction.

**Dated and delivered on this 23rd day of July, 2021.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**



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