Makumbi v Republic (Criminal Appeal E017 of 2022)
[2022] KEHC 15985 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E017 OF 2022

LM NJUGUNA, J

NOVEMBER 30, 2022

BETWEEN

JOSEPH NJUKI MAKUMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. Particulars of the offence being that on May 10, 2016 at Kabubua Market at Iriaitune location in Mbeere North Sub County within Embu County unlawfully killed Michael Njeru Mbuko.

2. The appellant pleaded not guilty to the charge and the matter proceeded for hearing. The trial magistrate after hearing seven prosecution witnesses and the unsworn testimony of the appellant found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict and sentence the appellant to serve 10 years' imprisonment.

3. Aggrieved by the said decision, the appellant filed the petition of appeal which he amended on October 14, 2022 based on the following grounds which basically challenged the sentence imposed:

    i. That the learned magistrate erred in law and facts by imposing a harsh and excessive sentence without considering that as a first offender, the appellant was qualified for the benefit of the law as enshrined under the *Constitution*.

    ii. That the learned magistrate erred in both law and facts by imposing an excessive sentence without taking into account that the appellant had no intention to commit the alleged offence.

iii. That the trial magistrate erred in law and fact by imposing a harsh and excessive sentence without taking into consideration the pre-sentence report.

iv. That the learned magistrate erred in law and fact by failing to comply with section 333(1) (2) of the CPC.

4. The appellant merged grounds 1-4 and submitted that the imposed 10 year imprisonment was harsh and excessive taking into account that he was a first offender hence qualified for the least severe punishment. That the sentence was only based on the principle of retribution. He submitted that the trial court erred in failing to comply with section 216 of the CPC and not relying on the probation officer's report. That during sentencing, the trial court failed to take into consideration the period already spent in lawful custody and as such, the same amounted to unfair discrimination.

5. The respondent submitted that upon evaluation of the evidence of the seven witnesses together with the unsworn testimony of the appellant, the trial court convicted him and sentenced him to serve ten years imprisonment. That on the outset, the respondent submitted that the appeal herein is devoid of merit and thus should be dismissed. It was its case that Section 329 of the CPC permits the trial court to receive evidence that it deems necessary to help it determine the appropriate punishment to impose. Further that, the Sentencing Policy guidelines para 20.12 requires that the trial court should take into consideration pre-sentence reports before imposing a sentence particularly where a person has been found guilty of a felony; but the reports are not binding on the courts and therefore, even in the absence of this report, the trial court can still proceed to sentence the appellant herein and the trial court could not be faulted in any way.

6. On ground 1, 2 and 3, it was submitted that sentencing by a trial court is discretionary and an appellate court would only interfere where it is demonstrated that the sentence imposed is not legal or is harsh and excessive as to amount to a miscarriage of justice. Reliance was placed on the case of *Shadrack Kipchoge Kogo v Republic eKLR*. In the same breadth, it was the respondent's case that section 205 of the Penal code which is a penalty section of the offence stipulates a sentence of life imprisonment. Therefore, there is no justification that had been offered by the appellant for this Honourable Court to overturn the determination by the trial court.

7. Having considered the grounds of appeal herein, this court finds that it has been called upon to determine whether the appeal herein has merits.

8. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of *Okeno v Republic (1972) EA 32* where the Court of Appeal for Eastern Africa stated that:

> ' An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) EA 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala V R [1957] EA 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) EA 424.'

9. On sentence, the penalty, upon conviction for manslaughter as provided for in Section 205 of the Penal Code is life imprisonment. The appellant was sentenced to serve 10 years' imprisonment. This was

after the prosecution stated that he was a first offender and the court considered his mitigation that; he had many problems at home, his wife was sick and his son is epileptic. The law on the jurisdiction of an appellate court to interfere with any sentence passed by a trial court is well stated in the case of *Ogalo s/o Owuora 1954 24 EACA 70* that:

> ' This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice.'

10. Section 354(3) (ii) and (iii) of the *Criminal Procedure Code* provides for powers of the Appellate Court on appeal: it stipulates that the court may:

> a).(ii) Alter the finding, maintaining the sentence, or, with or without altering the finding , reduce or increase the sentence or;
>
> (iii) With or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.
>
> (b) In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

11. In the case of *R v Jayani & Another KLR (2001) 593* it was held at paragraphs 3 and 4:-

> 'The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular and to society in general. This is also seen as promoting a source of responsibility in offenders.'

12. Sentencing is the power conferred on the trial court after entering a guilty finding against an accused person. It therefore follows that an appellate Court will only interfere with the discretion of a trial court in sentencing where the sentence was imposed against legal principles or where relevant factors were not considered or irrelevant and or extraneous matters considered or normally where the sentence is manifesting excessive in the circumstance of the case.

13. Having considered the grounds of appeal and submissions on sentence meted out on the appellant herein, it is not in dispute that the appellant was properly convicted and sentenced after a full trial where he was given an opportunity to give a defence and mitigation.

14. It is further not in dispute that the maximum sentence for manslaughter is life imprisonment. What should be in contention is whether the sentence is harsh and manifestly excessive in the circumstances or whether the trial court acted on the wrong principles or overlooked some material factor.

15. The trial magistrate sentenced the appellant to serve Ten (10) years' imprisonment and therefore, what needs to be determined is whether this is a proper case to interfere with sentence meted out on the appellant by the trial court.

16. In *Alister Anthony Pareira v State of Maharashtra [2012] SC 3802* the court in dealing with the issue of objects of criminal law and sentencing in India persuasively observed:

> 'One of the point objectives of the criminal law is imposition of an adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an

accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

17. The sentencing policy developed by the Kenya Judiciary set to address and mitigate the following risk factors:

    (1) Align the sentencing with provisions of the *Constitution*.

    (2) Guide the process of determining sentences.

    (3) Link the sentencing process to the overrating objectives of sentencing.

    (4) Address the disparities in sentencing by structuring the exercise of discretion.

    (5) Provide a benchmark for assessing the exercise of discretion in sentencing.

    (6) Address the over utilization of custodial sentences and promote the use of non-custodial sentences etc.

18. The sentencing policy framework also emphasizes the concept of proportionality, uniformity and accountability in sentencing. The principle of proportionality was discussed in the case of *Hoare v The Queen [1989] 167 CLR* at page 348 thus:

> 'That a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.'

19. The Supreme Court of India in *State of MP v Bablu Natt [2012] SCC 648* Para 69 stated that the principle governing imposition of punishment would depend upon the facts and circumstances of each case and in Alister Anthony Pareira vs State of Maharashtra, 1 [2012]2 SCC 648 Para 69 the same court held:

> 'Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

20. Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

21. The appellant herein was a first offender as deduced from the record and as already noted in mitigation, he stated that he had many problems, his wife was sick and further, his child is epileptic. The offence leading to loss of life is no minor offence and therefore stiffer penalties are necessary but nonetheless, it is also worth noting that the appellant was unrepresented.

22. Both the prosecution and defence agree that the death occurred as a result of a fight which the appellant was part of. That the appellant hit the deceased on the head with a stick according to the testimony of

PW4. Under the circumstances, it is clear that the appellant did not have a premeditated intention of killing the deceased, though the act of killing the deceased was unlawful and wrongful.

23. The trial court, in my view, should have considered many options including calling for a probation officer's pre-sentencing report to inform itself the sentence that was proportionate, in my view, to the offence herein.

24. The Guidelines recommend a three-step approach to sentencing thus; firstly, that the sentencing options provided by the specific statute creating the offence be ascertained; secondly, that a decision be taken as to whether a non-custodial or a custodial sentence would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, the duration thereof ought to be determined, taking into account the mitigating and aggravating circumstances; examples of which are set out in the said Guidelines. Moreover, even where custodial sentence is deemed the most appropriate, the Guidelines require that care be taken to ensure even-handedness in sentencing. To this end, the suggestion given in Paragraph 23.9 is that:

> ' The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/ transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.'

(8) Moreover, at Paragraph 22.12 of the Sentencing Policy Guidelines, it is recommended that:

> ' To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence. WHILST THE RECOMMENDATIONS MADE IN THE PRE-SENTENCE REPORTS ARE NOT BINDING, THE COURT SHOULD GIVE REASONS FOR DEPARTING FROM THE RECOMMENDATIONS.'
>
> [See *Elisha Kipleting v Republic [2021] eKLR*].

25. Under Section 329 of the Criminal Procedure Code, the Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

26. And on the principles guiding sentence in manslaughter cases, several decisions are relevant. It has been severally held that the objective of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.

27. In considering the appropriate sentence, same offences should attract similar consistent penalties, case law would be the starting point in determining a custodial sentence for manslaughter offenses because the Judiciary Sentencing Policy Guidelines are silent on the path to take in manslaughter instances. In *V M K v Republic [2015] eKLR* ten years in jail was given for manslaughter. When a dangerous weapon was used in the commission of the crime, courts are more likely to sentence the offender to life in prison. There is no proof that the accused utilized such a weapon in this case. [See *Republic v Isaac Wanjala Murumba [2021] eKLR*].

28. In *Andrew v R (1976-1980) KLR 1688*, in a case where the appellant and his co-accused had a fight started by them and as a result the deceased was stabbed, the Court of Appeal found the sentence meted out to be manifestly excessive and reduced a sentence of imprisonment for 11 years to imprisonment for a term of 5 years. In *Orwochi v R (1976-1980) KLR 1638*, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence ordered the immediate release of the appellant, a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.

29. The decision of the Court of Appeal in *Muoki v R (1985) KLR 323* (Madan, Kneller JJA & Platt, Ag JA) is equally relevant. The Court approved a sentence of 3 years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal.

30. In the same breadth, and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No 7 of 2007) which inserted a proviso that:

> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

31. Therefore, as a first appellate court, I find that it is worth interfering with the determination by the trial court.

32. In the circumstances, I therefore find and hold that:

    i. The sentence of Ten (10) years is hereby substituted with eight (8) years imprisonment.

    ii. The period of 70 days spent in custody to be deducted from the sentence term.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent