



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 1 OF 2020

FASILIO MUCHIRI NGARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was on the 6th day of March, 2017 arraigned in court and charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
2. The particulars were that on the 12th day of February, 2017 at Kamugu village of Thura location in Mbeere north sub county within Embu County he unlawfully killed Charity Ndegi Njoroge.
3. The case proceeded before the Senior Principal Magistrate's court at Siakago and in a judgment delivered on the 19th day of July, 2019 the appellant was convicted and sentenced to serve seven (7) years imprisonment.
4. He appealed to this court vide the petition of appeal dated the 24th January, 2020 which he later amended on the 21st October, 2020 wherein he has set out three grounds of appeal as hereunder;
 - a) *That the trial magistrate erred in law when he failed to consider the appellant's mitigation and imposed a harsh sentence upon him.*
 - b) *The learned trial magistrate erred in law and in fact by failing to consider the appellant was qualified and entitled to the benefit of the law and the least severe punishment.*
 - c) *The learned magistrate erred in law and in fact by imposing a harsh and excessive punishment without considering that it was not the appellant's intention to commit the offence.*
5. The appeal proceeded by way of written submissions.
6. In his submissions, the appellant contended that the sentence imposed on him was harsh taking into account his age and that he is a first offender who qualified for the benefit of the least severe punishment as prescribed under Article 27(1)(2)(4) and 50(2)(p) of the Constitution.
7. He further submitted that he had no intention of committing the offence and that the same occurred under the influence of alcohol and that he is remorseful for having committed the offence. He prayed that the seven (7) years sentence be substituted with a non-custodial sentence. He relied on the case of **James Kiogore Vs Republic**.
8. On the part of the respondent, it was submitted that the trial magistrate exercised his discretion in reviewing the penalty set out in law for the offence of manslaughter. She contended that the guidelines set out in the supreme court decision of **Francis Muruatetu Vs Republic** were complied with and therefore the appeal herein is misconceived and should be dismissed.
9. It was further submitted that the trial magistrate took into account the appellant's mitigation to the effect that he was a first offender when he was sentenced. Counsel stated that the sentence meted out on the appellant was within the law and the same was lenient considering the seriousness of the offence.

10. Further, it was submitted that the appellant has not demonstrated how the trial magistrate abused his discretion while sentencing. Reliance was placed on the case of **Bernard Kimani Gacheru Vs Republic [2002] eKLR** in which the Court of Appeal held that,

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. 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 wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.....”

11. Counsel urged the court to be guided by the Sentencing Policy Guidelines 2016 (“the Guidelines”) and the objectives a sentence must meet which are *inter alia*, Retribution, Deterrence, Rehabilitation, Restorative justice, Community protection and Renunciation. She urged the court to disallow the appeal given the aggravating factors exemplified in the circumstances under which the offence was committed and the seriousness of the offence of manslaughter.

12. Looking at the grounds, the appellant is challenging the sentence and not the conviction on the grounds that the learned trial magistrate failed to consider the appellant’s mitigation when he imposed the sentence; that the learned magistrate failed to consider that he was a first offender and qualified and entitled to the benefit of the law and the least severe punishment and that the learned magistrate erred in law and in fact by imposing a harsh and excessive punishment.

13. As earlier stated, the appellant herein was charged with the offence of manslaughter contrary to Section 202 as read with 205 of the Penal Code and convicted. Under Section 205, a person who commits the felony of manslaughter is liable to imprisonment for life.

14. In his judgment, the trial magistrate sentenced the appellant to serve seven (7) years imprisonment and in so doing he took into account the circumstances under which the offence was committed. He stated that the deceased was drunk and abusive and she provoked the appellant to assault her with a panga. That the appellant acted with rage and violently assaulted the deceased inflicting the injuries that claimed her life. He further stated that although the killing of the deceased was unlawful, it was not premeditated and that is why the appellant was charged with the offence of manslaughter and not murder.

15. In his mitigation, the appellant stated that he is a first offender and he prayed for a non-custodial sentence stating that he takes care of the children of the deceased who are in school and who depend on him. The court considered the mitigation before it meted out the sentence on the appellant. It is not therefore true that his mitigation was not considered by the trial court.

16. As rightly submitted by counsel for the respondent, the sentence meted out was lenient considering that the law provides imprisonment for life. The appellant has not demonstrated how the trial court abused its discretion in sentencing.

17. In the case of **Bernard Kimani Gacheru (supra)** the court noted that sentence is a matter of discretion that rests in the discretion of the trial court and sentencing must depend on the facts of each case. It also noted that an appellate court will not interfere with sentence unless, the sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor or took into account some wrong material, or acted on the wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed the sentence, these alone are not sufficient grounds of interfering with the discretion of the trial court on sentence unless, any one of the matters already stated are shown.

18. From the submissions of the appellant he has not managed to convince the court that any of the conditions set out in the above case exist.

19. This court also reminds itself of the objectives of sentencing which it has taken into account.

20. In the end, I find that the appeal herein has no merit. This court has no reason to fault the learned magistrate in his decision and I am of the considered view that all factors were taken into account before the appellant was sentenced. Further, the sentence meted out on the appellant was lenient.

21. The appeal is hereby dismissed.

22. It is so ordered.

Delivered, dated and signed at Embu this 27th day of January, 2021.

L. NJUGUNA

JUDGE

.....**for the Appellant**

.....**for the Respondent**