REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 127 OF 2018

CONSOLIDATE WITH CRIMINAL APPEAL NO. 128 OF 2018

BETWEEN

KENGA N. NGONYO.....1ST APPELLANT

KALUME NGONYO MAGOGO.....2ND APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence passed by Hon. D. Mochache SPM on 25.05.2018 in Mombasa CMCR No. 87 of 2014)

JUDGMENT

Introduction.

1. This Court vide order issued on the 25.06.2019 ordered that Criminal Appeal No. 127 of 2018 and No. 128 of 2018 be consolidated and heard together and the lead file be Appeal No. 127 of 2018 since the two appeals emanate from the same judgement of Hon. D. Mochache SPM in Mombasa CMCR No. 87 of 2014.

2. The appellants herein were charged with Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code. The Appellants pleaded not guilty and the case proceeded to full hearing. They were convicted and the trial court sentenced them to ten (10) years imprisonment, after taking into account their mitigation and treating them as first offenders.

3. The 1st Appellant being aggrieved by that decision lodged an Appeal to this Court against the sentence vide Amended Grounds of Appeal filed on 7.12.2020, on the following grounds;

1. That the learned Trial Court Magistrate erred in law and fact by giving a harsh and excessive sentence.

2. That the learned Trial Court Magistrate erred in law and fact by not considering my mitigation address.

3. That the learned Trial Court Magistrate erred in law and fact by failing to consider the period spent in remand custody.

4. The 2nd appellant being aggrieved by that decision lodged an appeal to this Court against the sentence vide Amended Grounds of Appeal filed in court on 7.12.2020, on the following grounds;

1. That the learned Trial Court Magistrate erred in law and fact by giving a harsh and excessive sentence.

2. That the learned Trial Court Magistrate erred in law and fact by not considering my mitigation address.

3. That the learned Trial Court Magistrate erred in law and fact by failing to consider the period spent in remand custody.

SUBMISSION

5. The appeal was canvassed by way of written submissions. On 2nd February, 2021 when the appeal came up for mention to confirm whether the respondent had filed its submissions, the 2nd appellant indicated that they wrote joint submissions with the 1st appellant. The appellants filed their submissions on 7th December, 2020.

6. The appellants submitted that the sentence imposed by the Trial Magistrate was harsh and excessive for treason that they were charged with the offence of manslaughter under Section 202 as read with Section 205 of the Penal Code. They further submitted that Sir Henry Webb, C.J in the case of Kichajele S/O Ndamungu vs Rep (1949) EACA 64 held that the proper construction of the words "liable to"

> **"the wording used throughout the ode is "shall be liable to" but a consideration of the various sections section shows in our judgment that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular in which these words occur is merely a maximum and that the court may impose a lesser sentence below the limit indicated."**

7. The appellants submitted that the use of the words 'liable to' imprisonment, gives room for the exercise of judicial discretion. They relied on the case of Gilbert Wanami Kisiangani v Republic H.C.C.R App No. 39 of 2017 at Mombasa eKLR in submitting on the approach to be adopted in determining an appropriate sentence where a mandatory minimum sentence was prescribed.

8. In Gilbert Wanami Kisiangani v Republic (supra) the appellant had been charged and convicted with the offence of Manslaughter the Court held that;

> **"I have also read the judgment of the trial Court and note that the issue of the Appellant's state of intoxication and state of mind was extensively addressed therein, and he has not appealed the findings thereof. I also note that the trial magistrate at the time of sentencing took into account the fact that the Appellant was a police officer and ought to have used his firearm responsibly, which was a material factor to consider. <u>However, he did not take into account that the Appellant was a first offender, which is also relevant in sentencing, and would have influenced the severity of the sentence had it been considered</u>.**
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> **<u>Arising from the foregoing reasons, the Appellant's conviction for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code is upheld, since he is not challenging the conviction. However, the sentence of ten (10) years imprisonment for the conviction is set aside, and substituted with a sentence of five (5) years imprisonment, to run from the date of conviction."</u>**

9. The appellants further submitted that this Court has discretion to substitute the 10 year sentence with a sentence of 5 years and placed reliance on the case of Rep v Thomas Gilbert Cholmondeley (2009) eKLR. That in doing so, the Court will be guaranteeing the appellants right to the benefit of the least sever of the prescribed punishment. The appellants relied on the provisions of Article 50 (1) (2) (p) and 27 of the Constitution and submitted that they guarantee every person is equal before the law and has the right to equal protection and equal benefit of the law.

10. On mitigation, the appellants submitted that they are very remorseful and deeply regret, they further submitted that they are first offenders and family men. The appellants submitted that in the interest of justice, though those who committed crimes against humanity should be punished, a sentence that is too harsh neither serves the interest of the public or of the society.

11. On the period spent in custody, the appellants urged the Court to consider the period they spent in custody prior to release on bond in line with the provisions of Section 333 (2) of the Criminal Procedure Code.

12. The respondent filed its submissions on 12th February, 2021. Looking at the respondent's submissions, they have submitted on appeal against conviction and not sentence as captured in the appellants' grounds of appeal and submissions.

<u>ANALYSIS AND DETERMINATION.</u>

13. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Okeno v Republic [1972] EA 32** where the Court of Appeal on the duty of the Court on a first appeal held that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 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] E.A. 570). It is not the function 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, [1958] E. A. 424."**

14. I have gone through the record of appeal and the submission by Counsel and in my view the issue that arises for this Court to determine is whether the sentence imposed by the trial Court was manifestly harsh and excessive.

15. The Appellants seeks to challenge their sentence for the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code. Section 202 of the Penal Code provides as follows;

> **1. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.**

2. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

16. The punishment for the aforementioned offence is found under Section 205 of the Penal Code which provides that;

"Any person who commits the felony of manslaughter is liable to imprisonment for life."

17. In the present case, the Trial Magistrate sentenced the appellants to serve 10 years' imprisonment and not life imprisonment for the offence of manslaughter, therefore the sentence was lawful. Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:

"In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence".

18. The Court of Appeal in the case of **Ogolla s/o Owuor vs R,** (1954) EACA 270 laid down the principles upon which an appellate Court may review or alter a sentence imposed by the trial court as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

19. At page 119 of the record of appeal, I note that the trial Magistrate considered the mitigation of the appellants and noted that they are first offenders. She went ahead to note that the offence is very serious since it led to the death of a young man. I am convinced that the trial Court did not act on wrong principles or overlooked some material factors when sentencing the appellants.

20. The Court in **Republic v Juliana Wanza Mulei** [2020] eKLR held that;

"I have considered the fact that the convict is a first offender, a relatively young lady at the age of 35 years when she committed the offence. In that regard the period of two years' imprisonment is justified in light of the mitigating factors. In accordance with Section 333(2) of the Criminal Procedure Code, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. I observe that the convict was charged on 18.9.2017 and has been in custody since then. I hereby take into account and set off a period of two years as the period the convict has already spent in remand. I therefore find that she has served her sentence and direct that she be set at liberty forthwith unless otherwise lawfully held."

21. In light of the foregoing, I do find that a term of 10 years' imprisonment instead of life imprisonment provided was an exercise of discretion and commensurate with offence committed and therefore there is no reason to interfere with the same. From the record of appeal, I find that the appellants took plea on 27.01.2014. On 13th April, 2016, the 1st Appellant was released on bond and the 2nd appellant was released on 7th September, 2016 which means that the appellants were in remand custody for two years prior to their release on bond.

22. In light of the foregoing and the provisions of Section 333 (2) of the Criminal Procedure Code I set off a period of two years as the period the appellants have already spent in remand. The appellants shall therefore serve the reaming period of eight years to run from the date of conviction

It is so ordered.

Right of appeal in 14 days.

DATED, SIGNED AND DELIVERED, IN OPEN COURT THIS 18TH DAY OF MARCH, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE