



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 84 OF 2019

JOSEPH KIORA SYENGOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from judgment delivered on 8th September 2016 by Hon. J.M. Nang'ea (Mr) Chief Magistrate in Mombasa Chief Magistrate's Court Criminal Case No. 1866 of 2014).

J U D G M E N T

1. The Appellant Joseph Kiora Syengo was charged and convicted for the offence of manslaughter contrary to Section 202(1) as read with Section 205 of the penal code in Count I.
2. The particulars to the Count I were that Joseph Kiora Syengo between the 21st and 23rd day of September 2014 at Dongo Kundu area in Likoni Sub-county within Mombasa County unlawfully killed Elizabeth Kisia Syengo.
3. In Count II, the appellant Joseph Kiora Syengo was charged with offence of assault forcing actual bodily harm contrary to Section 251 of the penal code.
4. The particulars to the Count II are that Joseph Kiora Syengo on the 23rd day of September 2014 at Dongo Kundu area, in Likoni subcounty within Mombasa county unlawfully assaulted Musyoki Syengo.
5. Upon taking the evidence of ten prosecution witnesses including that of Deputy Superintendent of Police David Siele who recorded the statement of the appellant under caution in the presence of his sister Caroline Kanyiva Syengo – PW 6 at the request of the appellant the trial Magistrate placed the appellant on his defence. When placed on defence the Appellant gave an unsworn statement and sought to be forgiven as it was his 1st offence.
6. He said he was confessing to the offences charged. The trial Magistrate found the accused guilty of both counts of manslaughter and assault and he was convicted under Section 215 of the Criminal Procedure Code. The trial Magistrate noting that the appellant brutally & fatally attacked the deceased and inflicted serious injuries on the brother – Musyoki Syengo- PW 1 sentenced the appellant to serve 30years & 3 years respectively for the offence of manslaughter and assault.
7. The Appellant was aggrieved by the conviction and sentence by the trial court and lodged his appeal out of time with the leave of the court on the following amended grounds of appeal:-
 - i. That the trial Magistrate erred in law and fact by giving him excessive sentence.**
 - ii. That the learned trial Magistrate erred in law and fact by failing to order counts 1 & 2 to run concurrently.**
 - iii. That the learned trial Magistrate erred in law & fact by failing to consider the period spent in remand custody prior to conviction and sentence as required by the law under Section 333(2) of the Criminal Procedure Code.**
 - iv. That the learned trial Magistrate erred in law & fact by not considering his Mitigation as a 1st offender.**
8. The Appellant therefore prayed that his appeal be allowed and the sentence of 33 years imprisonment be substituted with a lesser sentence of 10 years.

9. The court gave directions that the appeal be canvassed by way of written submissions. The Appellant in his submissions relied in the decisions of the court in:-

- *Peter Korir Ng'etich vs Republic CR. Appeal No. 163 of 2002* - The Appellant relied on it to support his appeal that the sentence by the trial court was excessive.

- *Kichajele s/o Ndamungu vs Republic (1949) EACA 64* in which it was held that the words shall be liable to does not import that the sentence mentioned in any particular in which these words occur is maximum and that the Court may impose lesser sentence below the limit indicated.

- *Opoya vs Uganda [1967] E.A. 752* where it was held that the words shall be liable to are not mandatory but provide a maximum sentence only which the court may use its discretion to impose.

- *Republic vs Gilbert Cholmondelay CR.C. No. 55 of 2006 High Court at Nairobi* in which the trial judge took into consideration that the accused person had been held in custody for over 3 years since he was arrested and consider the period in remand custody in passing sentence.

10. The Appellant also submitted he had been in custody for 6 years and had been of good conduct and should be given a chance to be reunited back to society. He claimed that his brother – PW 1 had been visiting him and had forgiven him and ready to welcome him home. He also urged the court to make an order that the sentences in counts I & II be made to run concurrently and the period he spent in custody should also be considered in the sentence.

11. The Respondents in submissions contended that the offence of manslaughter is punishable by a maximum penalty of life imprisonment under Sections 205 of the penal code and in passing the sentence of 30 years & 3 years respectively the trial court considered the Appellants mitigation.

12. It was argued that the sentences meted out were lawful and the trial court considered the gravity and nature of offence and did not act on any illegal or immaterial consideration when passing sentence. That there was no reason for the court to interfere with the sentence herein.

13. The state/Respondent's counsel relied on the decisions in the case of *Charles Ndirangu Kibue vs Republic [2016] eKLR* to support its stand that sentencing is a discretion of the court and appellant court should not interfere with it. The state/Respondent urged the court to dismiss the appeal.

14. This being a first appeal the court is enjoined to reevaluate the evidence and judgment of the trial court and taking it into consideration that it never witnessed the witnesses testifying come up with an independent verdict.

15. I have considered the grounds of appeal, the submissions and evidence and judgment of the trial Magistrate and the issue for determination is whether this court should interfere with the trial Magistrates discretion in passing sentence against the appellant.

16. I do concur with the Respondent's counsel that the sentences of 30years and 3 years for counts I and II respectively were lawful save that this court is to consider whether they were excessive in the circumstances and whether they should run concurrently to avoid prejudice being occasioned to the appellant.

17. It is noted that the appellant remained in custody from the date of his arrest on 25th September 2014 to the time when he was sentenced on 8th September 2016 a period of almost 2 years and in line with sentencing policy guidelines, it would have been proper to consider that period when passing sentence against the appellant.

18. The offences of manslaughter and assault were committed in a series of one transaction. PW 1 went to enquire about his mother the deceased when the appellant attacked and injured him. Although the trial court indicated that the appellant must be severely punished for the fatal & brutal attacks, he ought to have considered that imprisonment for a term of 30 years and 3 years running consecutively was as good as one's life span and it didn't make sense that life imprisonment had been quantified in terms of years.

19. In my view, it was prejudicial that the appellant was to serve 30 years for one offence and proceed to serve another 3 years subsequently. It is my view that since the appellant was 1st offender and he made the trial very easy by not cross examining witnesses most of whom were his siblings & not objecting to his confession being produced the trial Magistrate ought to have factored in his remorsefulness and meted out a more lenient sentence by considering the period spent in remand custody and also making an order for the two sentences to run concurrently.

20. The upshot is that the appeal succeeds partially to the effect that the sentence of 33years was excessive. The sentence of 30 years is set aside and substituted with one of 20 years imprisonment for the offence in Count No. I and the sentence of 3 years in Count II to remain inforce. The sentence in Counts I & II to run concurrently and to take effect from the date that the appellant was arraigned in court and remained in custody i.e. on the 6th October 2014.

21. Orders accordingly.

Dated, signed and delivered at Mombasa this 19th day of November, 2020.

HON. LADY JUSTICE A. ONG'INJO

JUDGE