REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 158 OF 2016

ANTHONY GITONGA KABUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the sentence imposed by Hon. Odenyo, Senior Principal Magistrate

in Mombasa Chief Magistrate's Court Criminal Case No. 18 of 2010

delivered on 22nd January, 2016)

JUDGMENT

1. The appellant Anthony Gitonga Kabugi *alias* British, with another person who was acquitted were jointly charged with the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the charge were that on the 30th day of July, 2010 at Shimanzi Police Lines Mombasa District within Coast province jointly unlawfully killed Mathias Muoka.

2. The appellant was found guilty as charged and sentenced to 20 years imprisonment. He was dissatisfied with the conviction and sentence and appealed against the decision of the lower court. On 27th November, 2018, the appellant, with leave of the court, filed mitigating grounds of appeal, thereby abandoning his appeal against conviction. He relied on the provisions of Section 329 of the Criminal Procedure Code to file the following grounds of mitigation:-

(i) That he spent over 5 years in remand prison, which time should be considered as a mitigation factor;

(ii) That he has reformed during the time he has been in remand from the time he was arrested;

(iii) That his disposition can be proved by a probation report, which can guide the court on the relief to grant;

(iv) That the unpleasant incident happened without his wish; and

(v) That his further incarceration is unnecessary.

3. In his submissions, the appellant urged this court to take into account the time he spent in custody during trial as a mitigating factor. He cited the case of **Sebastian Okwero Mrefu vs Republic** [2003] eKLR, where the court substituted a death sentence with 8 years imprisonment after taking into account that the appellant therein had been in custody for 11 years and that he had been in remand for 3 years.

4. The appellant submitted that he was sentenced to 20 years imprisonment without consideration of the provisions of Section 333(2) of the Criminal Procedure Code (CPC) and that the period of 5 years and 4 months spent in custody was not considered by the Trial Court when computing sentence.

5. The appellant stated that he had reformed and become a better citizen and cited the case of **Daniel Chege Magotho vs Republic**, Criminal Appeal No. 361 of 2009 Nairobi High Court, where the court considered that the appellant therein had been in custody for 5 years, thus he must have received sufficient correction and rehabilitation. The court was of the opinion that it could temper justice with mercy. The appellant herein prayed for an opportunity to be re-integrated into the society.

6. He indicated that he is a family man with children of tender age who need his parental care. He urged this court to exercise leniency

against him by placing him under probation, community service or to discharge him.

7. Ms Mamandi, Prosecution Counsel filed written submissions and opposed the appeal. She submitted that the deceased had 26 cut wounds on his body and a chest wound that had penetrated his right lung. She indicated that the killing of the deceased was not justified.

8. The Prosecution Counsel further submitted that the appellant was given an opportunity to mitigate in the lower court and he raised the same issues he has raised on appeal. She stated that the Hon. Magistrate considered the mitigation proffered but noted that the appellant deserved a stiff sentence as human life was lost. She stated that the appellant was not remorseful when he was mitigating thus his sentence should not be interfered with.

9. She relied on the case of **Samuel Muchiri vs Republic** [2016] eKLR where the court dismissed an appeal to reduce the sentence of 8 years imprisonment for the offence of Manslaughter. She indicated that the court therein stated that it could not interfere with a sentence where there was no evidence of an error in principle by the Trial Court. She submitted that in this case, the appellant did not indicate any error by the Trial Magistrate when he imposed a sentence of 20 years imprisonment. In Ms Mamandi's view, there was nothing harsh or excessive about the sentence. She prayed for the appeal to be dismissed.

10. The appellant responded to the submissions filed by the DPP and stated that he was remorseful and that this court's approach towards sentencing should be with compassion and understanding as in the case of **Republic vs Thomas Gilbert Cholmondeley** [2009] eKLR where the accused was sentenced to 8 months imprisonment after the Trial Court considered that he had been in custody for 3 years. He further stated that sentencing is meant to rehabilitate an offender.

DETERMINATION

11. I have considered the submissions made by the appellant and the respondent, and the authorities each one of them cited. I have also considered that sentencing is a matter that is left to the discretion of the court. The case cited by the appellant in **Republic vs Cholmondeley** (supra) addressed the considerations that a court should take into account in sentencing. The said factors are captured in the Judiciary of Kenya Sentencing Policy Guidelines. In considering the appeal herein, this court ought to consider the objectives of sentencing, the gravity of the offence committed, if the appellant had a previous conviction, the mitigation offered by the appellant and the time the appellant spent in remand, if applicable.

12. The appellant was convicted for the offence of Manslaughter. It is not in issue that the appellant killed his fellow Police Officer. The deceased was a married man. His wife testified in the lower court as PW4 and said that she was not working. The death of the deceased must have deprived her of the love, comfort, security that he was offering her, in addition to losing a provider. It must not therefore be forgotten that the death of the deceased means that his family was left worse off that it had been, when he was alive.

13. The death of the deceased, who was a Police Officer attached to Mombasa Railways Police Station deprived Kenyans of his services in maintaining law, peace and order.

14. The appellant herein was a law enforcement officer and was therefore well informed of the consequences of committing an offence such as the one he was convicted of. In his mitigation before this court he seeks for leniency of his custodial sentence. The appellant stated that he is a family man who should be set free to go home to provide for his young family.

15. After being charged, the appellant was released on bond pending trial. On 15th August, 2011 he absconded court and a warrant of arrest was issued against him. The appellant was taken to court on 28th May, 2012 under warrant of arrest. His bond was cancelled. It is therefore clear that the appellant abused the constitutional provisions that guaranteed him the right of being released on bond pending trial. It was as a result of absconding court that his bond was cancelled. He cannot therefore be heard to appeal to this court's discretion in the said circumstances, to consider the time he spent in remand awaiting trial. It is clear that he contravened the law as a result of which he had to remain in custody. He therefore, so to say, brought the wrath of the law upon himself. I therefore decline to be persuaded by his argument that the time he spent in remand as his case was being heard should be computed in considering his appeal on sentence.

16. As per the Sentencing Policy Guidelines, the objectives of sentencing in a case such as this, are to ensure that the appellant is punished for the offence he committed so as to discourage him from committing similar offences. Another objective is to rehabilitate the appellant by reforming him to make him a better person that can fit in the society. The third objective is to denounce his conduct by communicating to the public condemnation of his acts and fourthly to dissuade other members of the public from committing similar offences.

17. In the case relied on by the respondent's Counsel of **Samuel Muchiri vs Republic** [2016] eKLR, the Court of Appeal cited with approval the case of **Macharia vs Republic** [2003] 2 E.A 559 where the court stated as follows on sentencing:-

> ***"The principle upon which this court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola & O. Owuor [1954] EACA 270 wherein the predecessor of this court stated:-***
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> ***"The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs Republic [1950] 18 EACA 147 it is evident that the Judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case Republic vs Shersh Awsky [1912] CCA 228 TLR 263."***

18. Similarly, the Court of Appeal in **Arthur Muya Muriuki vs Republic** [2015] eKLR cited the case of **Shadrack Kipchoge Kogo vs**

Republic, Eldoret Criminal Appeal No. 253 of 2003 where it was stated as follows on the principles of sentencing:-

> ***"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was harsh and excessive that an error in principle must be inferred."***

19. PW7, Dr. K.N. Mandalia, the Pathologist who conducted the post mortem on the deceased's body counted a total of 26 cuts on the deceased's body. The foregoing is evidence of the viciousness of the attack on the deceased. Excessive force was used to settle a score between the deceased and the appellant who were said to be friends. The issue of the deceased telling PW12 to press charges against the appellant and 3 others who had assaulted him is a matter that could have been discussed by the appellant and the deceased, as PW12 had agreed to settle the matter amicably. The appellant however opted to kill the deceased.

20. The Trial Magistrate considered the mitigation offered by the appellant and after considering the circumstances of the case, he was of the view that a stiff sentence was called for. He sentenced him to 20 years imprisonment.

21. Taking into account the objectives of sentencing and the need to punish and rehabilitate an offender, I am of the considered view that the sentence of 20 years was on the higher side. I however decline to consider a non-custodial sentence based on the circumstances of the case. I note that the appellant is now remorseful for having committed the offence. I hereby exercise my discretion and set aside the sentence of 20 years imprisonment and substitute it with a sentence of 15 years imprisonment.

22. The said sentence will be effective from the 22nd January, 2016 being the date when the appellant was sentenced by the Trial Court. The appeal succeeds only to the said extent.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of April, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah - Prosecution Counsel for the respondent

Mr. Oliver Musundi - Court Assistant