



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 39 OF 2017

GILBERT WANAMI KISIANGANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the sentence of Hon. D.N. Ogoti (CM) in Criminal Case No. 2054 of 2011, delivered on 12th January 2017 at the Chief Magistrate's Court at Mombasa)

JUDGMENT

1. The Appellant was charged with, and convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, after the holding of a trial. The particulars were that on 8th November 2009 at Club Standard Two in Voi Township, Voi District within Coast Province, he unlawfully killed Mary Wangui Ndung'u.
2. The Appellant has preferred this appeal against the sentence only. During the hearing of the appeal held on 13th December 2018, the Appellant relied on Amended Grounds of Mitigation and submissions he availed to the Court on 29th November 2018 which he orally highlighted. The Appellant stated that he was a first offender, has learnt his lesson and is deeply remorseful. Further, that he was in a state of intoxication at the time of commission of the offence, and prior to his arrest was a law abiding citizen serving the nation as a police officer and had no criminal record.
3. The Appellant submitted that while he has been incarcerated, he has engaged in various courses which have reformed him; that he is a widower with three children and the sole breadwinner; and that his mother who had educated him has been greatly affected and is now sickly.
4. The Appellant cited various judicial decisions, including **Ali & 4 Others vs Republic, (1993) KLR** for the position that the sentence should be reduced on account of being a first offender. Reliance was also placed on the decisions in **James Kariuki Wahome vs Republic, Criminal Case No. 36 of 2009** and **Thomas Gilbert Cholmondeley vs Republic, Criminal Case No. 55 of 2006** where the sentences imposed for manslaughter were 5 years and 8 months respectively, to urge that this Court maintains this consistency in sentencing.
5. Mr. Masila, the learned Prosecution counsel, made oral submissions and contended that the defence of intoxication as provided in section 13 of the Penal Code is not available to the Appellant. Further, that as a police officer, the Appellant knew that killing someone was an offence, and he used his firearm recklessly and fatally wounded the deceased.
6. Lastly, that given that the maximum sentence for manslaughter is life imprisonment, the sentence of 10 years imprisonment was not excessive in the circumstances, and the trial Court did not overlook any material factor, nor take into account wrong principles.
7. I have considered the Appellant's mitigation and the submissions by the Prosecution. The issues for determination by this court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive, and whether the said sentence is amenable to reduction and /or variation.
8. 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”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270**, wherein the Court of Appeal stated 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)."

9. In the instant appeal, the Appellant was charged with, and convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Section 202 provides for the ingredients of the offence of manslaughter, while section 205 provides that any person who commits the felony of manslaughter is liable to imprisonment for life. The sentence of ten (10) years imprisonment meted on the Appellant was therefore lawful, to the extent that it is provided for by the said provisions of the Penal Code.

10. 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. 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.

11. 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.

12. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF DECEMBER 2018.

P. NYAMWEYA

JUDGE