REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 67 OF 2012

MERCY CHELANGAT TANUI …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Honourable W.N. Kaberia, Senior Resident Magistrate at Kericho in Criminal Case No. 1488 of 2012 in Judgement Delivered on 21.9.2012

JUDGMENT

Mercy Chelangat Tanui, the Appellant herein, was convicted on her own plea of guilty for the offence of Manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code.** She was thereafter sentenced to twenty(20) years imprisonment. Being aggrieved, the Appellant preferred this appeal and put forward the following grounds:

1. **The learned Magistrate erred in law and in fact in that he erroneously admitted as evidence hearsay evidence. This prejudiced the Appellant seriously and particularly as the learned magistrate relied on the same inadmissible evidence in his judgment thereby convicting the Appellant on the inadmissible evidence.**

2. **The learned magistrate erred in law and in fact in that he incorporated into his judgment matters not canvassed before him at all.**

3. **The judgment was bad in law and never considered the Appellant's sworn evidence at all nor did it take into consideration the Appellant's witnesses evidence. It was biased and never analyzed evidence before the court.**

4. **The learned magistrate erred in law and in fact in that he shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including whether the Appellant caused the death of the deceased.**

5. **The evidence of the prosecution witnesses was so contradictory and full of discrepancies that it should not have been relied upon to convict the Appellant.**

6. **The decision went against the weight of evidence before the court.**

7. **The sentence awarded was bad in law as no reason was given for the same.**

8. **The learned magistrate erred in law in his treatment of the case as the circumstances**

surrounding the entire case did not point at the Appellant as the offender at all.

9. **There were so many other hypothesis that were never considered.**

10. **The learned trial magistrate erred in law and in fact in convicting the Appellant on the charges of manslaughter whereas it was clear that the evidence adduced to prove the same count was seriously at variance with the particulars of the offence as stated in the charge sheet.**

11. **The Honourable magistrate erred in law and in fact by holding as he did the the Appellant murdered the deceased whereas no finger prints were taken from the scene of the incident to rule out any possible suspects.**

12. **The sentence awarded was unconstitutional.**

13. **The sentence awarded was harsh and excessive in all the circumstances of the Appellant and of the case before the court.**

When the appeal came up for hearing Mr. Motanya, learned counsel for the Appellant, informed this court that the Appellant was only pursuing the appeal as against sentence hence the Appellant basically abandoned the appeal as against conviction. Mr. Mutai, learned Principal Prosecution counsel conceded the appeal as against sentence.

Before considering the substance of the appeal, I think it is important to set out in brief, the case that was before the trial court. The particulars of the charge were that on the 4th day of August,2012 at Kapsorok village in Kericho District within the Rift Valley Province, the Appellant killed **Janet Chepkirui Byegon**. Before convicting the Appellant, Hon. Kaberia, the then learned Senior Resident Magistrate, invited the prosecution to outline the facts in support of the charge. The facts outlined stated that on 4th August, 2012, the Appellant met **Janet Chepkirui Byegon**, deceased at a nearby river where the deceased was washing her clothes. The accused questioned the deceased as to why she was spreading rumours that she was having an affair with her husband. The two women quarrelled and in the process the deceased is said to have picked a stone which she threw at the accused hitting her on the head. The accused in a fit of anger rushed to her house picked a knife and came for the deceased. At about 3.00p.m, the deceased in company of her sister and a friend went to report the incident to the village elder at Kapsorok Centre. Before reaching the home of the village elder it is said the accused came out of a hotel while armed with a knife, confronted the deceased and stabbed her on the back. The deceased was rushed to the nearby dispensary but collapsed on her way. She was later rushed to Kericho District Hospital where she was pronounced dead upon arrival. The accused went into hiding but was subsequently traced, arrested and taken to Kipsitet police post. She was thereafter transferred to Kericho police station where she was charged with the offence of Manslaughter. A postmortem was done on the deceased's body where the doctor formed the opinion that the deceased died as a result of excessive blood loss as evidenced by haemothorax and pneumothorax as evidenced by pierced middle lobe of the right lung. It is clear that the deceased suffered fatal injury as a result of a single stab wound.

Having set out the case that was before the trial court, let me now turn my attention to the substance of the appeal. The Appellant has argued that the learned Senior Resident Magistrate did not consider the mitigating factors thus pronouncing a harsh and excessive sentence. I am alive of the fact that this is an appeal as against sentence. The appellate court is always reluctant to interfere with a trial court's discretion on sentence unless it is shown that the same was made without considering the relevant factors or that the sentence is manifestly excessive. In **Griffin =vs= R[1981] K.L.R 121,** this court held *inter alia*

> ***"The court of appeal cannot interfere with the sentence solely on the ground that it was heavy, unless, it was also manifestly excessive"***

This court also expressed itself in **Wanjema=vs= R [1971] E.A** at 494 as follows"

"A sentence must in the end, depend upon the facts of its own particular case.....

….....

An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into account some immaterial factor, acted on the wrong principle on the sentence is manifestly excessive in the circumstances of the case."

Let me now apply the above principles to this appeal. It has been argued that the trial magistrate did not take into account the factors in mitigation. The record shows that the Appellant is a first offender who readily pleaded guilty to the charge. The Appellant informed the court that she had young children who needed her care. She also pleaded for leniency and stated that she did not intend to kill the deceased. It is also apparent from the record that the learned Senior Resident Magistrate called for a Probation report on the Appellant to be filed. Probation report was filed. It is clear that the learned Senior Resident Magistrate completely ignored the Appellant's mitigation. He did not also refer to the Probation officer's report filed therein. It is obvious that he did not put into consideration very cardinal principles and factors before sentencing. I am satisfied that Mr. Mutai rightly conceded the appeal. In the circumstances, this court must interfere with the order of sentence. It is acknowledged in the Probation Officer's report that the incident has caused great pain to the victim's family. It has also caused animosity between the family of the victim and that of the offender. Those families are neighbours. It is a matter of common notoriety that within the Kipsigis Community, that when such an incident takes place involving the loss of life, reconciliation has to be initiated before the traditional cleansing and compensation are undertaken. This will fully kick-start the process of the offender's re-integration to society. Both the deceased and the accused are mothers of young children. The deceased was survived by twin girls aged about two (2) years. Those children are under the care of their paternal grandmother. After a careful re-consideration of all the relevant factors, I am in agreement with the argument of the Appellant that the sentence is harsh and excessive. Though the victim's family are bitter and are yet to come to terms with the loss of their loved one, there is no evidence that the family cannot reconcile with that of the offender if given a chance. There is also no evidence that the home environment is hostile. The appeal is allowed and I order the setting aside of the sentence of twenty(20) years and substitute it with an order setting free the accused and directing that she serves two (2) years Probation under the supervision of the Probation Officer Kericho County.

Dated, signed and delivered in open court this 21st day of March, 2014.

J.K. SERGON

JUDGE

In the presence of

Mr. Lopokoiyit for Director of Public Prosecutions

Mr. Orina advocate holding brief for Mr. Motanya for Appellant