Ruoma v Republic (Criminal Appeal 11 (E011) of 2022)
[2024] KEHC 1759 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 11 (E011) OF 2022

TA ODERA, J

FEBRUARY 6, 2024

BETWEEN

JAMES RUNI RUOMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, James Runi Ruoma, filed an undated Petition of Appeal challenging the decision of Hon. P.C. Biwott (SPM) in Ogembo MCCR Case No. 431/19 in Republic vs James Runi Ruoma.

2. The Appellant was charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* in Ogembo SPMCCR Case No. 431 of 2019. He was convicted on 9.6.2022. The trial court took his mitigation and sentenced him to serve 20 years imprisonment.

3. Dissatisfied with the sentence, the Appellant filed an undated Petition of Appeal. The grounds of appeal were (I have reproduced them verbatim):

    1. That my Lordship the learned trial magistrate faulted both in law and fact by basing conviction and sentence of 20 years imprisonment for an offence of manslaughter, which is contrary to section 202 as read with section 205 of the *Criminal Procedure Code* (should be *Penal Code*).

    2. That my Lordship, I am a layman and first offender ignorant from the fact of the rule of law, I found myself in, and I beg to be a good citizen since the commission of the act was not intentional, and I wish to beg this Hon. Court to have the sentence imposed upon me be reduced.

    3. That my Lordship the crime in question was not committed under my wish but due to provocation that arose from my brother who was drunk during the alleged ordeal.

4. That my Lordship, the deceased was my beloved brother, whom I have stayed with for over 45 years, hence I regret a lot for the happening.

5. That my Lordship, I am the only breadwinner of my family, they may suffer a lot and starve due to my long-term sentence.

6. That my Lordship, I urge the honourable court to reduce the 20 years imprisonment imposed upon me, so that I can finish the sentence in time and go home to serve my family and the community at large.

7. That my Lordship Citing From The Case of *Bethwel Wilson Kibor Vs Republic* (Court Of Appeal at Eldoret Criminal Appeal No. 78 of 2009), the court held that the offender was convicted of manslaughter and sentenced to 5 years imprisonment. The trial court did not indicate whether it had taken into account the 9 years the offender had already served in custody. Guided by Section 333(2) of the *CPC*, the appellate court reduced the sentence to time served.

8. That my Lordship I humbly pray to this honourable court to be considerate as far as my fate is concerned.

4. The Respondent opposed the appeal vide the following grounds:

1. The maximum penalty for the offence of manslaughter which the appellant is charged with and convicted attracts a maximum penalty of life imprisonment.

2. The appellant was granted a chance to mitigate but he had no mitigation. He was not remorseful at all.

3. The circumstances of the offence needed a punitive and deterrent sentence. The appellant attached his brother without any justifiable reason and stabbed him 3 times in the chest for asking for the wages he had worked for.

4. The mitigation presented in the present appeal is an afterthought and should be dismissed. The mitigation ought to have been presented at trial.

5. The sentence meted was lenient in the circumstances of the offence and should not be interfered with.

6. The Appeal lacks merit and ought to be dismissed.

Submissions

5. Both Parties largely relied on their written cases presented to court.

6. The prosecution called 5 witnesses.

7. PW1 was Philip Ruoma Nyaburia. He testified that on 23.2.2019, at around 7.30 a.m., he was herding. He harvested grass. He heard screams from his son's house, James Ruoni Ruoma, the accused. He dropped the grass and ran over. Upon enquiry, someone pointed to a direction and in that direction was a young boy lying dead. He recognized the deceased who was the accused's sibling. The deceased at the time was married. The deceased was about 20-30 metres from the accused's house. The assistant chief and the police arrived and took the deceased's body away. He never got to know the cause of death or who did it.

8. PW2 was Dr. Nyaiberi Omari, a medical officer in Kisii County with a degree in medicine and surgery and with 7 years' experience. He had a postmortem report for Kennedy Siriba done at Nyamache on 28.2.2019. He testified that he saw 3 stab wounds on the anterior aspect of the trunk, one in the centre and two sideways with blood coming from the wounds. The 3 stab wounds were below the left ribcage and a secured stab wound below the right-side ribcage. The right hand was punctured and bleeding inside, collapsed. Nad seen in other system. His opinion was cardio respiratory arrest due to stab to the chest. The postmortem report was PEXh.1.

9. PW3 was Lilian Bitutu. The deceased is her brother. She testified that on 21.2.2019, she was at Boochi at 5.00 p.m. to see her ailing mother. The police arrived and took her to Nyangusu. She was not aware of the deceased's death at the time.

10. PW4 was Joshua Mokaya. He testified that he knew the family of Wendy (late). On 22.2.2019, at 7.00 a.m., he was at home. He met Runi (accused) in the chief's office. There was a problem between him and another and Joshua was not immediately informed what the problem was. On 23.2.2019, the chief told Joshua about a stolen cow. He later learnt that a man had been killed. On the same day at around noon, they proceeded there and found Simba (brother to the accused). The deceased's body was near a closed door and the police took it away. It was alleged that the deceased had stolen maize. On cross-examination, he testified that the accused had thieves at his place and a dead man was found beside his door. He did not witness the killing.

11. PW5 was Janet Nyaboke. The deceased is her husband. Simba and James are brothers. She testified that on 22.2.2019 in the morning, she was at home. Simba Ruoma went to the JAMES' place to ask for his wages for work he had done. James entered the house and came out with a knife. Simba was with his father. James stabbed Simba on the chest. They lived close to one another. Janet was heading to the river to fetch water. She screamed on seeing what was happening and a crowd came. The police also arrived. They found the deceased dead. The deceased was not armed. Janet testified that she was not aware of any differences between James and Simba. On cross-examination, she testified that she was on her way to the river when the incident occurred. The deceased did not enter James' house. She saw James Kill Simba. The crowd only observed. She confirmed that the deceased was at home that day and not away.

12. On 28.2.2022, the trial Court found that the accused had a case to answer. The accused indicated that he would give unsworn statement and he would call 2 witnesses. The defence case was taken on 4.4.2022.

13. DW1 was James Ruoni Ruoma. He testified that on 23.2.2019, which fell on a Saturday, he was in Narok Town doing carpentry work. In the evening, his neighbour Thomas Onderi called him about a call from home, i.e. his family. Thomas informed James that his (James') brother had been found dead at his (James) land at around 9.00 a.m. It was late in the evening, James spent the night in Narok and travelled on 24.2.2019. James boarded a vehicle to Kisii. He arrived at Nyangusu at around noon and he found many people there and a police motor vehicle there as well. He headed to his house where he found 2 police officers inside his banana plants. They stopped him and asked if the farm was his. Upon answering in the affirmative, they arrested him for investigations. They refused to listen to him when he tried telling them that he was from Narok Town. He was escorted to the police station and subsequently charged with the offence before court. He urged the court to acquit him.

14. DW2 was Philip Ruoma Nyaribuye. He testified that the accused was his elder son and the deceased was younger to the accused. On 23.2.2019, he was feeding his cows when he heard screams. He left his work and ran to James' house. He found Kennedy dead. A crowd had gathered. The body of the deceased was 50 metres away from the accused's house. Nobody told him what had killed his son. The police

took his son's body to the mortuary. He did not attend the post-mortem. He had met the deceased earlier that morning still alive. He was not aware of any differences between the deceased and James. On cross-examination, he testified that the accused was in Narok when the deceased passed away.

15. DW3 was Anastasia Nyaboke. She testified that the accused is her son and the deceased was her son. The accused was away in Narok when Kennedy died on 23.2.2019. She was at Nyangusu Market when the deceased died. She did not know who or what killed the deceased. On cross-examination, she testified that the accused and deceased were in good terms and had not differed at all.

16. The trial court delivered its judgment on 9.6.2022. The trial court found that the cause of death was undisputed. PW5's evidence was direct that she saw the accused stab the deceased who died instantly at the door. Her testimony was consistent with the doctor's findings. On the alibi defence, the trial court held that there was no proof about the accused being in Narok on the material day. PW4 testified that the accused was in the chief's office on 22.2.2019 over a dispute and the killing occurred the following day. He dismissed the alibi defence. The trial court found that the deceased killed the deceased and convicted him accordingly.

17. On mitigation, the trial court's record indicates that the accused maintained his innocence and stated that he had no mitigation.

18. The court noted that the accused was not remorseful for taking away the life of another. The court found that it had no reason to pardon him or give a lenient sentence and proceeded to sentence him to serve 20 years' imprisonment.

19. The Appellant appeals against the sentence of 20 years and prayed for a lenient sentence.

Determination

20. I have considered the appeal and the submissions in this case.

21. Being a first appellate court, my duties are as set out in *Okeno vs. Republic* [1972] EA 32, where the Court of Appeal set out these duties as follows: -

> " 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 vs. Republic* (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and arrive at its own conclusion. (*Shantilal M. Ruwala vs. R*. (1957) EA. 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 finding and conclusion; it must make its own finding 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 vs. Sunday Post* [1958] E.A 424

22. In *Kiilu & Another vs. Republic* [2005], the Court of Appeal stated:

    1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

    2. 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; 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."

23. The Appellant appeals only against the sentence but I feel that I should weigh in on the conviction and whether the same was safe or otherwise.

24. Evidently, the trial court relied on the testimony of a single-identifying witness which informed the conviction.

25. On the evidence of a single identifying witness, the Court of Appeal in the case of *Kiilu v Republic* [Supra], held thus:

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilty, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

26. The trial court did not warn itself as to the danger of relying on the evidence of a single identifying witness. That said, what was the quality of the evidence of PW5? I am persuaded by the decision in *AHM v Republic* (Criminal Appeal E043 of 2021) [2022] KEHC 12771 (KLR) (31 August 2022) (Judgment)where the Court held thus:

> "16. Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in all contested cases. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does not permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.
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> 17. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness' testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness' intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question, Further, the accuracy of a witness' testimony identifying a person also depends on the opportunity

the witness had to observe and remember that person, and whether the victim knew the accused before."

27. PW5 was the wife of the deceased. The accused was her brother-in-law. They lived close to each other. It follows that she knew him well. She testified that on the morning of 23.2.2019, the deceased went to the accused's house to collect his wages. On her way to the river, she saw the accused stab the deceased. Her evidence remained unshaken even during cross-examination neither was it controverted. She testified that the accused was not away as alleged.

28. The accused and his witnesses testified that he was away in Narok. I note that the defence witnesses all acknowledged being around the crime scene when the attack happened. There is no way that they could have known that the accused was in Narok, if indeed he was in Narok.

29. In the case of *Erick Otieno Meda v Republic* [2019] eKLR, the Court of Appeal held that:

> " 18. In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie v Republic* [1984] eKLR, this Court stated:
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> > " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable..."

30. I find that the trial court was right in rejecting the alibi defence. While the accused person does not bear the burden of proof in proving an alibi, I find that an accused has to do a lot more than just front an alibi. It has to be strong enough to introduce unreasonable doubt into the mind of the court. The Appellant failed to do so. I find and hold that the conviction was safe in the circumstances.

31. On sentencing, it is trite law that sentencing is a matter of discretion of the trial court. I am persuaded by the decision in *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), the Court held that "...*In S v Mchunu and Another* (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court held that:

> " It is trite law that the issue of resentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:
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> > Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'

32. The Court further held that the purpose of sentencing is to ensure that the sentence imposed is commensurate and proportional to the offence committed.

33. However, this Court may interfere with the same where the circumstances so dictate. I am persuaded by the decision in *MM1 v Republic* [2022] eKLR, where the Court held as follows:

> The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:
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> > " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

34. The Court further cited the case of *Shadrack Kipkoech Kogo vs R.* Eldoret Criminal Appeal No. 253 of 2003 where the Court of Appeal held that:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka-vs-R*. (1989 KLR 306))

35. The Court also cited the Court of Appeal case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, where it held that "The Court does not falter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

36. The Appellant was offered a chance to mitigate. He maintained his innocence and stated that he had no mitigation. The trial court noted that the charge ought to have been one of murder at best. The court further noted that the Appellant was not remorseful and found that there was no good reason to pardon.

37. Indeed, the objectives of sentencing as per the *Judiciary Sentencing Guidelines* (2023) are:

    a. Retribution

    b. Deterrence

    c. Rehabilitation

    d. Restorative justice

    e. Community protection

    f. Denunciation

    g. Reconciliation

    h. Reintegration

38. Of course, deterrence is not the only objective and the other objectives should not be sacrificed at the altar of deterrence.

39. In his appeal, the Appellant stated that he was provoked by the deceased who was drunk at the time. He also stated that there was a dispute between him and the deceased touching on land. None of these were fronted before the trial court. In fact, the Appellant's witnesses testified that there were no differences between the Appellant and the deceased. The same are indeed afterthoughts.

40. The trial court was correct in finding that at the time, the Appellant expressed no remorse for his actions.

41. Was the sentence commensurate in the circumstances?

42. In the case of *Republic v Japheth Oronyi Auka* [2020] eKLR, the accused person was sentenced to 25 years' imprisonment for the offence of manslaughter. The Court noted that the accused person therein was a young person but he had used a deadly weapon (panga) to murder the deceased. The accused was also found as not being remorseful.

43. In *Anyanje v Republic* (Criminal Appeal 45 of 2017) [2023] KECA 880 (KLR) (7 July 2023) (Judgment), the Court of Appeal sentenced the accused person to 30 years' imprisonment. In that case however, the accused person was charged and convicted of the offence of murder. That said, the Court of Appeal noted that the appellant therein killed his grandfather in a most gruesome manner by banging his head against a wall, hitting him with a fimbo because his grandfather had apparently declined to give him land.

44. In the case of *Stephen Ouma Owino v Republic* [2020] eKLR, the Appellant's sentence of 7 years imprisonment was upheld by the appellate court. He was charged with the offence of manslaughter and was convicted and sentenced to serve 7 years' imprisonment. On appeal, the Court found that the sentence imposed was lenient in view of the macabre way that the deceased was killed. The appellate court upheld the sentence.

45. Looking at the totality of the evidence herein, the decisions hereinabove s and the fact that accused and the deceased were brothers and differed over a debt owed to deceased by accused. I find that the sentence of 20 years' imposed was harsh in the circumstances and I proceed to reduce it to 10 years imprisonment.

46. The trial court, however, erred in failing to take into account the time spent in custody in line with Section 333(2) of the *Criminal Procedure Code*. The time spent in remand was 23.2.2019 to 6.6.2019 and from 25.11.2021 to 15.12.2021 which makes it a total of roughly 4 months and 3 days. In that connection, the Appellant shall serve the sentence of 20 years less the time spent in custody which is 4 months 3 days.

47. In the end, the Appellant's Appeal is successful to the extent that the appellant shall serve 10 years imprisonment to be computed less the period of 4 months and 3 days when he was in remand custody.

48. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 6TH DAY OF FEBRUARY, 2024.

TERESA ODERA

JUDGE

In the presence of:

Mr. Koima for the State

The Appellant in person

Oigo - Court Assistant