Maiyo v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 14832 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E011 OF 2023

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

SILAS KIPROP MAIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Iten Senior Principal Magistrate's Court Criminal Case No. 275 of 2017 with the offence of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code. The particulars were that on 22/04/2017 at about 5.00 pm at Kamok Village in Moiben Location within Elgeyo Marakwet County, by unlawful act, he caused the death of one John Kanda Blaseo.

2. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the prosecution called 8 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. The Appellant then gave a sworn statement and called no other witness. By the Judgment delivered on 27/08/2018, he was convicted and sentenced to 15 years imprisonment.

3. Dissatisfied with the said decision, and upon obtaining leave an Appeal out of time, the Appellant instituted this appeal in person on 22/03/2022, about 3 ½ years after the sentence. His Grounds of Appeal reproduced verbatim are crafted as follows:

    i. That I am a first offender and thus beg for leniency

    ii. That I am remorseful, repentant and reformed as I have learnt to take responsibility of my own actions.

    iii. That I am a young man and I pray to be re-inconstituted in the society to serve as a role model and a teacher/mentor to others o similar behaviour.

iv. That I have served a substantial part of my sentence.

v. That I am praying for reduction of my sentence by the time spent in remand custody pursuant to Section 333(2) and Section 362, 364(1)(b) & 365 of the CPC, Cap. 75 Laws of Kenya, among other enabling laws.

vi. That may this Honourable Court be pleased to consider the sentencing policy of 2016 published by the Kenyan Judiciary and establish the mitigating circumstances that would lessen the custodial sentence.

vii. That more grounds to be adduced at hearing thereof and determination of this appeal.

4. It is therefore evident that the Appeal is only against sentence as the grounds do not disclose any challenge against the conviction.

5. The Appeal was then canvassed by way of written Submissions upon which the Appellant filed his Submissions on 12/04/2022 while the State filed on 4/06/2024.

6. In his Submissions, the Appellant basically reiterated and expounded on his grounds of Appeal already set out above.

7. On his part, regarding the Appellant's ground that he was a 1st offender, Counsel for the State (Respondent) submitted that the trial Court was informed of the same by the Prosecutor, that the Appellant was also granted a chance to mitigate and that he prayed for leniency on the same ground. According to Counsel therefore, that issue was well considered by the trial Court and the Appellant cannot base his Appeal on grounds that were already considered and taken into account by the trial Court without manifesting any illegality and injustice.

8. Regarding the Appellant's plea for remorse on the ground that he had reformed and repented, Counsel submitted that the sentence meted out was legal and lawful, and not excessive or harsh given the circumstances of the case, and that it reflects the seriousness of the offence. He urged that the Appellant should be warned that the sentence may even be enhanced. He urged further that according to the "Judicial Sentencing Policy Guidelines 2016", one of the purposes of punishment is to act as a deterrence for the commission of offences and that if the Court allows this Appeal, the purposes of the punishment will not be served.

9. In respect to the Appellant's plea that he had acquired skills while in prison, Counsel submitted that such is part of the intended results of the punishment and that the Appellant cannot therefore appeal on that ground.

10. In conclusion, Counsel submitted that this Court should not interfere with the trial Court's discretion in sentencing unless it is demonstrated that the sentence was manifestly excessive, illegal, improper or founded/based on misrepresentation of material facts. He cited the case of Benard Kimani Gacheru vs Republic.

Determination

11. The issues arising for determination in this Appeal are evidently the following:

i. whether this Court should interfere with the sentence of 15 years imprisonment meted out by the trial Court.

ii. whether the period spent in custody by the Appellant before sentencing should be taken into account.

12. Regarding interference with the sentence imposed by a trial Court, the applicable principles were restated by the Court of Appeal in the case of Ogalo s/o Owuora 1954 24 EACA 70, in the following terms:

> " This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."

13. The above principle was affirmed by the former Court of Appeal of East Africa, in the case of Wanjema v Republic [1971] EA 494 as follows:

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

14. The same was further restated by the Court of Appeal in the case of Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

> " It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist".

15. It is therefore clear from the foregoing that the allegation that the Appellant was a 1st offender cannot by itself amount to a ground for Appeal against the sentence. That was an issue of mitigation before the trial Court and it has not been alleged that the Appellant was not given the opportunity to mitigate. In respect to the allegation that the Appellant has now reformed and repented, that, too, is a matter that, even if true, arose after conviction and sentence. It cannot therefore also form a ground for Appeal. The only viable ground for Appeal raised by the Appellant can only therefore be that the sentence was manifestly excessive or harsh.

16. The offence that the Appellant was convicted of was manslaughter contrary to Section 202(1) of the Penal Code which states as follows:

> " Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter."

17. Regarding sentence, Section 205 of the Penal Code provides as follows:

> " Any person who convicts the felony of manslaughter is liable to imprisonment for life."

18. The maximum possible sentence being therefore life imprisonment, it is clear that the sentence of 15 years imprisonment imposed was well within the law. The Appellant was also given the opportunity to mitigate, which he did by apologizing and seeking for forgiveness. The trial Magistrate also called

for a pre-sentence Report which was duly filed and only after considering the same did he mete out the sentence. Nevertheless, I take notice of other factors that should ordinarily be also taken into account when determining an appropriate sentence.

19. Regarding sentence, Majanja J, quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
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> (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaptation of the offender;
>
> (h) any other factor that the Court considers relevant.

20. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> "With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

21. In this case, it is stated that the Appellant and the deceased got involved in a fight over a sum of Kshs 50/- while they were drinking in a chan'gaa den and continued with the fight in other venues. Both of them therefore appear to have been drunk and thus ended up making the poor judgment of engaging in a fight instead of amicably resolving their dispute. The weapon used by the Appellant was an ordinary stone which he simply picked from the ground and which indicates that the Appellant harboured no prior intention to harm the deceased. This background does not paint the Appellant as a hardcore

criminal and only paints him as an overenthusiastic combatant who went overboard and most likely suffers from an anger management challenge. I find these facts to amount to mitigating circumstances.

22. Regarding aggravating circumstances, I observe that after subduing the deceased, the Appellant had no reason to continue repeatedly hammering the deceased on the head. He ought to have given consideration to the sensitivity of the area around the head and the probable consequences of continuing to hit the deceased thereon. Because of his rash decision and unreasonable action, a life was unnecessarily lost. For this, I agree that the Appellant merited a stiff sentence.

23. In view of the guidelines set out in the various authorities cited above, considering the mitigating and also the aggravating circumstances set out, considering the Appellant's mitigation before the trial Court and also considering the contents of the pre-sentence Report submitted before the trial Court, I find that the sentence of 15 years imprisonment was manifestly excessive in the circumstances of the case. I find that in reaching the same, the trial Court overlooked material factors and that as a result, the trial Court acted on wrong principles. I therefore find that the sentence ought to be reduced.

24. I have also not seen any indication that the Appellant was released on bail during the trial. If that is the correct position, then having apparently been in custody since he was arrested on 22/04/2017, more than 7 years ago, I trust that he has had ample opportunity to reform while in remand and in prison and is now ready to be released back to the society to achieve social re-adaptation and rehabilitation. He is also evidently remorseful and I believe that he has now suffered sufficient retribution for his "sins".

25. Regarding the Appellant's plea that the period that he spent in custody before sentencing be taken into account, I note that the trial magistrate did not mention whether he took into consideration such period as required by law. In his Submissions before this Court, the Prosecution Counsel did not also say anything about this prayer.

26. Regarding the issue, Section 333(2) of the Criminal Procedure Code provides as follows:

> "
>
> "(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

27. On the same issue, the Court of Appeal in Bethwel Wilson Kibor vs. Republic [2009] eKLR stated as follows:

> "By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

28. On its part, The Judiciary Sentencing Policy Guidelines (2014) also provides guidance on this as follows:

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

29. I note from the charge sheet that, as aforesaid, the Appellant was arrested on 22/04/2017 before being later arraigned. Although the Appellant appears to have been granted bail, as further stated, there is no indication that he paid the same and was released. If so, then it means that he remained in remand custody throughout the trial until 27/08/2023 when he was sentenced. The period between arrest (22/04/2017) and sentence (27/08/2018) is therefore, in aggregate, about 16 months.

30. In view of the proviso to Section 333(2) of the Criminal Procedure Code, which requires that the period that a convict has spent in remand custody be "taken into account" while determining sentence, I have done so.

Final Order

31. In the circumstances, I make the following Orders:

    i. The Appeal against conviction fails.

    ii. The sentence of 15 years imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 8 years imprisonment to be computed from the date of arrest, namely, 22/04/2017.

    iii. In the event that the Appellant has now fully served the said prison term of 8 years now imposed herein, then he shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Kirui for the State

Appellant present (virtually from Iten Law Courts)

Court Assistant: Brian Kimathi