**Cheboswony v Republic (Criminal Appeal 14 of 2023)**
**[2024] KEHC 13571 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13571 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ITEN**

**CRIMINAL APPEAL 14 OF 2023**

**JRA WANANDA, J**

**NOVEMBER 6, 2024**

**(FORMERLY ELDORET HIGH COURT CRIMINAL APPEAL NO 449 OF 2021)**

**BETWEEN**

**SOLOMON KIPLIMO CHEBOSWONY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. This Appeal is against the sentence of 40 years imprisonment imposed against the Appellant in Iten Senior Principal Magistrates' Court Case No. E449 of 2021 in which the Appellant was charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence were that on 14/06/2021 at Kapsio Estate in Keiyo North Sub County, within Elgeyo Marakwet County, he unlawfully killed one Phyllis Jepkoech. The killing was as a result of a "love triangle".

2. The Appellant pleaded not guilty and the matter proceeded to full trial in which the prosecution called 10 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. He then gave sworn testimony and did not call any witness. By the Judgment delivered on 09/09/2022, the trial Court convicted him and on 23/09/2022, sentenced him to 40 years imprisonment as aforesaid.

3. Dissatisfied with the decision of the trial Court, the Appellant instituted this Appeal on 3/10/2022. Although the preamble to the Grounds of Appeal indicates that the Appeal is against both conviction and sentence, it is clear that the Appeal is only against sentence. The grounds cited, reproduced verbatim, are as follows:

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

ii. That (I) am remorseful and reformed as I have learnt to take responsibility for my own actions.

iii. That (I) am a young man and I pray to be reconstituted into society to serve as a role model, teacher and mentor to others of similar behaviour.

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

v. That this court be pleased to consider the judiciary sentencing policy of 2016 published by the Kenya Judiciary and establish the mitigating circumstances that would lessen the custodial sentence.

4. As the Appeal is obviously only against sentence, there is no need to recount the evidence before the trial Court as the conviction has not been challenged.

**Hearing of the Appeal**

5. The Appeal was directed to be canvassed by way of written Submissions. Pursuant thereto, the State, through Prosecution Counsel Rachel Mwangi, filed its Submissions on 20/02/2024. On the part of the Appellant however, up to the time of concluding this Judgment, I had not come across any Submissions filed by him.

**Respondent's Submissions**

6. Counsel for the State submitted that the sentence meted out was legal, watertight and lenient given the circumstances of the case, that Section 202, as read with Section 205 of the Penal Code, provides for life imprisonment for anyone found guilty of the offence of manslaughter and that therefore, the Appellant cannot claim that the sentence of 40 years imprisonment was harsh. She cited the Court of Appeal case of Bernard Kimani Gacheru v Republic (2002) eKLR. Counsel submitted that the trial Magistrate did not act upon wrong principles or overlook material factors when meting out the sentence, that the sentence was not harsh, given the facts of the case, to warrant interference by this Court and that the Appellant is yet to serve a substantial part of the sentence to warrant reduction thereof, considering that the Appellant was charged on 29/06/2021 and was sentenced on 23/09/2022.

7. She submitted further that before this Court reduces the sentence, it should consider the aggravating circumstances and the severity of the offence. She recounted the evidence that in this case, the Appellant went to where the deceased was, removed a knife and stabbed her several times thereby causing her death, that so severe were the injuries sustained by the deceased that when her father went to see her in hospital, he lost consciousness, and that the Appellant committed a heinous act which caused and will continue causing trauma to the family of the deceased. She contended that as a result of the Appellant being unable to control his actions, he ended the deceased's life thereby causing everlasting suffering to the family of the deceased. She urged that the Appellant is a danger to the society and deserves to serve more years in custody so that he can serve as an example to others who intend to commit similar offences. She cited the case of Samuel Kipkirui Kumori v Republic (2019) eKLR. According to Counsel therefore, the Appellant does not deserve leniency from this Court and urged it court to dismiss the Appeal by upholding the trial Court's sentence.

**Determination**

8. As a first Appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32).

9. The issue for determination is evidently "whether this Court should interfere with the 40 years prison sentence imposed against the Appellant"

10. The limits of an appellate Court's power to interfere with a sentence passed by a trial Court was restated 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."

11. Similarly, the former Court of Appeal of East Africa in the case of Wanjema v Republic [1971] EA 494 stated that:

> " 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, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."

12. Section 205 of the Penal Code provides as follows;

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

13. Regarding sentence, Majanja J, in the case of Michael Kathewa Laichena & Another v Republic [2018] eKLR, quoting the Muruatetu Supreme Court decision, 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;
>
> (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."

14. Applying the above principles to the facts of this case, it is my considered view that the trial Court meted out a sentence that is commensurate to the offence committed. This was a love triangle killing after the deceased, erstwhile the Appellant's lover, apparently "dumped" him for another man. The

killing was so gory considering that the Appellant stabbed the deceased 28 times after carefully tracing her location using deception. This was a perfectly planned execution and I do not even understand why the Appellant was charged with the offence of manslaughter, and not outright murder. In the circumstances, find no reason to interfere with the discretion exercised to sentence the Appellant.

15. This Appeal therefore fails and is dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024**

**.....**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Ms. Ayuma for the State

Appellant present, acting in person

Court Assistant: Brian Kimathi