



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 27 OF 2019

MOSES OCHIEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Before Hon. Justice R. Nyakundi

Ms Sombo for the State

JUDGEMENT

The appellant, Moses Ochiel was charged with the offence of manslaughter contrary to Section 202 of the Penal Code. He was convicted and sentenced to serve seven years imprisonment. The appellant killed the deceased by setting fire on her. Prior to the incident on the material date, both of them were intoxicated. It was also ascertained that they had earlier quarreled. The deceased and appellant were engaged in a love relationship.

The appellant has now appealed against the sentence imposed by the trial magistrate by way of filing a mitigation. He contends that he is a first offender and layman on issues pertaining the law, that he is the sole breadwinner for his wife and children, that he is remorseful as he regrets the circumstances within which he committed the offence and that he promises to be a peaceful and law abiding citizen.

The law and court's determination

In determining matters before me it is important to reflect on the prevailing principles:

“Sentencing does not fall exclusively within the province of the criminal courts. Sentencing authority is distributed between the legislature, the judiciary and the executive, legislative policy and executive practice have an equally profound impact on the form of the sanction and the manner in which it is discharged.” (See Sentencing State and Federation in Victoria 2nd Edition (Richard G Gox and Arie Freidberg, Oxford University Press, 1999 at p 10).

The question which one must ask is why the disparities in sentences or in what circumstances it is desirable to pass a short, medium or long term custodial sentence.

Although judges and magistrates always speak of judicial discretion, by itself is not a remedy and it must be remembered that it is merely a power exercised for obtaining the remedy specified in the statute.

In **Veen v The queen NO. 2 (1987-88) 164 CLR 465 Mason C.J.** said of sentencing discretion as follows:

“However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be answered in isolation from the others, when determining what is appropriate sentence in a particular case. They are guide posts to the appropriate sentence, but sometimes they point in different directions.”

It seems further more in our sentencing policy guidelines of the Judiciary 2016 various principles and objectives in sentencing ought to be infused in a complex web of judicial power in exercise of discretion to fairly allow the following outcomes:

1. *Rehabilitation of offenders to be given more weight, than deterrence.*
2. *The exceptional circumstances of an offender merely to reduce his or her culpability for the offence is a strong factor to be taken into account.*
3. *In cases when an offender has pleaded guilty to the offence and is in particular remorseful lesser severe alternative punishments are recommended as an emphasis to reform and rehabilitate the offender.*
4. *The maximum sentence of an offence should only be reserved for the rarest of unlawfulness of the offence.*
5. *Closely a kin to the question of wide discretionary power is the question of balancing the competing considerations on aggravating and mitigation factors in order to come at an appropriate outcome or sentence.*

How then should these sensible principles normally be considered and implied in accordance with the provisions on sentencing to uphold right to a fair hearing and a just proportionate sentence for the offence.

The court in **Yardfey v Betts (1979) 22 SASR 108 (112 - 113)** in South Australian King C.J. held:

“To say that the criminal law exists for the probation of the community is not to say that severity is to be regarded as the sentencing norm. Times and conditions change and the approach of judges to their task must be influenced by contemporary conditions and attitudes. But public concern about crime, however, understandable and soundly based, must never be allowed to bring about departure by the court from those fundamental concepts of justice and mercy, which should animate the criminal tribunals of civilized nations. The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so.”

In truth, sentencing involves a decision by a judge or magistrate as to what the criminal justice system should do to the offender who has pleaded guilty or found guilty after a trial and conviction entered in favour of the punishment.

It is therefore more probably a case of discretion from the available alternatives to come to a deserving sentence, a duty lying upon every judge or magistrate who decides whether to impose a custodial or non-custodial sentence.

The most drastic of the such interventions on sentencing are when the court is called upon to pass a custodial sentence. Where there is irreparable harm on long custodial sentences proper weight must therefore be given while exercising discretion to pick an appropriate sentence.

The Constitution itself demands and obligating trial courts in Article 50(2)(P) **“that every accused person is entitled to the benefit of the least severe of the prescribed punishment for an offence”**.

Reflection on the decision of the Supreme Court in **Francis Muruatetu v R (2017) eKLR** the court impliedly follows this provisions and principles on sentencing when it emphasized amongst other things to be weighed during the sentencing hearing thus:

1. *The nature of the offence.*
2. *The circumstances of the offence.*
3. *The personal circumstances of the offender*
4. *The age of the offender.*
5. *The previous conviction if any.*
6. *The interest of the public of any extenuating circumstances etc. (Empahsis added).*

In applying the above principles, the discretion exercised by the learned trial magistrate and provisions of the statute pursuing punishment for manslaughter I hold the following view:

I have noted that the learned magistrate gave detailed reasons why she felt strongly which I must confess, the imposition of a custodial sentence was appropriate. The court considered the fact that the appellant was youthful, that he acted excessively against the deceased, that the offence is very serious as it resulted in loss of life of a young person, and that an equally innocent family is suffering.

In honor of the principles in **Bernard Kimani Gacheru v Republic CR Appeal No. 188 of 2000** where the court stated as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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, some wrong material, or acted on a 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.”

Giving effect to these time set precedent I find no reason to interfere with the sentence of 7 years imprisonment. The learned trial magistrate’s discretion remains unimpeachable and in concurrence her decision is affirmed. By this decision I disagree with the appellant that his mitigation and any pre-existing condition that there is raised his plea on a appeal within the threshold of **Bernard Kiman Case** (supra).

In the circumstances, I am of the firm view that the appeal must be dismissed in its entirety for lack of merit. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL, 2020.

.....

R. NYAKUNDI

JUDGE

In presence of: -

Mr. Kirui for the State present

Appellant present in person