REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 101 OF 2016

FRANCIS MUTURI WANINI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 126 of 2006 of the Chief Magistrate's court at Thika – U.P Kidula CM

J U D G M E N T

1. This appeal emanates from Thika **Criminal Case No. 126/2006** where the Appellant was tried for the offence of Manslaughter contrary to section 202 of the Penal Code. The particulars state that on 15th January, 2004 at Kamwangi village of Thika District, the Appellant unlawfully killed Joyce Wanini Ngugi. The trial proceeded before **U.P. Kidula CM** (as she then was). Judgment was delivered on 23.3.07. A pre-sentence report was called for and on 22/5/07 the Appellant was sentenced to 25 years imprisonment.

2. It would appear that the Appellant did not file his appeal in the time provided but he subsequently moved the court for leave via a miscellaneous application No.154/11 which enabled him file his petition of appeal. The Petition of appeal was assigned the No. 112/11 in the High Court of Kenya, Nairobi the Deputy Registrar of the court calling for the proceedings from the trial court by a letter dated 7th April 2011. Despite a further reminder dated 11th June 2012, the proceedings were not finished. On 16/4/13, Msagha J ordered that the appeal be transferred to the newly established High Court at Muranga.

3. The record of the lower court was forwarded to this court vide a letter dated 3rd February 2017 by which date the appeal has been transferred to this court by Waweru J (order of 16th August 2016).

4. The Appellant's petition of appeal is dated 17th March 2011. Two substantive grounds were raised in the petition as follows:

1) The trial court erred in law and fact for relying on doubtful and contradictory evidence.

2) The trial court erred in fact and law by its failure to consider absence of malice aforethought.

5. The appeal was eventually heard on 5/7/18. The Appellant informed the court that he would rely on the handwritten submissions filed on 15/5/18. The submissions are entitled "Mitigation"

6. What I gather from the submissions are complaints that trial court did not consider the facts of the case, and mitigation raised by the Appellant who describes himself as a "mentally retarded person". He seeks to have the sentence reviewed therefore. The submissions did not touch on the grounds of appeal in the petition.

7. The DPP opposed the appeal. Through Miss Ndombi, the DPP reiterated evidence by prosecution witnesses such as **PW2** and the dying declaration of the deceased as relayed to **PW4.** The DPP also pointed out that malice aforethought is not an ingredient of the offence of manslaughter. The DPP defended the sentence arguing that it was within the law.

8. The court has considered the arguments raised in respect of the appeal. The duty of the first appellate court is to review the trial evidence and to draw its own conclusions as stated in Pandya -Vs- Republic [1957] EA 336:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully**

weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

9. Although the Appellant did not address the grounds raised in his appeal during submissions, the grounds were not withdrawn and the court is obligated to consider them. The prosecution case was as follows. The Deceased was the mother to the Appellant. She lived in the same compound with the Appellant and a brother to the Appellant married to **Irene Wairimu Ngugi (PW2)** also lived in the same compound. The deceased lived in her single room with two children of a daughter, **Margaret Wambui (PW4).** These children were S and J W **(PW3).** On the right of 15th January 2004, the deceased was with the children in her room. A lantern was on. The deceased was preparing supper. Suddenly, the Appellant entered the room. He was armed with a panga.

10. He closed the door behind him. He warned the children not to raise an alarm. The deceased was kneeling by her bed trying to shoo out some chicken. The Appellant inflicted several cuts on the deceased's head with the panga. **PW3** managed to step out and raise an alarm, which brought **PW2** to the scene, only to meet the Appellant in flight. The deceased was taken to the hospital but succumbed to her injuries one week later. Meanwhile the Accused was traced and arrested by members of public on the same night. He was handed over to Gatundu police.

11. Dr. Nimrod Nganda Ngarama **(PW9)** conducted the post mortem on the deceased. He concluded that death resulted from the severe head injuries. He also examined the Appellant and certified him fit to stand trial. It would appear that the Appellant was initially charged before the High Court at Nairobi in **Criminal Case No. 48/04** for manslaughter. By an order of Rawal J (as she then was) made on 12th October 2005, the case was transferred to the CM's court Thika. When placed on his defence the Accused made an unsworn statement which merely stated his particulars. He further stated he had nothing to say regarding the case.

12. There is no doubt that the offence of manslaughter contrary to section 202 as read with Section 205 of the Penal Code does not involve the ingredient of malice aforethought. Indeed that is the precise distinction between the offence and murder contrary to Section 203 of the Penal Code. Section 202 of the Penal Code provides:

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

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tend to the preservation or life or death, whether such omission is or is not accompanied by an intention to cause death or bodily harm."

13. The Appellant did not point out the specific inconsistencies in the prosecution evidence upon which his challenge thereof was based. The trial magistrate reviewed with care the evidence of the witnesses called by the prosecution. She was alive to the fact that the sole eye witness to the offence, PW3 was a child of tender years. Thus, she sought corroboration of her account and found it in the evidence of **PW2, PW4** and **PW9**.

14. She concluded that:

"There is therefore no doubt in my mind that the Accused is the one who cut the Deceased and caused her death. The motive for cutting the deceased has not been found since it is said that even before this attack there had been no quarrel between the Accused and Deceased... The Accused ... raised no defence in question he asked the witness. In absence of any defence I find that the prosecution has proved the case against the Accused beyond any reasonable doubt."

15. The circumstances of the attack were in my view conducive to good visibility and positive identification. **PW3** was in a single room in the company of her younger sister and grandmother. **PW3** testified that:

"When he came in (Accused) he closed the door behind him when he told me not to scream... my grannie was looking after chicken which were under the bed. He cut her on the head and on the chin. He cut her with force. I was in the house. Muturi did not speak to my mother he cut her. It was a room not too big. We were waiting to eat. My grandmother was cooking. We were using a lantern to see. We were seating on the bed and my grand mother was on her knees checking on the chickens. My grandmother didn't hear when Muturi told us not to scream. He talked in a whisper then cut her. I ran out and screamed... my auntie Irene Wanini came first. Her house is near my grandmother. As I was screaming I saw Muturi leave and run away."

16. PW3 knew the Accused well being an uncle residing next door to the Deceased. Although the trial magistrate did not specifically address the question of the lighting in the room and other circumstances of the identification, It is clear that she believed that the testimony of **PW3** and upon considering it alongside that of **PW2** concluded that the Accused was properly identified, noting, that there was hardly any lapse of time between **PW3's** screams and **PW2** running to the scene, so that nobody else could have entered the deceased's house. Moreover she considered and accepted the evidence of the dying declaration made to **PW4** by the deceased one day after the offence. There was also similar evidence by the deceased's brother **John Waithaka (PW10)** who stated that when he visited the Deceased in Hospital, she told him several times that:

"Muturi mbaya amenikata kata"

17. In the case of **Aluta v R [1985] KLR 543** the Court of Appeal stated that it is unsafe to base a conviction solely on the dying declaration

of a deceased person made in the absence of the Accused and not subject to cross-examination, and that the court must be satisfied that the dying declaration was satisfactorily corroborated. Further in **Kihara v R [1986] KLR 473** the court urged caution regarding the time of the offence and the identification of the assailant. Moreover before placing reliance on such a declaration, it must be shown that death was imminent at the time the declaration was made.

18. This latter requirement is based on the general principle upon which dying declarations are received in evidence, which is that, the declaration is made when the maker is in a dire condition and at the point of death hence under compulsion to tell the truth (see **Chege v R [1985] KLR 1.** Therefore the dying declaration in this case itself required corroboration. I believe that in the circumstances of the attack, the Deceased was also in a position, like **PW3,** to see the Appellant. Even though she was in a kneeling position near the bed, there is no evidence that her view was obstructed and unable to have good visibility of the room and what was happening around her. Secondly, the deceased certainly sensed while in hospital that her end was near as demonstrated by her words to **PW4** that the Appellant ought to suffer the same treatment he had given her.

19. For some time she was unable to speak but died only a week after the attack. The injuries in my view were severe enough to cause the Deceased to fear imminent death. Finally, the evidence of **PW2** corroborates not only the testimony of **PW3** but also the dying declaration made by the Deceased. Although there had been no argument or quarrel between the Appellant and the Deceased, immediately prior to the attack **PW2** testified that the Appellant after quarreled with his mother, and that he had on several occasions threatened to kill the deceased.

20. The proximity of the Appellant's home to that of the deceased made it possible for the Appellant to sneak into the house on the material night, while armed, with the evident intention of harming the Deceased. Indeed had **PW3** not slipped out of the house and raised an alarm, the Appellant may have run off before **PW2** and neighbours could be alerted of the attack.

21. Reviewing all the evidence tendered by the prosecution. I would agree with the conclusions reached by the trial court thereon. The Appellant's grounds of appeal have no merit and must fail. The conviction is upheld.

22. Regarding sentence, the Appellant complains that the trial court failed to consider certain relevant matters including his mitigation and his mental status. The Appellant was certified fit to plead prior to his arraignment in court in 2004. Before this court, a similar opinion was given vide a letter dated 28th June, 2018 by Dr. Ochieng, a consultant psychiatrist at Mathare Hospital. This report was made pursuant to an order by Mutende J on 18/7/17 and was based on the judge's observations regarding the Appellant's demeanor.

23. The pre-sentence report that was called for by the trial court alluded to mental illness, which the trial court dismissed stating that there was no basis for such an opinion. The trial magistrate did consider the circumstances of the offence and could find no immediate motive for the attack on the deceased. It seems the court was oblivious of the evidence by **PW2** that the Appellant had a frosty relationship with his deceased mother and had threatened to kill her. The Appellant when called upon did not address the court in mitigation even though the record of the trial shows that he not only cross-examined witnesses but also sought several adjournments and demanded treatment on various occasions.

24. Before this court he has conducted his appeal in person, demanding proceedings and seeking adjournments as well as orders for treatment. For my part, I cannot find any reason to conclude that the Appellant suffers from a mental illness even though he did strike me as a person possessed of below average in intelligence.

25. The Appellate Court does not interfere with the sentencing discretion of the trial court unless it is shown that the court acted on a wrong principle and imposed a patently inadequate or manifestly excessive sentence – see R **v Mohammedali Jamal (1949) 15 EACA 126.** In **Wanjema v R [1971] EA 493** the court of appeal stated that:

> **"A sentence must in the end, however, depend upon the facts of its own particular case... an Appellate Court should not interfere with the discretion which a trial has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case..."**

26. The Appellant was convicted for what appeared to be the senseless killing of his mother, most possibly arising out of some old grudge. The maximum punishment for the offence of manslaughter is life imprisonment. The Appellant was aged 30 years at the time of the offence. In my own view the sentence cannot be faulted. It was not excessive in the peculiar circumstances of this case. Moreover no mitigation was offered. I find no basis for interfering with the sentence.

In the result the entire appeal has failed and is dismissed accordingly.

DELIVERED AND SINGED AT KIAMBU THIS 5th DAY OF OCTOBER, 2018

In the presence of:

Appellant - in person

For the DPP – Miss Ndombi

Court Clerk - Nancy

C. MEOLI

JUDGE