



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 130 OF 2017

(CORAM: R. E. ABURILI - J.)

MOSES OWUOTH MIGELE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the Sentence dated 13.12.2017 in Criminal Case No. 312 of 2016 in SIAYA Law Court before Hon. J. O. Ongondo - PM)

JUDGMENT

1. In the Memorandum of Appeal dated 27th December 2017 filed by the Appellant herein Moses Owuoth Migele through his counsel Ms Gadhia & Otieno Advocates, the appellant challenges the judgment of Hon. Mr. J. Ongondo (PM) delivered on 13/12/2017 in Siaya, PM Cr. Case No. 312 of 2016 Republic Vs Moses Owuoth Migele on the following principal grounds:-

- 1. That, the Learned Trial Magistrate erred in both law and fact in failing to appreciate the glaring contradictions in the evidence by the Prosecution case;***
- 2. That, the Learned Trial Magistrate erred in law by failing to that the charge was defective;***
- 3. That, the Trial Magistrate failed to appreciate the background of the matter;***
- 4. That, the Learned Trial Magistrate failed to critically evaluate and analyse the evidence tendered;***
- 5. That, the Learned Trial Magistrate erred in law and fact in rejecting the appellant's defence without assigning any reason.***
- 6. That, the Learned Trial Magistrate erred in both law and in fact in totally misunderstanding and or failing to appreciate the accused's mitigation and facts of the case thereby coming to a wrong conclusion.***
- 7. That, the sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances.***

2. The Appellant prayed that: the appeal be allowed; the conviction, judgment and sentence by the subordinate court be quashed and set aside respectively; and that the appellant be set free at liberty forthwith.

3. In the oral submissions canvassing the appeal, Mr. Otieno Counsel for the Appellant argued grounds 1 - 6 together and ground 7 alone. However, after arguing grounds 1 - 6 which challenges the conviction of the appellant, terming it unsafe, Mr. Otieno did submit, in rejoinder to the Prosecutions Counsel as follows: -

“We shall go by our arguments on sentencing alone so that the court does not have to belabour on the issue of conviction which we are not challenging. We abandon our plea on conviction and focus on sentence alone.”

4. The court then ordered that the appeal against conviction is abandoned and the court to consider sentence imposed on the appellant.

5. Earlier on, Mr. Okachi, Senior Principal Prosecution Counsel had opposed the appeal, urging the court to uphold both the conviction and sentence imposed on the appellant which was life imprisonment, for the offence of manslaughter.

6. The evidence as adduced against the appellant before the trial court was that on 15/3/2016 at about 1.00 pm, one Charles Otieno and Luka Adede were fighting over a panga. PW1, Alkana Oduor Adundo decided to intervene to separate the two and in the process, the deceased Moses Migele also intervened. The deceased started beating the appellant herein using a piece of wood which he picked nearby. The appellant took a piece of wood (firewood) and hit the deceased on the head (nape), the deceased bled from the head and he was rushed to hospital where he died the same night.

The appellant and the deceased were close relatives. The deceased was a nephew to the appellant. It was in evidence as adduced that previously, the deceased and the appellant were close friends who used to walk together.

The evidence of PW1 as supported by the evidence of PW2 by the evidence of PW2 Wilfred Otieno in all material particulars was that there was a fight that has broken between Otieno and Lukas Adede over a panga and as they fought fists, the witnesses tried to separate them. The appellant too went to the scene with a stick and beat up the deceased on the head. It was a piece of firewood used to hit the deceased and the deceased bled on the head. He died while undergoing medication at Kisumu JOOH. **The Investigating Officer, PW5, CIP David Wanjala** confirmed the evidence of PW1 and PW2 as reported to him.

All the civilian witnesses were related to the deceased and the appellant and candid as to what had happened. That evidence was never shaken.

7. The proof of death and cause of the deceased's death was as per the post mortem report produced by **PW7, Dr. Mathew Oluoch** on behalf of Dr. Omondi Mboya who was out of the country studying. The cause of death was found to be **"Bilateral epidural Haematoma Secondary to blunt force trauma to the head."**

8. In his defence, the appellant while denying that he committed the offence nonetheless admitted on oath that on 15/3/2016 at noon he was with the deceased at the home of Elkana Oduor (PW1) and while there, the deceased started fighting with Luka. That they were all drunk since they had been drinking at the home of one PW1 whose wife brews *chang'aa*. That the appellant separated the deceased and Luka but the deceased became wild and started beating everybody in the home. He also beat the appellant. In return, the appellant picked a piece of wood near the door and hit the deceased on the head. The deceased fell down and after sometime, he started bleeding from the nose.

PW4 and other people rushed the deceased to hospital at Tingwang Health Centre. He was referred to Siaya Referral Hospital and later to JOOH in Kisumu. The following day, the appellant learnt that the deceased had died.

He stated that he hit the deceased in self defence to stop the deceased from beating the appellant. That he never intended to hit the deceased.

9. **DW2, Michael Juma Odonda** gave evidence that supported the version given by PW1, PW2 and DW1 (the appellant). He added that there was a fight as the people fighting were drinking *chang'aa* and that the deceased became rowdy and started beating everyone, when the appellant picked a stick from the veranda and hit the deceased on the nape. DW2 left for his home but on the following day, he learnt that the deceased had died.

10. The trial court after analyzing the prosecution and defence case, he found that the prosecution had proved the appellant's guilt beyond reasonable doubt. He convicted him accordingly and on sentence after according appellant an opportunity to mitigate, he sentenced him to serve life imprisonment.

It is that conviction and sentence which formed basis of the 7 grounds of appeal subject of appeal.

11. From the evidence by both the Prosecution and Defence, court has no doubt in agreeing with the prosecution and the defence in the rejoinder submission that indeed the conviction of the appellant by the trial court was sound. The appellant in his defence narrated that there was a fight among his relatives involving the deceased who was also a relative and that when he intervened trying to stop the fight, the deceased started beating him. He picked a piece of wood and hit the deceased on the head. The deceased fell down and bled. He was rushed to hospital and died that night.

12. Therefore, the appellant's counsel having conceded that it would be a waste of judicial time to argue over the soundness of the appellant's conviction and which I find rightly so, I would proceed to determine one main issue which is whether the life imprisonment meted out on the appellant was excessive or manifestly harsh in the circumstances.

13. According to the appellant's submission, trial magistrate failed to consider circumstances under which the offence of manslaughter was committed. That the Accused / Appellant was provoked by the deceased hence he should not have been given/sentenced to serve a maximum life sentence, which sentence was, according to the Appellant, excessive in the circumstances of the case.

14. It was submitted that the appellant was a young man and a first offender whose life should be destroyed in person and that he was only separating a fight when he was caught up. In the commission of the offence. Counsel for the Appellant urged the court to adopt the decision of this court in **Siaya HC Cr. Case No. 83 of 2015 Republic Vs David Omondi Molo[2016]eKLR**, and the principles of sentencing espoused in **HC Cr. Case No. 14 of 2015 Republic Vs Philip Muthiani Kathiwa and HCCRA No. 40 of 2017 Republic Vs James Kimosop[2017]eKLR**.

It was submitted that the trial court did not give any reasons why the appellant was sentenced to serve life imprisonment and that as the deceased died some 1-2 days after the assault, the appellant never intended to kill the deceased hence the Court should reduce the sentence considering the period already served by the appellant in prison custody from 13/12/2017.

On the other part of the Prosecution, it was submitted that human life is sacrosanct and that is why the State is under a duty to protect life.

15. It was contended that the appellant had not sought review of sentence and was instead rubbishing all that the trial court had done yet the trial court correctly found and held that the prosecution had proved its case against the appellant beyond reasonable doubt.

16. It was submitted that the trial court considered the prevalence of the offence in this region and circumstances which are differently put by the defence, leading to the deceased's demise and accorded the appellant an opportunity to mitigate before arriving at the sentence that was meted out hence the court should not disturb the decision of the Lower court.

17. The Appellant's counsel having abandoned his arguments and therefore grounds that challenge the conviction of the appellant by the trial court, as earlier stated, the main question is whether the sentence meted out on the appellant was proportionate to the circumstances under which the offence of manslaughter was committed.

18. The death of the deceased is not denied and the appellants in his own defence concedes that he hit deceased in self defence when the deceased attacked him as the appellant was intervening to separate/quell a fight involving the deceased and others.

19. Therefore, albeit what is before this court is not a sentence review application. Nonetheless ground 7 of the Petition of Appeal which touches on the alleged severity of sentence meted out on the appellant by the trial court can be determined independently as a ground of appeal even where there is no challenge on the conviction.

20. Accordingly, I shall proceed to determine the issue of sentence which though lawful, but whether it was proportionate to the circumstances under which the offence was committed.

21. Albeit, the Appellant did not plead guilty to the charge of manslaughter, his defence was a defence of self defence, therefore there is no denial that the appellant unlawfully killed the deceased in the course of a fight.

22. Section 354(3) (ii) and (iii) of the Criminal Procedure Code provides for powers of the Appellate court on appeal: it stipulates that the court may:

“ (a) (ii)..... alter the finding, maintaining the sentence, or, with or without altering the finding , reduce or increase the sentence or;

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

23. In the case of **R. Vrs. Jayani & Another KLR (2001) 593** it was held at paragraphs 3 and 4:-

“The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular and to society in general. This is also seen as promoting a source of responsibility in offenders.”

24. Sentencing is the power conferred on the trial court after entering a guilty finding against an accused person. It therefore follows that an appellate Court will only interfere with the discretion of a trial court in sentencing where the sentence was imposed against legal principles or where relevant factors were not considered or irrelevant and or extraneous matters considered or normally where the sentence is manifesting excessive in the circumstance of the case.

25. Having considered the grounds of appeal and submissions on sentence meted out on the appellant herein, it is not in dispute that the appellant was properly convicted and sentenced after a full trial where he was given an opportunity to give a defence and mitigation.

26. It is further not in dispute that the maximum sentence for manslaughter conviction is life imprisonment and therefore the sentence that was meted out on the appellant cannot be rubbished by the appellant.

27. What should be in contention is whether in meting out the sentence against the appellant, the trial magistrate erred by failing to consider that the appellant was a first offender and that he acted in self defence, and that as a result, the trial court meted out a sentence, which the appellant feels is extremely harsh and manifestly excessive in the circumstances.

28. The trial magistrate sentenced the appellant to serve life imprisonment which is the maximum sentence prescribed under section 205 of the Penal Code which stipulates:

“Punishment for manslaughter ...Any person who commits the felony of manslaughter is liable to imprisonment for life”

29. In **Ugalo s/o Owoura V. Reginan (1954) EACA 270**, the appellate court set out the critical principles that must guide this court in disposing of the instant matter the court stated:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by trial judge unless,

as was said in *JAMES V R (1950) 18 EACA 147*;

“It is evident that the judge has acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

30. In the instant case, what needs to be determined is whether this is a proper case to interfere with sentence meted out on the appellant by the trial court.

31. In **Alister Anthony Pereira v State of Maharashtra [2012] SC 3802** the court in dealing with the issue of objects of criminal law and sentencing in India persuasively observed:

“One of the point objectives of the criminal law is imposition of an adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”

32. The sentencing policy developed by the Kenya Judiciary set to address and mitigate the following risk factors:

(1) Align the sentencing with provisions of the constitution.

(2) Guide the process of determining sentences.

(3) Link the sentencing process to the overrating objectives of sentencing.

(4) Address the disparities in sentencing by structuring the exercise of discretion.

(5) Provide a benchmark for assessing the exercise of discretion in sentencing.

(6) Address the over utilization of custodial sentences and promote the use of non-custodial sentences etc.

33. The sentencing policy framework also emphasizes the concept of proportionality, uniformity and accountability in sentencing. The principle of proportionality was discussed in the case of **Hoare v The Queen [1989] 167 CLR at page 348** thus:

“That a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.”

34. The Supreme Court of India in **State of M.P. vs Bablu Natt [2012] S.C.C 648 Para 69** stated that the principle governing imposition of punishment would depend upon the facts and circumstances of each case and in **Alister Anthony Pereira vs State of Maharashtra, 1. [2012]2 S.C.C 648 Para 69** the same court held:

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”

35. Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

36. The appellant herein was a first offender as deduced from the record. He however did not give any mitigation and therefore did not seek for leniency of the trial court. No doubt, an offence leading to loss of life is no minor offence and therefore stiffer penalties are necessary. Nonetheless, it is also worth noting that the appellant was unrepresented and his appearance in court, being the first one, must have overwhelmed him hence his failure to say anything in mitigation.

37. Both the prosecution and defence agree that the death occurred as a result of a fight which the appellant only joined to try and separate the scuffle between the deceased and another and in the intervening circumstances the deceased attacked the appellant. The appellant hit the deceased on the head with a piece of firewood, in a bid to keep the deceased away from attacking the appellant. The appellant did not have a premeditated intention of killing the deceased, albeit the act of killing the deceased was unlawful and wrongful. The appellant, in my view, was derived of the power of self-control and was induced to commit the crime by the deceased's action of attacking the appellant who was not armed with any object.

38. Albeit the force used by the appellant was not proportionate but from the evidence on record, the appellant took a firewood and hit the

deceased on the head upon which the deceased fell on the ground and started bleeding. He was taken to hospital but never survived to tell a tale. He died the same night.

39. The appellant and deceased were close relatives and had been drinking illicit brew together

40. The post mortem report does not state that there were several injuries. The deceased was found to have died due to bilateral epidural haematoma due to blunt force trauma to the head. As was submitted by the appellant's counsel, one can die with a single blow of a fist on the head.

41. It was an unfortunate death, in my humble view. Therefore, guided by the principles of sentencing, I am of the view that albeit the life imprisonment sentence imposed on the appellant was lawful, but the same was manifestly excessive having regard to the circumstances of the case. This calls for interference by this court.

42. The trial court, in my view, should have considered many options including calling for a probation officer's pre-sentencing report to inform him of the antecedents of the appellant who was closely related and or a close friend of the deceased prior to the unfortunate incident.

43. Under Section 329 of the Criminal Procedure Code, the Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The court in passing sentence shall in addition take into account, among others, the period during which the accused person has been in custody and where necessary, and desirable, the court may in passing sentence take into account a probation officer's report.

44. And on the principles guiding sentence in manslaughter cases, several decisions are relevant. It has been severally held that the objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.

45. Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. **See Mokwa v. R (1976-1980) KLR 1337.** The appellant herein no doubt, I reiterate, acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked. The use of a firewood stick on the deceased, in the circumstances of this case, was, in my view, not excessive force, and so the appellant was rightly charged and found guilty of Manslaughter.

46. In considering the appropriate sentence, same offences should attract similar consistent penalties. In **Andrew v. R (1976-1980) KLR 1688**, in a case where the appellant and his co-accused had a fight started by them and as a result the deceased was stabbed, the Court of Appeal found the sentence meted out to be manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In **Orwochi v. R (1976-1980) KLR 1638**, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of the appellant, a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.

47. The decision of the Court of Appeal in **Muoki v. R (1985) KLR 323** (Madan, Kneller JJA. & Platt, Ag. JA) is equally relevant. The Court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that:

“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.”

48. It is a principle of sentencing that a sentence must reflect the accused person's blameworthiness for the offence. In **Omuse v. R (2009) KLR 214**, where it was held that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence. See also **Republic v James Kimosop [2017] eKLR, Muriithi J.**

49. Therefore, as a first appellate court, I would, before interfering with the sentence meted out on the appellant, call for a social inquiry report from the Probation officer Siaya County on the appellant's antecedents to guide this court in determining what sentence would be appropriate sentence and proportionate to the offence committed by the appellant. This is so because there is no minimum or mandatory sentence for the offence of manslaughter.

50. Accordingly, I direct the Probation Officer, Siaya County to conduct a social inquiry of the appellant's antecedents and file a probation report on the appellant Moses Owuoth Migele within the next 21 days from the date hereof. Mention on 28th November, 2018 to confirm availability of the probation report and for final orders of this court on sentence.

51. Orders accordingly.

Dated, Signed and Delivered in open Court at Siaya this 7th Day of November 2018.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr R.Otieno Advocate for the appellant

Mr Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar