



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 46 OF 2015

PAUL KIBIA WANGONDU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. T.W. CHERERE CHIEF MAGISTRATE** dated 6th November 2014 in Nanyuki Chief Magistrate's **Court Criminal Case No. 2321 of 2007**)

JUDGMENT

1. **PAUL KIBIA WANGONDU**, the appellant in this appeal was convicted before Nanyuki Chief Magistrate's court of the offence of Manslaughter **Contrary to Section 202 of the Penal Code**. The court sentenced him to 10 years imprisonment.
2. When he filled his petition of appeal he was seeking to appeal against both conviction and sentence. However when the appeal came for hearing he abandoned his appeal against conviction and only proceeded with his appeal against sentence.
3. His case before the lower court was indeed a sad one. His evidence, which was largely supported by **P W 1, P W 2, P W 4** and **P W 5** was that on 23rd September, 2007 appellant went to visit his mother. On his return to his home at about 5p.m. it began to drizzle. The rains became heavy as he walked home. He shielded himself at some shops upto 9 p.m. There after he began to walk home.
4. On reaching his home at 11p.m. he said he was wet tired and muddy. He called out his wife while outside asking her to open. She did not open but since he had a key he used it to let himself in.
5. Once inside his house he saw a man, the deceased, running out of his bedroom.
6. **P W 2 DAVID MAINA WAWERU** a neighbour of appellant said that at around 11p.m., while he was sleeping, he heard screams coming from appellant's home. He was able to recognise the voice of appellant's wife as the one screaming. When **P W 2** and his wife heard appellant's wife screaming they said to each other that she must have been caught with her friend Maina (**the deceased**).
7. **P W 2** narrated an earlier incident of about five weeks before when he had been called by the appellant to the appellant's home. When he went he found appellant in the company of the deceased. Appellant had called **P W 2** so that he could witness his warning to the deceased whereby he warned deceased to

desist from having a love affair with his wife. So, when on the material date P W 2 and his wife heard screaming coming from appellant's homestead it is what led them to conclude appellant had found out the deceased had failed to heed appellant's warning.

8. **P W 2** and his wife rushed to appellant's homestead. He then stated:

"The accused (appellant) was beating his wife and Maina (deceased) outside the house. I asked Kibia (appellant) whether he wanted to kill them. He said no..... He was beating them using a stick. They had been beaten badly but I did not know what injuries they sustained. ... I asked the wife (of appellant) and the wife said they were caught making love. Maina (deceased) also confirmed the same. I notice a condom at the foot of Maina (deceased.)"

9. Ten days after the assault by appellant on 2nd October, 2007 deceased died of his injuries while receiving treatment in hospital. The postmortem indicated deceased died due to multiple injuries to the head, chest and ribs .

10. As stated before this is an appeal against sentence. The court of appeal in the case **MACHARIA – V- REPUBLIC [2003] 2 EA** page 559 held as follows when considering an appeal on sentence:

"An Appellant court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellant court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial Judge unless the Judge acted on some wrong principle or overlooked some material factor or issued a sentence that was manifestly excessive."

11. When appellant was convicted he presented the following mitigation to the trial court.

- a. ***He had been in custody for one year on a murder charge before the charge was reduced to manslaughter.***
 - b. ***He was separated from his wife and was the one taking care of his school going children as a sole bread winner.***
3. ***He asked for leniency.***

12. The trial court in passing sentence simply stated it had considered those mitigation but because the offence of manslaughter has a maximum sentence of life imprisonment and because a man's life was lost and also because deterrent sentence was necessary a sentence of 10 years was would be passed.

13. In those mitigations appellant raised two issues that needed further consideration by the court to enable the court determine the correct sentence to pass against appellant.

14. Appellant stated he was separated from his wife and he was the one taking care of the children of the marriage.

15. Secondly that he was the sole bread winner to provide for the children of the marriage.

16. Those two issues needed further investigation by way of probation report to confirm how the welfare of the children would be impacted by the appellant's sentencing. This is what the High court at Muranga, Justice H P G Waweru stated in a case very similar to this one. The case is **MARGARET WAMBUI MBURU – V- REPUBLIC [2015] EKL R** where the appellant had been sentenced to 9 years for the offence of stealing stock **Contrary to Section 278 of the Penal Code**. Appellant in that case on being convicted informed the trial court she had 3 children aged between 12 and 19 years and that she was the solely responsible for their maintenance.

17. In reducing her sentence Justice Waweru stated:

“Given the personal circumstances of the appellant, I hold that the trial court should have called for probation report in order to consider in alternative punishment for the appellant... when sentencing accused person the court ought to look beyond the accused before it and consider the possible ramifications to other persons, especially children, of the sentence imposed.”

18. I wholly support the sentiments stated by the Learned Judge. As a it is, in 2007 the appellant was placed in custody for one year before the murder charge was dropped and substituted with the charge of manslaughter. At the time the crime was committed, according to P W 2 appellant had a child aged 3 years. That child is now 11 years. Appellant has been in custody from November 2014 to date. It is because of that I shall interfere with appellant’s sentence as passed by trial court. The children no doubt need at least one parent as they grow up.

19. I hereby reduce appellant’s sentence to the period so far served. Accordingly I order appellant to be hence forth released from custody unless otherwise lawfully held.

20. Orders accordingly.

Dated and Delivered at Nanyuki this 9TH February, 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant Kiruja

Mr. Tanui for the state

For Appellant:

Court

Judgment delivered in open court

MARY KASANGO

JUDGE