IN THE COURT OF APPEAL
AT ELDORET

(CORAM: MATIVO, GACHOKA & KORIR,

JJ.A.) CRIMINAL APPEAL NO. E152 OF 2022

BETWEEN

JOSEPH KIPKOECH *alias*
KIPKOECH CHEPKWONY SANG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court at Eldoret (H. A. Omondi, J.) delivered on 6th December 2018

in

HCCRC No. 1 of 2011)
****

JUDGMENT OF THE COURT

1. The appellant, **Joseph Kipkoech *alias* Kipkoech Chepkwony Sang**, was convicted of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Upon conviction, the appellant was sentenced to 20 years in prison. The appellant is now before this Court challenging the sentence of 20 years imprisonment imposed by the trial court for being too harsh in the circumstances and for non-compliance with **section 333(2) of the Criminal Procedure Code**.

2. When the appeal came up for hearing, learned counsel Mr. Nabasenge and Mr. Oyaro represented the appellant, while learned Principal Prosecution Counsel Mr. Waweru appeared

for the

respondent. Counsel for the parties briefly highlighted their filed written submissions.

3. At the hearing, counsel for the appellant confirmed to the court that the appellant's appeal was limited to sentence only and argued that the trial court failed to comply with the mandatory provisions of **section 333(2)** of the **Criminal Procedure Code** by failing to credit to the appellant the 8 years spent in remand custody during the trial, and that the sentence was manifestly harsh and excessive given the mitigating factors. Relying on the decisions of the Court in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** and **Bethwel Wilson Kibor vs. Republic [2009] eKLR**, counsel submitted that the proviso to **section 333(2)** of the **Criminal Procedure Code** obligated the trial court to meaningfully take into account the period spent in custody during the trial by reducing the sentence proportionately. Counsel argued that by merely stating that the period had been considered while still ordering the sentence to run from the date of conviction amounted to ignoring the pre-trial detention period altogether.

4. On the severity of the sentence, counsel invoked the decision of the Supreme Court in **Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2017] KESC 2 (KLR)** to assert that the decision opened the door for discretionary sentencing in respect of murder. Counsel argued that the appellant's age, status as a first offender, demonstrated remorse, and rehabilitation efforts justified a reduced sentence.

He urged

that the appeal be allowed, the sentence set aside, and that the

appellant be resentenced with the eight years spent in remand credited to him, or alternatively, the sentence be reduced to the period already served.

5. On his part, learned Principal Prosecution Counsel Mr Waweru opposed the appeal, submitting that the trial court complied with **section 333(2)** of the **Criminal Procedure Code**. Buttressing this submission, counsel argued that the trial court expressly considered the eight years the appellant spent in remand custody prior to sentencing him to twenty years imprisonment, which sentence was proportionate. According to counsel, the trial court considered the objectives of sentencing as outlined in the **Judiciary Sentencing Policy Guidelines**, and also took into account the victim impact statements from the deceased's family members who pleaded for a harsh penalty, as well as the appellant's mitigation that he was remorseful and a student. Relying on the principles in **Mbogo & Another vs. Shah [1968] 1 EA 93** and **Bernard Kimani Gacheru vs. Republic [2002] eKLR**, counsel urged that the appellant had not met the threshold warranting this Court's interference with the sentencing discretion by the trial court. Counsel therefore urged the Court to uphold the sentence and dismiss the appeal in its entirety.

6. This being an appeal against sentence only, our mandate is to re-evaluate the record and, in particular, the sentencing proceedings in order to determine whether the trial court acted on wrong principles, overlooked material factors, considered immaterial

factors, or imposed a sentence that is manifestly excessive in the

circumstances. The scope of the duty of an appellate court in an appeal against sentence was succinctly expressed by the Court in **Bernard Kimani Gacheru vs. Republic** (supra), thus:

> ***"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."***

7. We will therefore address this appeal within the boundaries set in the above excerpt. On the issue of alleged non-compliance with **section 333(2)** of the **Criminal Procedure Code**, we find it necessary to reproduce the learned Judge's ruling on sentence as follows:

> ***"Pre-sentence report perused and it points a very forded picture of the accused. A non-custodial sentence would not be an option at this point. It is with a very heavy treatment that I have to make this sentence taking into account that accused has spent 8 years in remand and is only 28 years old. The offence comes with it a death sentence and I am mindful of the decision in Francis Muruatetu case, I therefore order accused to serve 20 years (twenty years) imprisonment running from today. He has 14 days right of appeal."***

8. In **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] KECA 743 (KLR)**, the Court addressed the import of **section 333(2)** of the **Criminal Procedure Code** thus:

> ***"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."***

9. Unlike in **Ahamad Abolfathi Mohammed** (supra), where the Court did not give effect to the pre-trial detention period, the trial court here considered the lengthy remand period before imposing the impugned sentence. In the present case, the trial Judge expressly acknowledged the eight years spent in custody and indicated that she would impose what she considered to be a heavy sentence notwithstanding the age of the appellant. The fact that the learned Judge did not expressly state the period of

imprisonment that she

would have imposed had the appellant not spent eight years in

custody during the trial does not, by itself, demonstrate non-compliance with the proviso to **section 333(2)** of the **Criminal Procedure Code**. In our view, even though the approach adopted in **Ahamad Abolfathi Mohammed & Another vs. Republic** (supra) appear to require the mathematical deduction of the period spent in custody from the whole sentence handed down, we think what matters is the court's consciousness of the pre-trial detention period as a factor in arriving at the sentence it deems appropriate. The trial court was entitled to exercise its discretion in the manner it did. We are therefore satisfied that the trial court complied with the proviso to **section 333(2)** of the **Criminal Procedure Code** by expressly acknowledging and considering the eight years spent in custody before imposing the sentence of 20 years imprisonment.

10. As regards the alleged harshness and excessiveness of the sentence, we observe that the sentence of 20 years imprisonment for murder is not manifestly excessive in the circumstances of this case. The offence carries a maximum penalty of death, but following **Muruatetu & Another vs. Republic** (supra), courts can impose determinate sentences. The trial court took into account the appellant's remorse, status as a student, and the victim's family's plea for a harsh penalty. Given that, the appellant took a life, the trial court's decision to impose 20 years imprisonment is reasonable and within the permissible range of the sentences for the offence of murder.

11. We are mindful of the principles governing interference with

sentencing discretion. As the Court stated in **Bernard Kimani**

Gacheru vs. Republic (supra), an appellate court should not interfere with the sentencing discretion of the trial court unless it is satisfied that the 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. The appellant has not demonstrated any such misdirection or error on the part of the trial court. We also note that the trial Judge considered the appellant's mitigation, the circumstances of the offence, and the interests of justice. We therefore find no reason to interfere with the sentence imposed.

12. For the foregoing reasons, we find no merit in the appeal against sentence. The appeal is accordingly dismissed. The sentence of twenty (20) years imprisonment imposed by the trial court is hereby upheld.

Dated and delivered at Nakuru this 24th day of April 2026.

J. MATIVO

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.... JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original
Signed
DEPUTY
REGISTRAR