Mado & another v Republic (Criminal Appeal 83 of 2020)
[2025] KECA 1016 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1016 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 83 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 30, 2025

BETWEEN

CALVIN OUMA MADO ..... 1ST APPELLANT

JACK OMONDI OKUMU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (Cherere, J.) dated 23rd October, 2018 in Criminal Case No.2 of 2017)

JUDGMENT

1. Calvin Ouma Mado and Jack Omondi Okumu ('the appellants') were tried before the High Court of Kenya at Kisumu for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 12th March, 2017, at Koyango Area in Kisumu East District within Kisumu County, the appellants, jointly with others not before court, murdered Francis Owino Owuor.

2. When the appellants were arraigned before the trial Court, they denied the charges. The prosecution availed five (5) witnesses in a bid to establish its case. A brief summary of the facts according to the prosecution were that on 12th March, 2017, at

3. 00 a.m., the appellants, armed with hammers, attacked the deceased, who was alleged to have stolen a Tuk Tuk motorcycle (Tuktuk) from the 1st appellant. According to PW1, Jared Otieno, the appellants assaulted the deceased, and thereafter tied his legs to the back of a Tuk Tuk, and dragged him away from the scene of crime. PW2, CPL Joseph Ouma, who went to the scene after the incident was reported to him, stated that he saw a Tuk Tuk registration number KTWB 863B dragging a man who was tied to it by a rope. He followed the Tuk Tuk and managed to arrest the 1st appellant who was a passenger on

the Tuk Tuk, and the 2nd appellant who was riding the said Tuk Tuk. The victim was taken to Avenue Hospital where he subsequently succumbed to his injuries. According to the postmortem report, the deceased died of severe head injuries with massive subdural hematoma, secondary to blunt force trauma on the head. The appellants, in their respective sworn statements in defence, denied assaulting the deceased.

3. At the end of the trial, the learned Judge found that the prosecution had sufficiently established its case against the appellants. Upon conviction, each appellant was sentenced to serve thirty (30) years imprisonment.

4. The appellants, dissatisfied with the sentence meted on them by the High Court, filed a joint appeal before us. Their appeal is against sentence only. The appellants challenged the sentence awarded by the trial court on the sole ground that the learned Judge failed to consider the issues raised in their respective mitigation statements, hence the sentence meted was manifestly harsh and excessive in the circumstances.

5. The appeal was heard by way of written submissions. The appellants were represented by learned counsel Ms. Anyango. It was her submission that despite calling for a pre-sentencing report and victim impact statement, the trial court failed to take into account the appellants' mitigation, in particular, that they were first offenders, and were young men with families who were dependent on them. Counsel urged that the trial court, in its sentencing notes, did not indicate that appellants' mitigation was taken into account prior to pronouncing the sentence. Counsel submitted that with respect to the 1st appellant, who was in custody during the pendency of the case, the trial court failed to comply with the provisions of Section 333(2) of the *Criminal Procedure Code*. Counsel urged us to interfere with the sentences meted upon the appellants, and substitute the same with a custodial sentence of fourteen (14) years.

6. The appeal was opposed. Learned Prosecution Counsel, Mr. Okango, stated that the trial court, prior to awarding the sentence, recorded the appellant's respective mitigation, and called for a pre-sentencing report, and a victim impact statement. Mr. Okango urged that upon consideration of mitigation and the said reports, the learned Judge determined that the appellants deserved a deterrent sentence. Counsel opined that the sentence awarded by the trial court was not excessive in the circumstances, as the maximum penalty for murder is death. He urged us to uphold the same.

7. This is a first appeal. The duty of the first appellate court was stated by this Court in Gabriel Kamau Njoroge v Republic [1987] eKLR as follows:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".

8. We have considered the material placed before us, and we find that the only issue for determination is whether this Court can interfere with the sentence of thirty (30) years' imprisonment that was imposed on each of the appellants.

9. Section 379(1) of the *Criminal Procedure Code* gives this Court jurisdiction to entertain an appeal against sentence from a decision of the High Court. It provides as follows:

> "A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal:
>
> a. against the conviction, on grounds of law or of fact, or of mixed law and fact;
>
> b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law."

10. The conditions upon which the appellate court may interfere with the sentence of a trial court were set out in the case of Bernard Kimani Gacheru v. Republic [2002] eKLR where this Court held 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 states is shown to exist."

11. This Court's predecessor in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

12. The appellants, upon conviction for the offence of murder, were each sentenced by the trial court to serve thirty (30) years imprisonment. The appellants' bone of contention is that the trial court failed to take into account their mitigation in meting out the said sentences.

13. A perusal of the trial court's sentencing notes shows that the appellants were given an opportunity to present their mitigating circumstances before the trial court pronounced itself on the sentence. Counsel for the appellants noted that the appellants were first offenders; they were young (30 years of age); they were married with families that depended on them; and that they were remorseful. The trial court, upon receiving the appellants' respective mitigation statements called for a pre-sentence report and a victim impact statement. The reports were availed on 20th December, 2018. They were explained to the appellants after which the trial court pronounced itself on sentence, noting that the deceased died a very cruel death, and that the appellants were deserving of a deterrent sentence.

14. The appellants' contention that their mitigating circumstances were not taken into consideration is therefore incorrect. They were given an opportunity to address the trial court on their mitigating circumstances prior to sentencing. The trial court took their mitigation into account, and in its judicious discretion, awarded a thirty-year term imprisonment sentence, rather than the death penalty, which is the maximum penalty prescribed by Section 204 of the *Penal Code*. Their appeal against sentence therefore fails. The appellants' respective custodial sentences of thirty (30) years are hereby affirmed.

15. We note that the 1st appellant was in remand custody during the pendency of the suit before the trial court. The trial court failed to take this period into account as directed by Section 333(2) of the *Criminal Procedure Code*. We therefore order that the 1st appellant's sentence commence from the date he was arraigned before the trial court, that is, 23rd March, 2017. As for the 2nd appellant, he was out on bond during trial. As such, his sentence shall run from the date of conviction by the trial court.

16. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY,2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR