Juma alias Mercy v Republic (Criminal Appeal 166 of 2020)
[2025] KECA 1439 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1439 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 166 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

JULY 31, 2025

BETWEEN

DOROTHY AWUOR JUMA ALIAS MERCY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Kisumu (Cherere, J.) dated 19th April, 2018 in HCCRC No. 4 of 2016)

JUDGMENT

1. Dorothy Awuor Juma alias Mercy, the appellant herein, was charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that, on 10th January, 2016 at Awasi Township, Nyando Sub-County, within Kisumu County, she murdered Irene Awour.

2. The appellant pleaded not guilty to the charge and a fully- fledged hearing ensued. The genesis of the case is that the appellant and the deceased were friends who lived in the same neighbourhood and got into a fight as a result of a love triangle. Unfortunately, the appellant who had a knife inflicted a stab wound on the deceased's chest, which penetrated the right lung; and the deceased later succumbed to the injury while receiving treatment.

3. The appellant's defence was that it was the deceased who provoked the situation by calling her for help after feigning illness, only for her to be confronted with insults from the deceased who referred to her as a prostitute, before grabbing her by the collar and inflicting injury on her hand and head; that the deceased was at the time armed with a knife, the appellant acted in self-defence; and following the physical struggle the deceased fell on the knife and sustained injuries. At the conclusion of the trial, she was convicted of the lesser offence of Manslaughter contrary to section 202 as read with section 205 of the *Penal Code* and sentenced to 15 years imprisonment, the trial court, pointing out that the deceased

insulted the appellant, attacked her and confronted her while armed with a knife, leading the appellant to believe she was facing imminent danger; thus, reacting in self defence.

4. Aggrieved by the outcome, the appellant preferred the present appeal against sentence only. The learned judge is faulted for meting out a sentence of 15 years imprisonment which is described as harsh, cruel and unreasonable. The learned judge is further faulted for failing to consider her plea in mitigation, the period already spent in custody while awaiting trial; and in failing to consider the probation report which was favourable to her.

5. At the plenary hearing, Mr. Ogenga learned counsel appeared for the appellant while Mr. Okango learned Assistant Director of Public Prosecutions appeared for the respondent.

6. In support of the appeal, the appellant complains that the trial judge failed consider her mitigation that she was a first offender; was remorseful, is a mother with a child; and the judge did not consider her pre-sentence report which was favourable for granting her a non-custodial sentence.

7. It is the appellant's contention that by failing to consider the mitigation, the learned judge meted a sentence of 15 years imprisonment which was harsh and excessive in the circumstance. In support, the appellant cited the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 4 others [Amicus Curiae] [Petition 15 & 16 of 2015] [2021] KESC 31 [KLR] [6 July 2021] [Directions] in which the Supreme Court gave directions on sentencing and consideration of mitigation.

8. Relying on the case of Onware v Republic [Criminal Appeal 116 of 2020] [2023] KECA 1238 [KLR] [6 October 2023] [Judgment] the appellant urged the Court to set aside the sentence and substitute with the period already served.

9. In rebuttal, the respondent submitted that sentencing is a matter of judicial discretion, and appellate courts should not interfere unless it is proved that the discretion was exercised arbitrarily by ignoring material facts or considering wrong facts. In challenging her 15-year sentence, the appellant must show how the judge misused that discretion.

10. The respondent maintains that the maximum statutory sentence for conviction for manslaughter as provided by section 205 of the *Penal Code* is life imprisonment; and the appellant was sentenced to 15 years imprisonment which cannot be said to be excessive.

11. Regarding the complaint that the trial court did not consider the appellant's mitigation and the pre-sentence report, the respondent contends that the proceedings of 19th April, 2018 indicated that the same was considered and that for the court to consider the mitigation it does not have to rehash entirely what the accused stated; that it was as a result of her plea in mitigation that the learned judge called for a pre-sentence report

12. In support of the foregoing argument, reference is made to the persuasive decision in Jamleck Mugo Karani v Republic [2016] eKLR, where the High Court rendered itself on this issue thus:

> " On the ground that the trial court in this case never considered a probation report which was favourable to the appellant's being given a non- custodial sentence, it has to be noted that by law such reports are not binding to a trial court. The report can only act as a guide. It can adopt it or ignore it altogether depending on the circumstances obtaining in each case..."

13. It is further argued that there is no rule that a custodial sentence should not be meted out to a first offender. It is also pointed out that a pre-sentencing report contains mere facts stated without cross-examination; and the statements and conclusions therein are not made on oath, as to render them to have more weight than the evidence given in court by witnesses under oath and cross-examined; that

the reports are not binding to the court such that a court should go by what it recommended therein. Further, that to demand that a court be bound by those recommendations amounts to usurping the judicial discretion of sentencing by the court. Relying on the case of Jamleck Mugo Karani v Republic [2016] eKLR, the respondent reiterates that the learned judge was not bound by the probation report and was at liberty to take note of the contents in the report, but pass such sentence as deemed just and as prescribed by law which she did.

14. Having carefully considered the record of appeal, submissions by respective counsel, the authorities cited and the law, the twin issues for this Court's consideration are whether the trial court failed to take into consideration the mitigation offered by the appellant and whether the sentence imposed is harsh and excessive in the circumstances of this case.

15. Turning to the first issue, the record indicates as follows;

> Ms. Shemi: I have prepared a presentence report and victim information assessment report.
>
> Court: The probation Officer is directed to interview relatives of the deceased and avail a report next week.
>
> Probation I have filed a victim Impact
>
> Officer: Assessment Report.
>
> Court: I have considered the probation officers report and victim Impact Assessment Report. A life was lost and it would not be in the interest of justice for the accused not to be punished for it.

16. Does this demonstrate that the learned Judge did not take into consideration the mitigation offered by the appellant and the presentence report? The record is clear that the learned Judge did not consider the mitigation that was offered. While sentencing the appellant, the trial court considered only the probation report and the victim impact assessment report.

17. Turning to the question whether the sentence was in the circumstances of this case, harsh and excessive, the circumstances under which this Court can interfere with a sentence imposed by the High Court and the applicable principles were set out by the court in the case of Bernard

Kimani Gacheru v Republic [2002] eKLR 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 states is shown to exist."

18. An appellate court cannot interfere with the sentencing discretion merely because it would have imposed a different sentence. It can only do so where there has been a material misdirection with regard

to the sentence. In Shadrack Kipkoech Kogo v Republic Eldoret Criminal Appeal No.253 of 2003, this Court observed that:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered [see also Sayeka v R [1989 KLR 306]."

19. Having perused the ruling on sentence delivered by the court in the present case, it would appear that the Learned Judge in meting out the sentence did not consider the appellant's mitigation, which indicated she was orphaned while a toddler; was a young mother.

20. A perusal of the social inquiry report indicates that it was favourable to the appellant. The report shows that indeed the appellant and the deceased were very close friends a fact the deceased's family does not dispute. However, from the said report, the deceased's family acknowledges that the deceased was quite aggressive and provocative as a result of which she was sent away by her husband from their matrimonial home in Nyakach.

21. Considering the circumstances of the case, the injuries that were inflicted on the deceased and the appellant's mitigation and presentence report, the sentence of [15] years imprisonment was excessive to be appropriate. Further, we take note that the appellant was in remand custody while awaiting trial from 21st January 2016 to 17th May 2018 when she was sentenced, making it a period of slightly close to two and a half years. It would appear that the learned trial judge did not consider the provisions of section 333 [2] of the *Criminal Procedure Code*, this period ought to have been deducted from her sentence. The learned judge failed to take into consideration the relevant factors and balance them with the aggravating circumstances aforementioned. Consequently, the trial court acted on some wrong principles and overlooked some material factors that justifies this Court's interference.

    We find that the appellant has been incarcerated for total of 9 [nine] years, which we consider sufficient punishment. We thus allow the appeal, set aside the sentence; and substitute it with the term already served. This means that the appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR