Rotich v Republic (Criminal Appeal 15 of 2020)
[2025] KECA 1256 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1256 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 15 OF 2020

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JULY 11, 2025

BETWEEN

MICHAEL CHERUIYOT ROTICH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgment of the High Court at Kericho (Ongeri, J.) dated 6th October 2020 in HCCRC No. 25 of 2018)

JUDGMENT

1. Michael Cheruiyot Rotich, the appellant herein, has appealed against the sentence of 30 years imprisonment passed against him by Ongeri, J. upon pleading guilty, pursuant to a plea agreement, to the charge of manslaughter contrary to section 202 as read with 205 of the *Penal Code*. The appellant's sole ground of appeal is that the sentence is manifestly harsh and excessive in the circumstances.

2. To give context to the appeal, the appellant was initially charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, to which he pleaded not guilty.

   Before the trial could commence, he entered into a plea agreement with the State as a result of which he pleaded guilty to the lesser charge of manslaughter.

3. The facts of the case were that on 7th October 2018 at about 9.30pm, at Adson Rental Houses in Kapkelek Market, Kericho County, the appellant quarreled with one Caren Kimeto, threatening to assault her while attempting to undress her. Caren's screams attracted neighbours, including Wesley Kibyegon Kemei, the deceased, who was the caretaker of Adson Rental Houses. The appellant was requested to leave. After being forced out, the appellant threatened the deceased before walking away, warning him that they would meet again. Hardly 30 minutes later, screams were heard, and it was discovered that the deceased had been stabbed to death. The neighbours' search for the appellant that evening did not bear fruit. While collecting the deceased's body, police officers were informed of the

earlier altercation between the appellant and the deceased. The police officers tracked the appellant to his house the same night and found him with bloodstained clothes. He was arrested and his clothes later sent for forensic analysis. An autopsy indicated that the deceased died as a result of hemorrhagic shock secondary to massive left-sided hemothorax.

4. When this appeal was placed before us for hearing, learned counsel Ms. Mungai held brief for learned counsel Mr. Orege for the appellant while Mr. Omutelema, Senior Assistant Director of Public Prosecutions, appeared for the respondent. Counsel for the parties opted to rely on their filed written submissions while offering oral responses to clarifications sought by the Court.

5. In her submissions, Ms. Mungai argued that the sentence of 30 years' imprisonment was disproportionate to the offence of manslaughter and the circumstances of the case. Counsel faulted the learned Judge, submitting that whereas the victim impact statement was considered, the appellant's mitigation was disregarded. Ms. Mungai referred the Court to the holding in Mulu Munyalo vs. Republic [2011] eKLR to identify the factors that we ought in finding that the sentence was harsh and excessive. In response to the Court's question as to what the appropriate sentence would be in the circumstances, she urged us to consider the period already spent in custody and sentence the appellant to a period of between 15 and 20 years.

6. On his part, Mr. Omutelema, urged that the plea agreement was proper and pursuant to section 137L (1) of the *Criminal Procedure Code*, the appeal could only be on sentence. He submitted that the appellant was accorded an opportunity to mitigate and his mitigation was considered by the learned Judge. In urging that the sentence was legal and merited in the circumstances of this case, counsel referred to Bernard Kimani Gacheru vs. Republic [2002] eKLR to urge us not to interfere with the sentence since sentencing is at the discretion of the trial court. At the hearing and in response to probing questions from the Court, Mr. Omutelema accepted that a plea agreement is one of the factors that a trial court ought to take into account when passing sentence. He also appreciated that ordinarily, manslaughter attracted less than 30 years' imprisonment but maintained that the circumstances of this case called for a stringent sentence and that the sentence was adequate, and should not be disturbed.

7. We have duly considered the record and submissions by counsel. This being an appeal against sentence, we are aware that ordinarily, sentencing is a matter that falls within the trial court's discretion. As an appellate Court, our approach to an appeal on sentence is to defer to the discretion of the trial court unless that court imposed a manifestly excessive sentence, overlooked a material factor or took into consideration irrelevant factors or, that it adopted wrong legal principles in arriving at the sentence. These principles were enunciated in Bernard Kimani Gacheru vs. Republic [2002] eKLR 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 stated is shown to exist."

8. As provided in section 137F(1)(h) of the *Criminal Procedure Code* the appellant, having entered a plea agreement, waived the right to appeal except as to the extent or legality of the sentence. Section 137L(1) of the *Criminal Procedure Code* reiterates this view by stating that a sentence passed by a court

pursuant to a plea agreement shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed.

9. At the centre of the appeal is the appellant's contention that his mitigation was not taken into account. Counsel pointed that part of the omitted considerations was that the appellant pleaded guilty to the charge on a plea agreement.

10. Richard Adelstein in Plea Bargaining in South Africa: An Economic Perspective, an article published in Constitutional Court Review 2019, Volume 9, 81-111, while appreciating that sentencing remains a duty of the court posits that:

> " The crux of every consensual plea bargain is the sentencing discount given in exchange for the guilty plea. As elaborated below, if there is no difference between the sentence the defendant would receive after conviction at trial and the sentence proposed in the agreement, then there is little reason for a defendant with even a very slim chance of acquittal to accept an agreement, convict himself without putting the prosecution to the proof, and surrender his right to take the small chance that he will somehow avoid conviction. Even if the plea is motivated, as some are, not by fear of greater punishment after trial but by the adverse consequences of bringing the facts of the matter to light in a public trial, s 105A's requirement that the facts be stipulated in writing in the agreement largely removes this advantage of guilty pleas."

11. Jeffrey Bellin and Jenia I. Turner (2023), in an article titled Sentencing in an Era of Plea Bargains published in North Carolina Law Review, 102(1), 179-230, observe that:

> " The scholarly literature includes two inconsistent generalizations about the foundational question of who sentences in America's criminal courts. One group of commentators contends that judges choose the sentence while another identifies prosecutors as playing that role. The truth is more complex. In a system dominated by plea bargains, prosecutors play an important role in shaping the ultimate sentence of a person convicted of a crime. But judges too have many levers through which they can affect the ultimate sentence, even in negotiated cases. Judges influence sentences directly by choosing a sentence term and type from the range of options left open in many plea deals. They also do so indirectly through their power to reject the plea deals and recommendations presented to them by the parties."

12. The authors continue to state that:

> " It also highlights that sentencing is a cooperative, not unilateral, exercise. Any plea deal offered by a prosecutor and accepted by a defendant will be influenced by the legislative framework, as well as the anticipated actions of the assigned judge and a parole board (if any). Thus, the answer to the question "who sentences" is more complicated than the literature suggests. And, as we have demonstrated, when considering the mix of actors who contribute to a sentence, the trial Judge continues to play a central role."

13. Locally, in Mwangi vs. Republic [2024] KECA 928 (KLR), the Court, while discussing the place of a plea of guilty or a plea agreement in sentencing, pointed out that:

> "It must be appreciated that an accused person who pleads guilty saves the time that would have been used to conduct a trial. A plea of guilty also guarantees the prosecution a conviction which is not a certainty where a trial is held. Unless there are exacerbating factors, an accused person who pleads guilty whether on the day he first appears in court for plea

or through a plea bargain agreement should reap the fruits of his or her surrender. Afterall, [*the Constitution*] guarantees every accused person the right to a full trial, and nothing can stop an accused person who knows of his or her guilt from taking the court through the rigmarole of a full trial."

14. As was held by this Court in Wakianda vs. Republic [2016] KECA 181 (KLR):

> " ...the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity..."

An accused person who chooses this path should gain from taking this option.

15. Similarly, in Sawe vs. Republic [2024] KECA 816 (KLR), the Court also pointed out that:

> " We, nevertheless, agree with counsel for the Appellant that sentence should be part of the plea bargain, even as the court retains the discretion as to sentence. For that reason, we are of the view that a material factor was overlooked by the trial court and this allows us to interfere with the sentence."

16. The Supreme Court in Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2017] KESC 2 (KLR) indicated that a plea of guilty should be among the factors to be considered in determining an appropriate sentence. This position is replicated in paragraph 4.8.20 of the Sentencing Policy Guidelines, 2023 by the National Council on Administration of Justice. In the same breadth, paragraph 4.3.6 of the same Policy Guidelines provides that:

> " Where courts are satisfied that it is safe to accept a plea of guilty, they should grant a discount after considering the appropriate sentence based on culpability and harm specific to the offence alongside other aggravating and mitigating features. Once the court has arrived at that sentence, a discount of up to one third of the sentence should be applied where the offender has pleaded guilty at the earliest opportunity. Thereafter, e.g., where an offender has pleaded guilty just before, or during trial, a lesser reduction may be afforded."

17. Paragraph 12 of The Criminal Procedure (Plea Bargaining) Rules [*Legal Notice 47 of 2018*] provides that parties to a trial may make a specific recommendation to the court as to the sentence to be imposed and include the recommendation in the final plea agreement even though the court retains the sole discretion in sentencing. On the importance of protecting judicial discretion, the Supreme Court in Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (supra) affirmed that the guidelines it had issued on sentencing were advisory and not mandatory, and that they in no way replaced judicial discretion.

18. From the foregoing analysis, the judicial systems in Kenya, South Africa, and the United States share certain salient features concerning the place of plea bargaining and sentencing and the role of the court. Firstly, sentencing remains a discretion and sole duty of the trial court. Secondly, there is no doubt that parties to a plea agreement are at liberty to make recommendations on what the appropriate sentence ought to be. Unfortunately, in this case, the plea agreement did not entail a suggestion on sentence from any of the parties. However, during the hearing of this appeal, Ms. Mungai pleaded for a sentence of 15 to 20 years while Mr. Omutelema argued for the retention of the 30 years imposed by the trial court. Thirdly, that a plea agreement, just like a plea of guilty, ought to count for something in sentencing, without which there would be no reason for an accused to accept an agreement, accept a conviction,

and surrender his right to a full hearing. Finally, that a plea agreement should always adhere to statutory provisions and public policy.

19. From what we have stated and considering the latest jurisprudence emanating from this Court and the High Court, we have no difficulty in agreeing with the appellant that the sentence of 30 years imprisonment was harsh and excessive, notwithstanding the statement by the trial court in the sentencing ruling that it had taken into account the appellant's plea of guilty. A perusal of the decisions of the High Court tends to suggest that a sentence of 15 years' imprisonment is suitable for the offence of manslaughter where there has been a plea of guilty. Two of those decisions are Mathew Langat vs. Republic [2020] eKLR and Eiton vs. Republic [2023] KEHC 23575 (KLR). Similarly, this Court in Abraham Kibet Chebukwa vs. Republic [2020] eKLR affirmed a sentence of 15 years imprisonment meted out by the High Court. In the case of Mulu Munyalo vs. Republic (supra), which was cited by the appellant, a sentence of 30 years' imprisonment imposed by the trial court in a case in which the appellant an offered a plea of guilty to a charge reduced from matter to manslaughter, was reduced by this Court to 15 years' imprisonment. In Ngeny vs. Republic [2024] KECA 929 (KLR), this Court dismissed an appeal against a sentence of 20 years' imprisonment where the appellant had pleaded guilty to a charge of manslaughter.

20. We also observe that there are several decisions from the High Court and this Court showing that murder generally attracts a sentence of 30 years' imprisonment. Unless the circumstances of the commission of the offence of manslaughter are aggravated, it would be unjust to impose a term of 30 years' imprisonment for the offence thereby failing to distinguish the punishment for the charge of manslaughter from that of murder. Indeed, as per section 137A of the *Criminal Procedure Code*, a plea agreement is entered into with a view to having the reduction of a charge to a lesser offence or withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges. At times, the trial court is of the view that the more serious charge should be retained. The answer to such a concern is not to impose a sentence commensurate to the more serious offence but to reject the plea agreement. Afterall, the court has discretion of rejecting a plea agreement and giving reasons - see sections 137H and 137J of the *Criminal Procedure Code*. We therefore conclude that in passing the impugned sentence, the learned Judge failed to take into account the fact that the appellant had pleaded guilty pursuant to a plea-bargaining agreement. As such we accept the appellant's invitation to interfere with the sentence.

21. What then would be the appropriate sentence in the circumstances of this case? The appellant in mitigation told the trial court through counsel that he was remorseful, a first offender and a breadwinner to his wife and family. On the other hand, a life was lost. The deceased's only "mistake" was to oversee the removal of the appellant from the premises he was tasked to take care of. In the circumstances, we find there was an aggravating factor that would call for a stiffer sentence. Twenty years in prison would, in our view, suffice in this case.

22. In the circumstances, the conclusion we arrive at is that the appellant's appeal against sentence succeeds to the extent that the sentence of 30 years' imprisonment is set aside and substituted with a prison term of 20 years to run from 15th October 2018 when the appellant was presented before the trial court to take plea.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb., FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR