Otieno v Republic (Criminal Appeal 4 of 2019)
[2024] KECA 42 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 42 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 4 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 25, 2024

BETWEEN

GEORGE OKOTH OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyamira (Maina, J.) dated 20th December, 2019 in HCCRC No. 5 of 2015)

JUDGMENT

1. The appellant, George Okoth Otieno, was the accused person in the trial before the High Court at Nyamira in Criminal Case No. 5 of 2015. He was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on 19th June, 2010, at Obomo Bar and Lodging in Keroka Township in Masaba North District within Nyanza Province, the appellant murdered DMA alias K

2. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called a total of seven (7) witnesses and closed its case. The trial court found that the prosecution had established a prima facie case and placed the appellant on his defence. In his defence, the appellant gave unsworn testimony and called no witnesses.

3. At the conclusion of the trial, the learned trial judge, in a judgement dated and delivered on 20th December, 2018, convicted the appellant and sentenced him to twenty-five (25) years imprisonment.

4. Aggrieved by the trial court's decision, the appellant has lodged the present appeal challenging both conviction and sentence. He raised eight (8) grounds in his Memorandum of Appeal; seven of which impugned his conviction, while one impugned his sentence.

5. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Mokaya appeared for the appellant, whereas learned counsel, Mr. Okango, appeared for the respondent.

6. Although the appellant had filed written submissions on all the eight grounds, during the plenary hearing of the appeal on 28th September, 2023, the appellant, through his counsel, informed the Court that he wished to withdraw his appeal against conviction and only pursue his appeal against sentence. We allowed him to so withdraw his appeal against conviction and conducted a hearing on the appeal against sentence only.

7. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See Okeno vs. Republic [1972] EA 32.

8. Mr. Mokaya, learned counsel for the appellant, relied on his written submissions on sentence and also made oral submissions in which he argued that the appellant had spent about thirteen (13) years in prison, during which time he has learnt his lesson; and urged this Court to relook at the sentence imposed on the appellant vis-a-vis the circumstances of the case and the years the appellant has already spent in prison. He urged the Court to revise the sentence downwards to the time already served. Additionally, he submitted that even though the appellant did not personally state during the sentence hearing that he was remorseful, the advocate who represented him at the High Court recorded a mitigation on his behalf in which he expressed remorse on behalf of his client.

9. Mr. Okango opposed the appeal on sentence and relied on the persuasive decision in *Arthur Muya Muriuki vs. Republic [2015]* eKLR, wherein the High Court (Mativo, J. as he then was) held that sentencing is the discretion of the trial court, which must be exercised judiciously and not capriciously; thus, the trial court must be guided by evidence and sound legal principles and take into account all relevant factors and eschew all extraneous or irrelevant factors. An appellate court would only be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed was not legal or was so harsh and excessive as to amount to miscarriage of justice, and/or that the trial court acted upon a wrong principle or if the trial court exercised its discretion capriciously. In this regard, counsel argued that the learned judge considered the appellant's mitigation and the circumstances of the case; and submitted that no basis had been laid for this Court to interfere with the sentence imposed. Counsel urged that considering that the maximum sentence for murder is the death penalty, the sentence of twenty-five (25) years imprisonment meted upon the appellant was proper and not excessive in the circumstances.

10. Briefly, the facts of the case are as follows. The appellant was charged with the murder of the deceased, DMA alias K. The body of the deceased was found lying naked in a pool of blood, on the floor of a hotel room at Obomo Bar and Lodging in Keroka, by the hotel workers. It had a single stab wound on the neck. One of the witnesses, PW1, testified that the hotel room was locked from the outside. The matter was reported to the police officers at Keroka Police Station who immediately went to the scene and secured it, and then commenced investigations. The appellant was arrested at the Kaplong matatu stage by Chief Inspector Barnfort Surwa (PW7), when he noticed that the appellant was acting suspiciously and his shirt had blood stains. Upon arresting the appellant, he found him in possession of human hair and two knives, one of which was blood-stained. Further investigations confirmed that the blood samples found on the knives, the human hair and the blood sample on the appellant's shirt matched the DNA profile generated from the blood sample of the deceased. This was part of the evidence that persuaded the trial court that the appellant was guilty of the murder and convicted him.

11. During the sentence hearing, the prosecutor informed the court that the appellant was a first offender. The appellant's counsel expressed remorse on behalf of his client although the trial court found that it was not sincere since the appellant insisted that he did not commit the offence during the sentence hearing. Upon considering the circumstances, the learned judge imposed a sentence of imprisonment for twenty-five (25) years.

12. As the respondent correctly points out, it is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not 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 R. Eldoret Criminal Appeal No.253 of 2003, this Court in a differently constituted bench 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)."

13. Similarly, in *Bernard Kimani Gacheru v Republic [2002]* eK LR, this Court stated:

> 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."

14. In the present case, the appellant was convicted of murder. The exact motive for the murder is not known but what is clear is that it was brazen and pre-meditated: a stab wound in the neck is one calculated to kill not merely injure or maim. Moreover, the murder can be categorized as gender-based violence. The only extenuating circumstances disclosed to the sentencing court was that the appellant was a first offender; and that he is relatively youthful. Against the maximum sentence which the court could have imposed – which is the death penalty – one cannot rationally say that the sentence of imprisonment for twenty-five (25) years imposed is, in any way, manifestly excessive or perverse. Neither is there any evidence that the learned Judge failed to take into consideration any relevant factor or, conversely, took into consideration any extraneous factor in reaching her sentencing decision.

15. The upshot is that the appeal against sentence fails and is hereby dismissed. The sentence by the High Court is upheld. The record shows that the appellant was in custody since he was arraigned in court on 1st July, 2010. By dint of Section 333(2) of the *Criminal Procedure Code,* the imprisonment term of twenty-five (25) years shall be computed to begin running from that date.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR