Mdzomba v Republic (Criminal Appeal 29 of 2020)
[2024] KECA 501 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 501 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 29 OF 2020

KI LAIBUTA, A ALI-ARONI & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

KAREMA MLEWA MDZOMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 5th August 2020 in High Court Criminal Case No. 2 of 2018)

JUDGMENT

1. The appellant, Karema Mlewa Mdzomba, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of the offence being that on 10th December 2017 at Muyeye Village in Malindi Sub County within Kilifi County, he unlawfully murdered Katana Mlewa Midzomba.

2. The record as put to us does not seem to contain all the material placed before the trial court, such as the plea bargain agreement in issue. However, from the proceedings and the judgment, it appears that, on 27th February 2020, and pursuant to section 137F of the *Criminal Procedure Code*, Nyakundi, J. admitted the Plea bargain Agreement entered into between the appellant and the respondent. Although the fresh information does not form part of the record, from the judgement it would seem that the charge of murder was substituted for that of manslaughter to which the appellant pleaded guilty after section 137F was complied with.

3. The brief facts of the case as presented by the prosecution were that the deceased's body was found next to the appellant's house and blood stains were seen on the floor, mattress, shirts, beddings, and other utensils in the appellant's house. The investigations revealed that the motive for the murder was an allegation that the deceased was practising witchcraft. However, the appellant confessed to have caused the death of the deceased.

4. In his decision on sentence, the learned Judge was alive to the fact that sentencing is within the sole discretion of the trial Judge. He considered the fact that the appellant killed the deceased in cold blood using a panga before dumping his lifeless body in the open field. When discovered, the deceased's body was lying in a pool of blood with multiple cut wounds on the head, stomach, and left shoulder. In assessing an appropriate sentence, the learned Judge took into account the totality of mitigating factors, which he weighed against the aggravating factors in seeking to strike a balance. He considered such factors as the nature of the offence, the appellant's personal circumstances, and societal interest, that justice must not only be done but must be seen to be done. He also considered the pre-sentence time of incarceration as part of the punishment already served and suffered by the appellant.

5. According to the learned Judge, although under Section 205 of the Penal Code, the maximum sentence for manslaughter is a life sentence, that maximum punishment is usually reserved for the worst of such cases. In his view, the case fell within ambit of the most extreme cases of manslaughter. The learned Judge referred to the case of *Francis Karioko Muruatetu & Another v Republic*, [2021] KESC 31 as a guide on what to consider when determining the nature of the sentence to impose. He also cited the decision in the case of *Dahir Hussein v Republic* [2015] eKLR on the objectives of sentencing.

6. In this case, the learned Judge found that the crime was premeditated; that the appellant took his time to meticulously plan before executing the murder; that the degree of cruelty and lack of respect for human life exhibited was shocking; that the manner of execution was cold-blooded, callous and cowardly; and that the public should be made aware of the fact that those who commit murder under the guise of a belief in witchcraft commit a very serious offence deserving a lengthy prison term. However, the learned Judge considered mitigating circumstances, such as the fact that the appellant had no previous criminal record; and that he confessed to having committed the offence, which not only showed that he was remorseful, but also saved the court's time and resources.

7. The learned Judge then noted that manslaughter comes in two forms: voluntary and involuntary manslaughter and explained that manslaughter is voluntary when it exhibits free choice, decision, and voluntary action of which the offender is culpable as well as the capacity of the offender to distinguish between right and wrong, good and evil, (insight) before committing the act. According to him, in the instant case where all the ingredients of voluntary manslaughter were present, the sentence that ought to be meted is heavier than that of involuntary manslaughter.

8. The learned Judge sentenced the appellant to 18 years imprisonment with effect from 22nd January 2018.

9. It was that decision that the appellant found unsatisfactory and preferred this appeal in which he contends that: the learned Judge erred in law in completely failing to record and consider the appellant's mitigation; and that the learned Judge erred in law in passing a sentence which was manifestly harsh and excessive in the circumstances.

10. We heard the appeal on the Court's GoTo virtual platform on 8th November 2023 during which learned counsel, Mrs. Oluoch-Wambi, appeared for the appellant while learned counsel, Mr. Mwangi Kamanu, appeared for the respondent. Both learned counsel, who had filed their respective submissions, relied on them.

11. The appellant appreciated that, under section 379(3) of the *Criminal Procedure Code*, no appeal lies where an accused person pleaded guilty and was convicted on a guilty plea by the High Court, except as to the extent or legality of the sentence. It was submitted that, in this case, although the sentencing hearing was scheduled on the 24th March 2020, that did not materialise. It was submitted further that, since sentencing is a crucial component of a trial, the trial process does not end with the conviction

because it is during sentencing that the court hears submissions that impact thereon. According to the appellant, this necessarily means that the principle of fair trial must also be accorded to the accused on sentencing. In this regard, the appellant relied on section 329 of the *Criminal Procedure Code* as well as the decision in *Muruatetu & another vs. Republic; Katiba Institute & 4 others* (*supra*). In this case, it was submitted that there was no evidence that the learned Judge heard and considered the appellant's mitigating factors, and reference was made to this Court's decision in *Amos Changalwa Juma vs. R* [2009] eKLR where the need to hear and consider mitigating even in cases where the death penalty is mandatory was emphasised.

12. It was the appellant's position that the learned Judge took into account material that was not before the Court when he observed that:

> " In cases of this nature, the offender voluntarily admits to the commission of the offence for the sole purpose of seeking a lesser sentence."

13. According to the appellant, there was no evidence in support of this finding which lacked any legal basis. Accordingly, that finding unlawfully prejudiced the appellant's constitutional right as he was not presented with an opportunity to challenge the trial court's observation in this regard.

14. It was further submitted that sentencing in Kenya has been marked by instances of unwarranted disparities and disproportionate sentences. Reference was made to this Court's decision in *V M K vs. R* [2015] eKLR in which the Court substituted the sentence of 30 years imprisonment for 10 years imprisonment. According to the appellant, no dangerous weapon was recovered from the appellant and no pre-sentencing report was availed in this case. To the contrary, the learned Judge observed that the appellant was a first offender and was remorseful. At the time of the offence, it was submitted that the appellant was 32 years of age and worked as a masonry in a bid to provide for his family; that the appellant was the sole breadwinner for his wife and child together with his parents, who are elderly; and that the custodial sentence imposed on the appellant has caused a ripple effect on the well-being of his child and family. Urging us not to sacrifice the interest of the child, reference was made to Article 55(4) of the *Constitution* which provides that a child's best interests are of paramount importance in every matter concerning the child. The appellant contended that the sentence of 18 years imprisonment was made without due regard to the appellant's mitigating factors contrary to the provisions of Article 50 of the *Constitution*, and that the sentence was harsh and excessive in the circumstances.

15. In conclusion, the appellant urged us to find that the learned trial Judge erred in law by failing to record and consider the appellant's mitigating factors, and that this appeal should be allowed, the sentence set aside and substituted for lesser years of imprisonment.

16. It was submitted on behalf of the respondent that section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty, except on the extent and legality of sentence. In this regard, the respondent relied on the case of *Olel vs. Republic* [1989] KLR 444 and submitted that, the appellant having pleaded guilty to the offence of manslaughter, is barred from challenging the conviction, and that his only recourse is to challenge the extent or legality of the sentence imposed on him by the trial court.

17. On the legality of the proceedings, it was submitted that a keen perusal of the record confirms that the plea was unequivocal, the court having complied with sections 207(1) and (2) of the *Criminal Procedure Code*. In the respondent's view, the process that led up to the appellant's conviction and sentencing was extensive, and he understood each step taken as he was represented by counsel.

18. On the legality of the sentence, it was submitted that section 205 of the *Penal Code* provides that any person who commits the felony of manslaughter is liable to imprisonment for life; that, in sentencing

the appellant to 18 years imprisonment, the trial court went to into very elaborate details of how it had reached this decision while considering the mitigating and aggravating circumstances, time spent in custody, the need to protect the sanctity of life, the manner in which the appellant took time to plan and execute his acts, the fact that the appellant acted irrationally for killing the deceased believing him to be a witch, the fact that the appellant had no previous records, the fact that the appellant committed voluntary manslaughter and the need to mete out a higher sentence than that of involuntary manslaughter; and that the court acted well within the law in sentencing the appellant to 18 years imprisonment.

19. Given that the law provides for life imprisonment as a sentence, it was urged that the trial court's sentence was quite lenient. We were urged to dismiss the appeal.

20. We have considered the foregoing submissions.

21. It is clear that, as a consequence of a plea bargaining agreement, the charge of murder initially preferred against the appellant was reduced to manslaughter to which the appellant pleaded guilty. Section 379(3) of the *Criminal Procedure Code* provides that:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by the High Court, except as to the extent or legality of his sentence.

22. This was the position in *Olel vs. Republic* [1989] KLR 444 where it was held that:

> "Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

23. It follows therefore that the appellant cannot challenge his conviction before us and this appeal can only be determined on the ground of the extent or legality of the sentence.

24. It is argued by the appellant that he was sentenced without a sentence hearing. Section 323 of the *Criminal Procedure Code* provides that:

> If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.

25. This is the stage at which an accused person mitigates. The importance of mitigation was appreciated by this Court in *Henry Katap Kipkeu vs. Republic* [2009] eKLR where the Court expressed itself as follows:

> "Before we conclude this judgment we must say something about the manner the learned Judge dealt with the sentence. We note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person before sentencing him/her. This obtains even in the cases where death penalty is mandatory and the reasons for this requirement are clear. Some of the reasons are first that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as that of manslaughter,

grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing the sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for consideration of clemency. Thirdly, matters such as age, pregnancy in cases of women convicts, may well affect the sentence. It is thus necessary that mitigating factors be recorded even in capital offences. In *John Muoki Mbatha v R.* – Criminal Appeal No. 72 of 2007 (unreported) this Court stated:-

> " As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the Court receives mitigating circumstances if any are offered.'

" In conclusion, we are of the view that apart from the error in sentencing the appellant in the main judgment we decipher no other error on the part of the learned Judge. He was right in convicting the appellant since, as we have already stated, the appellant's conviction was inevitable as it was based on very sound evidence. We agree with Mr. Omuletema that this appeal ought to be dismissed." [Emphasis ours]

26. A similar view was expressed by the Supreme Court in *Muruatetu & Another vs. R* [2017] eKLR where the Court expressed itself as follows:

> (49) With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.
>
> 50 We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder.
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> 52 We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the *Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness."

27. At paragraph 54 the Court held that:

> "A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law."

28. Mitigation being a facet of fair trial under Article 25(c) of the *Constitution*, it is a non-derogable right.

29. However, the question before us is whether or not the appellant was afforded an opportunity to mitigate. It is clear that the record as put to us does not indicate when, if at all, mitigation was taken. Even though the record reveals that sentence hearing was scheduled for 22nd March 2020, there are no proceedings on record for that day. The judgement dated 5th August 2020 (which properly speaking ought to have been the sentence, conviction having been entered on 24th March 2020), incorporates the sentence. At this point, we wish to point out that strictly speaking, and as was held in *Henry Katap Kipkeu vs. R* (*supra*), it is inappropriate to incorporate the sentence in the judgement. Sentencing is a process that takes place after the conviction and, where there is a formal judgement on record, the sentencing proceedings can only take place thereafter. However, nothing turns on this point since, as we have pointed out above, the "judgement" ought to have been the sentence.

30. We have considered the "judgement" and it is clear that various mitigating circumstances were considered. We find nothing to suggest that the learned Judge plucked those mitigating circumstances from the air. The manner in which the proceedings were recorded in these circumstances is, in our respectful view, curable under section 382 of the *Criminal Procedure Code*, and we so find.

31. The next issue is whether the sentence imposed was harsh and excessive in the circumstances. The appellant having been charged with the offence of manslaughter was, under section 205 of the *Penal Code*, liable to serve a life sentence. However, he was sentenced to 18 years.

32. In *S vs. Malgas* 2001 (1) SACR 469 (SCA) it was held at para 12 that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'."

33. Similarly, in *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

34. The position was stated even more succinctly by the predecessor of this Court in the case of *Ogola S/ O Owoura vs. Reginum* (1954) 21 270 where it was held that:

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R.,* (1950) 18 E.A.C.A 147:
>
> > " It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. V Sher shewky,* (1912) C.C.A. 28 T.L.R. 364.'"

35. This Court in *Bernard Kimani Gacheru vs. R.* [2002] eKLR expressed a similar opinion when it held that:

> " 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, any one of the matters already stated is shown to exist..."

36. We find no reason to disturb his decision we find the finding in *Bernard Kimani Gacheru v R* (*supra*) on all fours with the instant case. In that case, the Court found that:

> " In the appeal before us, the learned trial Judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly, he did not act on any wrong principle. The very same matters that the appellant urged before us were urged before the learned trial Judge and he took all of them into account...The sentence was entirely in the discretion of the learned trial Judge and we are satisfied that he exercised that discretion properly and on the facts before him. The sentence he gave was well deserved and was not manifestly excessive. We have found absolutely no reason to interfere with it..."

37. We have considered the decision of the learned Judge on sentencing in this case and find nothing to persuade us that the learned judge's exercise of discretion was improper. In his detailed and well-reasoned decision, he considered all the relevant facts and did not consider any irrelevant ones. His decision on the sentence was well within the law.

38. Accordingly, this appeal fails and is hereby dismissed.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR