**Muraga v Republic (Criminal Appeal 61 of 2017)**
**[2024] KECA 1071 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1071 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CRIMINAL APPEAL 61 OF 2017**

**W KARANJA, J MOHAMMED & LK KIMARU, JJA**

**APRIL 26, 2024**

**BETWEEN**

**WAITHAKA MURAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Meru (Wendoh, J.) delivered on 23rd February 2017, in High Court Criminal Appeal No. 21 of 2012.

2. A brief background of this appeal is that the appellant was charged before the said High Court with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence alleged that on 31st January 2012, at Ngage Village, Igarie Location, Tigania East District, within Meru County, the appellant murdered Francis Muraga M'koroi.

3. After full trial, the trial court acquitted him of the offence of murder. He was however convicted of the offence of lesser but cognate offence of manslaughter contrary to Section 202 of the *Penal Code*. Upon his conviction, the appellant was sentenced to serve life imprisonment.

4. Aggrieved by his conviction and sentence, the appellant proffered the instant appeal. He advanced a total of six grounds in his memorandum of appeal. The gist of the appeal is that the appellant was aggrieved that the learned Judge failed to find that the evidence adduced by the prosecution witnesses was hearsay, inconsistent, uncorroborated and insufficient to sustain a conviction. He further faulted the trial court for rejecting his defence. The appellant asserted that the prosecution's case was not proved to the required standard of proof beyond reasonable doubt.

5. When the case came up for hearing, the appellant abandoned his appeal on conviction and pursued the appeal against sentence only. The appellant submitted that he has been in custody for approximately

ten years since his sentence was passed by the High Court in the year 2012. He urged this court to reduce his sentence on grounds that he is a reformed man.

6. The appeal on sentence was contested by the State. Learned State Counsel, Mr. Masila, filed written submissions on behalf of the respondent, dated 4th December 2022, in rebuttal. With regard to the sentence, learned State Counsel stated that the manner in which the appellant killed the deceased was heinous and brutal. He submitted that the trial court considered the appellant's mitigation before meting out the sentence of life imprisonment. He urged that the appellant has not availed any documentary evidence to establish that he has undertaken any rehabilitative courses while in prison, or that he has reformed in any way. He urged us not to interfere with the sentence meted by the trial court.

7. We have carefully considered the record of appeal, the submissions by both parties, and the law. This is an appeal against the sentence. The only issue arising for our determination is whether the sentence meted upon the appellant by the trial court is sound in law.

8. Section 379 (1) (a) & (b) of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court. The said section provides thus:

> "379. Appeals from High Court to Court of Appeal
>
> 1. 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."

9. 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."

10. The East Africa Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270 held that the appellate court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. Similarly, in *Mokela v 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."

11. Section 205 of the *Penal Code* provides for a maximum sentence of life imprisonment for the offence of manslaughter. In the instant appeal, the appellant was sentenced to serve life imprisonment after his conviction. The learned Judge in sentencing the appellant, stated that he considered the pre- sentence report dated 22nd March 2017, mitigating circumstances given on behalf of the appellant by his counsel as well as the circumstances under which the offence was committed. The learned Judge was of the view that the manner in which the appellant committed the offence warranted him to be kept away from society for the rest of life.

12. According to the facts of the case, on the fateful day, the deceased had just tethered his cows and entered his house when the appellant arrived. The appellant accosted the deceased (his father) at the entrance of his house and wrestled him to the ground. When the deceased's wife went to inquire what the problem was, the appellant drew a panga from his waist. The deceased's wife ran away and came back with police officers. They found the deceased had been be-headed. The appellant was seated next to him with the panga. It was the evidence of the prosecution witnesses that the appellant and the deceased often disagreed. The main cause of disagreement was that the appellant had formed the habit of harvesting the deceased's miraa plantation without his permission. It was however not established in evidence whether this was the cause of their fight on the material day.

13. We agree with the finding of the learned Judge that the manner in which the appellant killed his father was vile and brutal. The confrontation that led to the death of the deceased was provoked by the appellant. The appellant was the aggressor. He attacked the deceased using a panga which he had carried on his waist. According to the post mortem report, the deceased's head was severed from his body. The deceased also had several cuts wounds on his left wrist, left upper limb and on his face. He suffered fractures on his head and spine. The cause of death was ascertained to be asphyxia, second to spinal cord and head injury. The deceased did not deserve to die in the manner that he did.

14. In his mitigation before the trial court, the appellant stated that he was remorseful, was of a young age, with a future ahead of him, and prayed for leniency. The appellant is a first offender.

15. We have also considered recent jurisprudence from this Court.

    In *Evans Nyamari Ayako v Republic*, Criminal Appeal No. 22 of 2018, where this Court sitting at Kisumu observed that the indeterminate nature of a life imprisonment sentence contravened Articles 27 and 28 of the *Constitution*. The Court stated as follows:

    "25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.

    26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

16. Considering the manner in which the offence was committed, and all the surrounding circumstances, as well as applying the aforestated reasoning of this Court to this case, we hereby set aside the life imprisonment sentence imposed upon the appellant by the trial court. The sentence is substituted

with a custodial sentence of thirty (30) years imprisonment, effective from the date of the appellant's arrest i.e. 31st January 2012.

17. Orders accordingly.

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

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

**.....**

**JUDGE OF APPEAL**

**L. KIMARU**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**