SKN v Republic (Criminal Appeal 18 of 2019)
[2024] KECA 498 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 498 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 18 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 26, 2024

BETWEEN

SKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Bungoma (Ali-Aroni J.) dated 22nd March 2018 in HCCRA No. 1 of 2012)

JUDGMENT

1. Before us is a first appeal on sentence only, the appellant SKN, having abandoned his appeal on conviction. He was charged before the High Court in Bungoma vide Criminal Case No. 1 of 2012 with the offence of murder of AMK contrary to section 203 as read with section 204 of the Penal Code. The incident occurred on the 3rd January 2012 in Kaptama location of Mt. Elgon, Bungoma County. He denied the charge against him; and ultimately it proceeded to a hearing where he was convicted of the offence and sentenced to life imprisonment.

2. A summary of the prosecution's case is that the appellant lived with AMK (deceased), as husband and wife, together with their children aged 9 and 12 years. On the 3rd of January 2012, the couple arrived at their home drunk, and started quarrelling in the presence their two daughters PI (PW1) and MC (PW2), who were already at home. According to PW1, the appellant was not their biological father but the deceased had moved with them into her marriage with the appellant.

3. On the fateful day, the appellant beat the deceased with a metal rod before throwing her into the fire she had lit, and she sustained burns. When the deceased tried to run away, the appellant followed her with an axe and hit her. The deceased requested for water, but she was unable to hold onto the same as she lay on the ground.

4. In the morning PW1 was joined by her sister (PW2) who had run away when she saw the parents quarrel. Their father asked them to go ahead of him; and he would join them later at a place known as Kaptama, to buy them clothes. The two minors felt it was unusual for their mother not to have woken up, as she would rise up early to prepare them for school, so they made a report about the incident at the police station. The police accompanied them back home and on their way home, they met the appellant who was arrested. They all, then, proceeded to the house where he was asked to open the door. The deceased was found lying lifelessly on the floor. Her body was carried and taken to the mortuary.

5. James Amoit (PW3) and Timothy Chengenjo Ndiema (PW4) confirmed the deceased's death. The post-mortem was conducted on 6th January, 2012 by Dr. Adama Limo. It showed a cut wound on the skull; 2nd degree superficial burns on left arm and shoulder extending to the left back percentage of burn approximately 8%; laceration on the left leg with a fracture; the right leg was fractured. The doctor formed the opinion that the cause of death was cardio- respiratory arrest following the physical assault as a result of a fracture of the ribs on the left side and bleeding into the chest.

6. In her judgment, the learned judge noted that the deceased's children had witnessed the appellant brutally beat the deceased; and found that the prosecution had proved its case beyond reasonable doubt; and the appellant was convicted of the offence of murder and sentenced to serve life imprisonment.

7. Dissatisfied with the court's decision, the appellant preferred an appeal to this Court; his initial grounds of appeal were that he was a first offender; he was remorseful for the offence committed; he was the sole breadwinner for his family; the sentence meted on him was in excess and harsh; and a non- custodial sentence was preferable. His supplementary memorandum of appeal dated 17th October 2023 raises one issue, urging that the sentence of life imprisonment be set aside for being harsh and excessive.

8. At the hearing of the appeal, the appellant was represented by Miss Imbaya, while Miss Mwaniki appeared for the State. In support of the appeal, counsel for the appellant, Miss Imbaya, urged us to note that no pre-sentence report was presented to the trial court; and find that the life sentence meted was indeterminate, and therefore unfair to the appellant. While referring to the Supreme Court decision in Francis Karioko Muruatetu & Anor v Republic [2017] eKLR, though as noted in the decision, it was never raised before the two courts below, the trial court still went ahead to note that it was not within its purview to define what constituted a life sentence, or, what number of years was to be served by a prisoner before he was considered on parole. The appellant's counsel argues that a life sentence could imply a certain minimum or maximum to be set by a judicial officer.

9. We were urged to exercise our judicial discretion and set aside the life imprisonment; and reduce it to appropriate term sentence; or even place him under probation.

10. Opposing the appeal, Ms. Mwaniki, for the State, urged us to find that having been convicted of the offence of murder then the sentence of life imprisonment was the most appropriate; that the appellant's mitigating factors were considered by the trial judge who noted that domestic violence was on the rise, though he was a first offender was remorseful; and that he had been in custody.

11. In addition, the aggravating factor was that the deceased was his wife, whom he had brutalized in the presence of her children, hitting her on the head with an axe and raining kicks her on the ribs; crowned with the gruesome act of pushing her to roast in the fire resulting in her cruel death at the hands of the appellant; that in the circumstances, the aggravating factors outweighed the mitigation; and the trial judge did not err in imposing a life sentence.

12. Despite this submission, counsel nonetheless conceded to the fact that there is emerging jurisprudence on the unconstitutionality of the indeterminate nature of life sentence. In this regard, we have been referred to the unreported decision in Criminal appeal No. 12 of 2021, Julius Kitsao Manyeso v Republic and the oft cited decision by the Supreme Court in Francis Karioko Muruatetu & Anor v Republic [2017] eKLR, and urged to give a term sentence which is appropriate to the nature and gravity of the offence.

13. This being a first appeal, we have considered the record of appeal, the judgment of the High Court, the memorandum of appeal by the appellant, the submissions by both parties, and the authorities cited. This is in line with the principles enunciated in Okeno v. R [1972] EA 32, where it was held:

> " an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] E.A
>
> 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shanitilal M. Ruwala v. R, [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court's findings and conclusions; it must make its findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters v. Sunday Post [1958] E.A 424."

14. We have considered the material placed before us and we find that the issue for determination is whether, this Court can tamper with the sentence that was imposed on the appellant. Section 379(1) (a) & (b) of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against the sentence from the High Court. It states as follows:

> 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.

15. The appellant urges us to find that though convicted of murder, the sentence of life imprisonment was too harsh and excessive in the circumstances. Under the Penal Code, section 203 provides that:

> any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> whereas section 204 provides that:
>
> any person convicted of murder shall be sentenced to death.

16. The foregoing provides a mandatory death sentence on any person who is convicted of the offence of murder. However, the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR [commonly known as Muruatetu1] changed the landscape for persons convicted on a charge of

murder, giving them a chance to escape the mandatory hangman's noose; and giving court's the discretion on the nature of penalty to mete out, holding that:

> " that section 204 of the penal code deprives the court of the use of judicial discretion in a matter of life and death, which can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of a fair trial that accrue to accused persons under article 25 of
>
> *the Constitution*; an absolute right"

17. Both counsel refer us to the decision by this Court in Julius Kitsao Manyeso v Republic [2023] KECA (KLR) which addressed the imposition of a mandatory indeterminate life sentence as being unjustifiable, discriminatory, unfair, and repugnant to the principle of equality before the law under Article 27 of *the Constitution*.

18. In this regard while sentencing the appellant, the learned judge considered the issues he raised in his plea in mitigation. We note that the appellant and the deceased had started quarreling when in a drunken state, but the appellant not only beat the deceased even in her defenseless state, but went ahead to get a panga and cut her, and as if this was not enough, acting as though driven by some dark spirit of termination, pushed the already injured woman into the burning fire. Even if we were to buy into the sob-story plea that he had been propelled by the spirits of inebriation, surely the next morning, he did not bother to even check on his wife; or even take her to hospital for treatment.

19. Our assessment of the whole situation, echoes what the trial judge observed, regarding domestic violence, which, we note,is fast transforming into femicide; and can only be deterred by meting out a stiff sentence that communicates how totally unacceptable it is to assault and kill a person who stands in significant relationship with the perpetrator. That was the position taken by the sentencing court; and we do not find any fault in the learned judge exercising her discretion and meting out the life sentence.

20. The only issue that arises is whether an indefinite life imprisonment sentence is constitutional and can be justified given the emerging jurisprudence revolving around human rights and dignity.

21. We will not pretend to re-invent the wheel, as indeed, in the recent case of Evans Nyamari Ayako v Republic Kisumu Criminal Appeal No 22 of 2018 (UR), this bench considered a broad spectrum survey in many national courts such as Namibia, Germany, South Africa, Mauritius, Spain and Zimbabwe; and regional courts like the European Court of Human Rights that they have, in the recent past, held that indeterminate life imprisonment is antithetical to human rights (See, D van Zyl Smit 'Life imprisonment as the ultimate penalty in international law: A human rights perspective' [1999] 9 Criminal Law Forum 26-45).

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Many of these jurisdictions have held that life imprisonment can be saved where there is a possibility of release through parole or where life imprisonment has been limited to a number of years [See State v Bull & Another 2002 (1) SA 535 (SCA) at 552 (para. 23). Ultimately, in many States, there is a consistent gravitation towards abolition of life imprisonment, or re-defining it to a term sentence since an indeterminate life imprisonment is a cruel and degrading punishment. As a matter of fact, many jurisdictions have embraced substituting life imprisonment to a term sentence either through legislation, or through judicial interpretation of the Bill of Rights.

23. We observed in the Evans Nyamari Ayako case (supra) that Malaysia for instance amended its code (Abolition of Mandatory Death Penalty Act 2023 (Act 846) section 6) by varying life imprisonment, and substituting it with imprisonment for a term of not less than thirty years but not exceeding forty years. Pakistan's Penal Code is even more definite at section 57, defining life imprisonment in terms of the number of years in the following terms:

    Fractions of terms of punishment:

    In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty-five years.

24. Lest it be said that all these examples are from the Asian continent, in Africa the Zimbabwe Constitutional Court held in Makoni v Prisons Commissioner, CCZ 8/16 Constitutional Application No CCZ 48/15) [2016] ZWCC 8 (13 July 2016), that life sentence imposed on;

    'convicted prisoner without the possibility of parole or release on licence constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the (Zimbabwean) Constitution'.

    Subsequently the Zimbabwean parliament passed the Prisons and Correctional Service Act 2023 which at section 146 of the Act extends parole to prisoners sentenced to life imprisonment by General Notice 673 of 2023 under Clemency order 1 of 2020, the Zimbabwean President remitted life imprisonment to 25 years.

25. We also take note that just at our doorstep, even when being punished, as pointed out by the Supreme Court in Francis Karioko Muruatetu & Another v Republic (supra) that:

    > "...the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*".

    This emerging jurisprudence is a product of a purposive reading of Articles 27 and 28 of our Constitution as applied to sentencing.

26. We shall echo the very sentiments we expressed in the Ayako (supra) case that, taking into account the comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we have no hesitation in holding that life imprisonment in Kenya does not mean the natural life of the convict; rather, life imprisonment translates to (30) thirty years' imprisonment.

27. We have already considered the severity of the offence committed by the appellant, and we hereby set aside the sentence of life imprisonment imposed and, substitute it with a term sentence of thirty (30) years imprisonment. The record shows that the appellant was in custody from 6th January, 2012 when he was arraigned in court; and remained incarcerated to date. By dint of Section 333(2) of the Criminal Procedure Code, the imprisonment term shall be computed to begin running from that date.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 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