



**Mwiru v Republic (Criminal Appeal 57 of 2022)
[2024] KECA 1078 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KECA 1078 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 57 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
JUNE 20, 2024**

BETWEEN

DANIEL BEKE MWIRU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the High Court at Embu (F. Muchemi, J.) dated 4th December, 2019) In High Court Criminal Case No. 10 of 2016)

JUDGMENT

Background

1. The appellant, Daniel Beke Mwiru, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on 10th June 2016 at Kibugu market, Kibugu sub-location within Embu County, the appellant murdered Mary Wanyaga Ndwiga (the deceased). The appellant pleaded not guilty and the matter was set down for trial.

2. The prosecution called a total of ten (10) witnesses in support of its case.

In a nutshell, Esther Njoki Nyaga (PW1), testified that she was a friend of the deceased and that they shared a rented house. She identified the appellant as the deceased's boyfriend. She testified that on 8th June, 2016 at around 10:00a.m the appellant visited the deceased with some shopping and the deceased prepared lunch for them. Thereafter, at 5:00pm, PW1 and the deceased left the house and went to their village leaving the appellant in the house. PW1 testified that she parted ways with the deceased at around 6:30pm as both went to their respective mother's homes which was about 4km away from Kibugu market. PW1 testified that she learned of the death of the deceased the following morning when she was called by a police officer who requested her to go to Kibugu Police Station.



3. It was PW1's evidence that she proceeded to the police station and thereafter to her house where she found the body of the deceased.
4. Rose Kwamba Njiine (PW2) was the mother of the deceased. She testified that the deceased visited her on 9th June, 2016 with a request that she takes care of the deceased's eight-year-old daughter as the deceased was to proceed to Nairobi to buy clothes for sale. PW2 testified that the deceased left her house and returned to her rented house at Kibugu market at 7pm. PW2 testified further that she received a call from her other daughter, one Catherine Wanjiru from Nairobi asking her to go to Kibugu to the deceased's house to find out what had happened. PW2 testified that she went and found that her daughter, the deceased had died. It was her evidence that she learned from the police that the suspect, the appellant herein, had surrendered. Peter Njagi Njiine (PW3) testified that he was the deceased's uncle and he identified the body of the deceased at Embu Level 5 Hospital.
5. Dr. Phylis Muhonja, (PW8), from Embu Level 5 Hospital testified she conducted the post-mortem and that the cause of the death of the deceased was brain intracranial pressure due to massive hemorrhage and subdural haematoma followed the forced head trauma.
6. Catherine Wanjiru Ndwiga, (PW5) a sister of the deceased testified that she was called and informed of the death of her sister.
7. No. 65877 PC Raphael Rotich, (PW 6) testified that on 10th June, 2016 at 9:00am he was at Kibugu Police post with a colleague named PC Mutua when the appellant reported that he had killed his girlfriend named Mary Makena Wanyaga. PW6 testified that the appellant was drunk, restless and was crying. They locked up the appellant in cells and called the in-charge Salome Njeri who interviewed the appellant.

That the appellant then took them to the scene of crime where they found the body of the deceased on the bed. They arrested the appellant and returned to secure the scene of crime.
8. No. 234949 CI Salome Njeri (PW7) testified that while stationed at Kabugu Police Station, she received a call on 10th June, 2016 at 9:00 am from PW6 informing her that there was a report at the police station by a suspect stating that he had murdered his girlfriend. PW7 testified that she went to the police station and saw the appellant who was known to her having seen him several times at Kibugu market. She testified that upon enquiring from the appellant, the appellant said in Kiswahili "Madam huyo mwanamke amenisumbua sana and }nimemuua. "(Madam, that woman has disturbed me a lot and I have killed her.)" It was her further evidence that the appellant agreed to take her and other officers to the scene of crime where they found the body of the deceased with foam oozing from the mouth and nose.
9. No. 63010 Corporal Alex Chokera (PW9) testified that he was the Investigating Officer. He visited the scene of crime and found a body of a middle aged woman lying on the bed. On conducting search of the house, PW9 recovered an identity card in the name of the appellant and a bank plate which were produced as exhibits. PW10 No. 69531 Daniel Kiragu testified that he visited the scene of crime and took photographs which were produced as evidence.
10. On conclusion of the prosecution case, the appellant was found to have a case to answer. The appellant gave a sworn statement and did not call any witness.
11. DW1, the appellant herein, gave sworn testimony that the deceased was his lover for many years. That the deceased lived in a rented house at Kibugu while he lived at Kagumo. The appellant testified that he saw the deceased on 10th June, 2016 in a critical condition. He testified that he talked with the deceased on 9th June, 2016 when he visited her in the morning hours and they spent the day together. The



appellant testified that later in the evening, the deceased went to visit her mother in the rural Kibugu with Esther Njoki (PW1). Further, that he escorted the deceased and PW1 to the bus stage and paid their bus fare, he then went to a club at Kibugu to take a drink with other patrons. He testified club as he was very drunk. Further, that he was in company of a woman called Karimi and slept up to 6.00 am and left the club after 6.00 am.

12. The appellant testified that his companion went her way and he proceeded to the house of the deceased, knocked on the door but that there was no response. The appellant testified that he checked on the steel door latch and found that it was not locked. That he opened the door and entered the room, sat on the side of the room divided with a curtain and called the deceased but she did not respond. It was his testimony that he lifted the curtain and saw the deceased on the bed on her back with foam oozing from the mouth. He touched the deceased but she was not responding. He got out of the gate to ask for help from a neighbour but saw no one who could help. He then saw a police Land Rover from Kibugu Police Post which was only about 40 metres from the house of the deceased heading to the deceased's house. He informed the police what he had seen while crying at that at the time as he was shocked. He told police that he found the deceased on the bed and denied killing the deceased or informing the police that he had killed her.
13. Upon analysis of all the evidence, the trial court convicted the appellant of the offence of murder by judgment dated 4th December 2019 and accordingly sentenced him to thirteen (13) years imprisonment.
14. From the memorandum of appeal, the appellant was not aggrieved by the conviction but only the sentence meted out by the High Court hence
 - i. The High Court erred in law and in fact by failing to take into consideration the period spent in custody by the appellant as required by law;
 - ii. The learned high court judge erred in failing to deduct the said period from the sentence imposed hence amounted to double jeopardy and a contravention of section 333(2) of the criminal procedure code and Article 27(10)(2), 25(c),50(2)(p) and 51(1) of *the Constitution* of Kenya.
15. The appellant prayed that the period spent in custody before sentencing be taken into account as part of the imposed sentence in conformity with the decision of Ahamad Abolfathi Mohamed & Another vs Republic [2018] eKLR.

Submissions

16. At the hearing of the appeal, the appellant was acting in person while learned counsel Mr. Okonga was representing the State. As stated above, the appeal is in respect of the sentence. The appellant relied on the case of Ahamad Abolfathi Mohamed & Another (supra) where this Court held that courts should take into account the period spent in custody during sentencing in compliance with Section 333(2) of the Criminal Procedure Code.
17. Mr. Okonga opposed the appeal and briefly orally highlighted his written submissions. Counsel submitted that the High Court considered the period that the appellant had spent in custody and the same was taken into account in sentencing. Counsel submitted further that the sentence meted out did not violate the appellant's constitutional rights.

mitigation. Mr. Okonga conceded that other than the alleged confession of the appellant, there was no other prosecution evidence linking the appellant to the murder of the deceased. Counsel urged us to dismiss the appeal on sentence.



Determination

18. We have considered the record of appeal, the submissions, the authorities cited and the law. As this is an appeal against sentence, the issue for determination is whether this Court should interfere with the sentence meted on the appellant by the High Court.
19. The guiding principle for interfering with sentencing by an appellate court were set out in the case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, where the predecessor of this Court stated that:
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
20. Further, this Court, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated the principle guiding appeal on sentence 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.”
21. The appellant was sentenced to thirteen (13) years’ imprisonment. The appellant maintains that the High Court did not take into consideration the period he was in remand custody in imposing the sentence. The appellant relied upon Section 333(2) of the Criminal Procedure Code and this Court’s decision in *Ahamad Abolfathi Mohamed* (supra).
22. Section 333(2) of the Criminal Procedure Code provides that:
- “(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
- Provided that where the person sentenced under subsection
- (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
23. Further, the Judiciary Sentencing Policy Guidelines, 2023 provides:
- “Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of the bail or bond.”
24. The provision of Section 333(2) of the Criminal Procedure Code was highlighted by this Court in *Ahamad Abolfathi Mohammed’s* case (supra) that:
- “Taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It



is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.”

25. During mitigation on the 4th December, 2019, Mr. Momanyi, counsel for the appellant stated as follows:

“The accused has been in custody for about four (4) years. He is married with two children aged 8 and 5 years. His parents separated and he has no place he can call home. His family lives in rented premises and his wife is unemployed. It has been heady (sic) for the family for the four (4) years he has been in custody. He is remorseful and is really sorry for what happened.”

26. The High Court stated as follows:

“I have considered the period the accused spent in custody of four years which I take into account in sentencing him.”

Sentence: The accused is hereby sentenced to serve thirteen (13) years imprisonment. I also consider the mitigation regarding the accused’s family life and responsibility, however, I find a non-custodial sentence inappropriate in this case.”

27. With that holding, the High Court did not indicate the date when the thirteen (13) years sentence was to start running. Odunga J. - as he then was, stated in the persuasive decision of John Muthoka Ndolo v Republic [2022] eKLR that:

“...where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.”

28. There was no indication that the said period was deducted from the sentence meted out. We therefore find that the four (4) year period that the appellant was in custody was not taken into account in sentencing.

29. In view of the foregoing, we find merit in the appeal. The appeal against sentence is hereby allowed. We hereby set aside the thirteen (13) years imprisonment imposed and substitute therefor with the time already served.

30. Accordingly, we order that the appellant be set at liberty forthwith and released from prison, unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

