Mibei v Republic (Criminal Appeal 44 of 2021) [2024] KECA 949 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 949 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 44 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JULY 26, 2024

BETWEEN

SIMON KIBET MIBEI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 16th June 2021 in High Court Criminal Case No.14 of 2020)

JUDGMENT

1. The appellant, Simon Kibet Mibei, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, the particulars being that, on 18th May 2019 at Kilifi Town in Kilifi North Sub-County within Kilifi County, he murdered Lucyline Muthoni Michael.

2. When the statement and particulars of the charge were read over to the appellant on 2nd July 2020, he pleaded not guilty to the offence. However, following plea bargaining between the prosecution and the defence on 8th December 2020, a Plea Bargaining Agreement dated 25th November 2020 was filed before the trial court by which the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* was reduced to manslaughter contrary to section 202(1) as read with section 205 of the Penal Code. The brief facts, as contained in the Plea Bargaining Agreement, were that:

   > On 18th May 2019 a female adult by the name of Lucyline Muthoni Michael was found murdered at her house in Kilifi Town, Kilifi North Sub-County within Kilifi County. The police officers from DCI-Kilifi Police Station visited the locus in quo, secured the scene for evidence, drew a sketch map and later on removed the body to Kilifi Hospital mortuary where a post-mortem examination was done. The post-mortem revealed that the deceased had been smothered to death. The police led by PC Yusuf commenced investigations, which culminated into the arrest and charging in court of the accused person herein, and that the

accused person unlawfully killed the deceased. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.

3. When the charge of manslaughter was read over and the facts explained to him, the appellant admitted the same, and a plea of guilty was entered. The court then directed that the matter be mentioned on 17th December 2020 for the purposes of mitigation, pre-sentence report, victim impact statement and aggravating factors. On 14th June 2021, the court fixed the matter for sentencing on 16th June 2021 and, on that date, the learned Judged handed down the verdict in which the appellant was sentenced to serve a term of ten (10) years with effect from 16th June 2020.

4. In his decision on sentence, the learned Judge referred to the *Judiciary Sentencing Policy Guidelines*, 2016 on the consideration to be taken into account in meting out sentences and the case of *Veen v The Queen [No 2]* (1987- 88)164 CLR 465 at 476 detailing the purposes of criminal punishment. The learned Judge was alive to the fact that the appellant killed the deceased without premeditation or malice aforethought; that the appellant was a first offender of youthful age; and that the appellant had no previous convictions relevant to the charge or any other known convictions in the criminal data base. He noted that the key aggravating factor in the case was substantial violence to the victim without any justification or excuse as demonstrated in the Plea Bargaining Agreement, which prematurely terminated the deceased's life. In his view, that action called for an appropriate custodial sentence largely to punish for the crime, and to contribute to deterring offenders from re- offending. The learned Judge took into account the possibility of rehabilitation of the appellant and referred to the case of *R v Hviland* [1983] 5 Cr App 109, highlighting the discretionary powers of the court in sentencing.

5. Based on the said consideration, the learned Judge formed the view that the case was not one that called for imposition of life sentence, which is the maximum penalty for the offence of manslaughter, and hence the 10-year sentence.

6. That decision dissatisfied the appellant who filed this appeal in which he contends that the learned Judge erred in law and fact by meting out a manifestly excessive and harsh sentence.

7. We heard the appeal on the Court's GoTo virtual platform on 19th March 2024 during which learned counsel, Ms. Aoko, appeared for the appellant while learned counsel, Ms. Keya, appeared for the respondent. Both learned counsel relied on their respective written submissions, which they briefly highlighted.

8. The appellant's submissions dated 13th May 2024 were drawn by M/s. Aoko Otieno Advocates. It was contended, based on the case of *Bernard Kimani Gacheru v R* [2002] eKLR, that sentencing is discretionary and must depend on the facts of each case; that , in this case, the sentence was manifestly harsh and excessive since there were no aggravating circumstances; that the appellant is youthful and a first offender; that the prosecution wilfully omitted to submit on the sentence, and that the appellant deserved a discounted sentence; that recent jurisprudence from both this Court and the High Court hands down sentences of 10 years where one is found guilty of murder and not manslaughter; that the appellant had been in lawful custody of 1 year and 3 months as at the time of sentencing; and that, by the time of the hearing of this appeal, he has been in lawful custody for 3 years and 11 months.

9. In support of the submissions, the appellant relied on the cases of Joseph Yusuf Mimo v R Kisumu Criminal Appeal No. 19 of 2010 in which the appellant who was facing the offence of robbery with violence had his sentence reduced to 5 years; *Ephas Fwamba Toili v R* [2009] eKLR where this Court sentenced the appellant to 10 years in a case where it was noted that the killing was mercilessly carry out in the presence of a very young boy; Mathew Kiplalam Chepkieng v R [2019] eKLR in which a 10 year sentence was imposed for murder; *Republic v James Kimosop* [2017] eKLR where a sentence of 2 years

was imposed for manslaughter; and *Republic v Daniel Okello Rapuch* [2017] eKLR in which a sentence of 12 months imprisonment was meted on the accused where the death arose from a love affair.

10. We were urged to allow the appeal, set aside the sentence of 10 years and set the appellant at liberty.

11. The respondent's submissions dated 18th March 2024 were drawn by Ms. Keya Ombele, Principal Prosecution Counsel, in which it was submitted that, pursuant to section 379(3) of the *Criminal Procedure Code*, no appeal lies in the case where an accused person pleads guilty and is convicted thereon by the High Court, save on the legality of the sentence; that the 10 year sentence was lawful as the law provides for up to life imprisonment for manslaughter; that, under section 329 of the *Criminal Procedure Code*, receiving evidence before passing sentence is discretionary, and that the court is mandated to exercise its discretion to sentence whether or not parties make submissions; that, based on the cases of *Arthur Muya Muruiki v R* [2015] eKLR; and *Ogolla s/o Owuor v R* [1954] EACA 270, the appellate court should not interfere with the discretion on sentencing unless, in passing the sentence, the court took into account an irrelevant factor, or that a wrong principle was applied or, short of those, the sentence was so harsh and excessive that an error in principle must be inferred; that the aggravating factor in this case was the smothering of the deceased to death; that the purpose of the sentence is to punish the offender, deter re-offending and offer the offender an opportunity to be rehabilitated; and that the court considered the sentencing objectives and principles, thereby balancing the mitigating and aggravating factors.

12. We were urged to dismiss the appeal.

13. We have considered the foregoing submissions.

14. 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.

15. This was the position in *Olel v 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."

16. It follows therefore that this appeal can only be determined on the ground of the extent or legality of the sentence. Ms. Keya's submissions that this Court can only interfere with the sentence where its legality is in issue cannot therefore be entirely correct. The section clearly provides two situations in which this Court may interfere, and these are where the extent or legality of the sentence is in question.

17. It was urged by Ms. Aoko that, although the learned Judge directed that mitigation, pre-sentence report, victim impact statement and aggravating factors would be considered before sentencing, the same were not considered at all, and hence the learned Judge lacked the basis upon which he could impose a sentence. We have noted that learned counsel for the appellant and the respondent filed

written submissions in which mitigation was made and aggravating factors pointed out to the Court. In his decision on sentencing, the learned Judge expressed himself as follows:

> " Following a consideration on the mitigation [sic] and aggravating factors, I am of the view that the facts of this case are not suitable for imposition of a life sentence which is the maximum penalty for the offence of manslaughter. From the foregoing I sentence the convict to a term imprisonment of (10) years with effect from the 29th June 2020."

18. From that statement, it is clear that the mitigating circumstances were considered by the trial court and we have no basis to interfere with the decision on that ground.

19. 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 liable to serve a life sentence as prescribed under section 205 of the *Penal Code*. However, he was sentenced to 10 years. This Court in *Bernard Kimani Gacheru v R*. [2002] eKLR expressed its opinion on the jurisdiction to interfere with the sentence 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..."

20. On the factors to be taken into account in sentencing, this Court in *Thomas Mwambu Wenyi v R* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* [2012] 2 SCC 648 where it was held:

> "Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

21. As regards the sentence, we are guided by in the case of *Bernard Kimani Gacheru v R* (*supra*) which is 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..."

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

23. Even if this Court was of the opinion that had it been sitting as the trial court might have meted a sentence different from the one that was imposed by the learned Judge, that would not, without more, be the basis upon which the exercise of discretion would be interfered with.

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

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

A. K. MURGOR

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA Crb,FCIArb.

....

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

Criminal Appeal No. 44 of 2021