Mwangi v Republic (Criminal Appeal 29 of 2016)
[2024] KECA 928 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 928 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 29 OF 2016

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 26, 2024

BETWEEN

ISAAC WAMBUGU MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the sentence of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 10th March, 2016 in HCCRC No. 53 of 2015)

JUDGMENT

1. When this appeal came up for hearing on the Court's virtual platform on 12th March 2024 learned counsel Ms. Ekesa appearing for the appellant, Issac Wambugu Mwangi, successfully sought permission to abandon the appellant's undated notice that had sought to withdraw the appeal. Counsel also indicated to us that her client was abandoning his appeal against conviction and would concentrate on trying to persuade us to review the life imprisonment he was serving.

2. At the High Court, the appellant faced a charge of murder contrary to section 203 as read with 204 of the Penal Code. The information stated that on 7th June 2015 at Githunguri Village in Olkalou Division within Nyandarua County, the appellant murdered Elizepher Wamuyu Kiragu. However, on 10th March 2016, the appellant entered into a plea bargain agreement and pleaded guilty to the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code. He was subsequently sentenced to life imprisonment.

3. The appellant's decision to abandon his appeal against conviction was not only a wise one, but also guided by the law for section 137F(1)(h) of the Criminal Procedure Code is clear that an accused person who enters a plea bargain agreement waives the right to appeal except as to the extent or legality of the sentence. This position of the law is reiterated by section 137L (1) of the Criminal Procedure Code which states that a sentence passed by a court pursuant to a plea bargain agreement shall be

final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed. The appellant having been sentenced pursuant to a properly recorded plea bargain agreement, an appeal against conviction was therefore not available to him.

4. In the written submissions dated 2nd November 2023, the appellant's counsel contended that the sentencing proceedings offended section 137(I)(2) of the Criminal Procedure Code as the appellant was not granted an opportunity to tender his mitigation before his sentencing. Counsel relied on Edwin Otieno Odhiambo v. Republic [2009] eKLR in support of her argument that the trial court has a duty to record and consider an accused person's mitigation before sentencing. Counsel urged the Court to adopt the re-sentencing guidelines established by the Supreme Court in Muruatetu & Another v. Republic [2017] eKLR.

5. Turning to the appellant's mitigation, counsel orally submitted that the appellant who was 28 years old at the time of his conviction was a first offender who was in remand throughout the trial and had entered a plea bargain. Counsel relied on John Muendo Musau v. Republic [2013] eKLR to urge that section 26(2) of the Penal Code allowed courts to exercise discretion in sentencing. Ms. Ekesa prayed for a non-custodial sentence pointing out that the appellant has already served 8 years and has since reformed.

6. In response, Mr. Omutelema indicated that the State was not opposed to the appeal against sentence. According to counsel, the appellant having entered a plea bargain agreement deserved a sentence lesser than the life imprisonment meted by the trial court. When we prompted him to suggest what he thought would be an appropriate sentence in this case, counsel indicated that 5 years in prison would be sufficient punishment. He was opposed to the imposition of a non-custodial sentence asserting that such a sentence would be too lenient.

7. In principle, sentencing remains a matter within the discretion of the trial court and as an appellate Court, we are required to approach the issue with deference to the discretion of the trial court and we should not interfere with the sentence imposed by the trial court unless there are concrete grounds for doing so. It has been held in several decisions of this Court, including Ahamad Abolfathi Mohammed & Another v. Republic [2018] eKLR that "sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

8. Even outside our jurisdiction, the South African Court of Appeal in S v. Barnard 2004 (1) SACR 191 (SCA) has held that interference with the sentencing discretion of a trial court by an appellate court can only be allowed where "the Court did not exercise its discretion at all or exercised it improperly or unreasonably."

9. In this appeal, we are persuaded, with utmost respect to the learned Judge of the High Court that she got it wrong on the sentencing principles and on that score alone, our jurisdiction has been properly invoked by the appellant. As correctly conceded by counsel for the respondent, one of the benefits that accrues to an accused person who surrenders arms by pleading guilty is a reduced sentence. That sentencing is one of the cornerstones of the plea bargain procedure is affirmed by the fact that Parliament specifically legislated the factors to be taken into consideration in sentencing an accused person who has entered a plea bargain agreement. Thus, at section 137I(2)&(3) of the Criminal Procedure Code it is provided that:

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> "(2) In passing a sentence, the court shall take into account—

a. the period during which the accused person has been in custody;

b. a victim impact statement, if any, made in accordance with section 329C;

c. the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;

d. the nature and amount of any restitution or compensation agreed to be made by the accused person.

(3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report."

[Emphasis ours]

10. It must be recalled that the appellant pleaded guilty to the lesser charge of manslaughter whose maximum sentence is life imprisonment. In the circumstances, passing the maximum sentence on the appellant who had pleaded guilty was too severe. It must be appreciated that an accused person who pleads guilty saves the time that would have been used to conduct a trial. A plea of guilty also guarantees the prosecution a conviction which is not a certainty where a trial is held. Unless there are exacerbating factors, an accused person who pleads guilty whether on the day he first appears in court for plea or through a plea bargain agreement should reap the fruits of his or her surrender. Afterall, *the Constitution* guarantees every accused person the right to a full trial, and nothing can stop an accused person who knows of his or her guilt from taking the court through the rigmarole of a full trial. In this matter, even though the learned Judge acknowledged that the appellant was a young and remorseful first offender who was convicted based on a plea bargain agreement, she nevertheless went ahead to impose the maximum sentence for the offence.

11. What then are the factors to be considered in sentencing? In Muruatetu & Another v. Republic (supra), the Supreme Court identified factors for consideration in sentencing as the age of the offender, being a first offender, plea of guilty, character and record of the offender, commission of the offence in response to gender- based violence, remorsefulness of the offender, and the possibility of reform and social re-adaptation of the offender. The Supreme Court pointed out that despite these factors being advisory, the doctrine of stare decisis was still applicable, hence this Court is bound to consider the factors in determining the appropriateness of a sentence.

12. The appellant's mitigation was that he had pleaded guilty and was a young first offender. In this case, the appellant took plea on 3rd November 2015. The matter was mentioned severally thereafter owing to the absence of the appellant's counsel. However, on 9th February 2016 when the matter came up for hearing, counsel for the appellant informed the trial Judge that the appellant was willing to plead to a lesser charge. Given the foregoing circumstances, and considering that the appellant would have to consult his advocate, we find that the appellant was appreciative and remorseful for his offence.

13. However, the circumstances of the accused person should not be considered in isolation. The circumstances surrounding the commission of the offence also assists the trial court in determining the appropriate sentence. In the instant appeal, those circumstances were highlighted by the prosecutor as follows: the appellant was a pillion rider on the motorbike of one Jacob when they met the deceased who was with her sister. The appellant stopped the two but they defied him and walked away. It was then that the appellant got angry, picked a stone and threw it at them. The deceased was hit on the

right ear and she later passed away as a result of the injury. Postmortem revealed that the deceased died as a result of hematoma due to blunt trauma to the head.

14. In determining an appropriate sentence for the appellant, we observe that life imprisonment is the maximum sentence for the offence which the appellant had been convicted. Counsel for the appellant asked us to consider the fact that the appellant was 28 years at the time he was convicted and sentenced. The appellant's age becomes a factor for consideration in ensuring that whichever sentence he is given, the sentence does not in fact turn into a life imprisonment.

15. What then would be the appropriate sentence in this case? We restate that the appellant was about 27 years old at the time of the commission of the offence. He pleaded guilty and indicated to the court that he was remorseful. He was a first offender. On the other hand, a life was lost in the twinkle of an eye. The appellant not only failed to accept rejection but also failed to appreciate the deceased's freedom to choose the person to surrender her heart to. This, in our view, is an aggravating factor that would disentitle the appellant a lighter sentence notwithstanding his decision to enter into a plea bargain agreement.

16. Additionally, we are also cognizant of and appreciate the principle that there should be consistency in sentencing and that the same offences should attract relatively similar sentences. A perusal of the decisions of the High Court tend to suggest that a sentence of 15 years' imprisonment is suitable for the offence of manslaughter where there has been a plea of guilty. Some of those decisions are Mathew Langat v. Republic [2020] eKLR and Eiton v. Republic [2023] KEHC 23575 (KLR). Similarly, this Court in Abraham Kibet Chebukwa v. Republic [2020] eKLR affirmed a sentence of 15 years imprisonment meted by the High Court. 15 years imprisonment would, in our view, therefore suffice in this case.

17. In the circumstances, the conclusion we arrive at is that the appellant's appeal against sentence has merit and partially succeeds. The sentence of life imprisonment is set aside and the appellant is instead sentenced to serve 15 years in prison from the date of his conviction, which is 10th March 2016.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY 2024

F. OCHIENG

..... JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

..... JUDGE OF APPEAL

W. KORIR

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR