



REPUBLIC OF KENYA



**Ngeny v Republic (Criminal Appeal 117 of 2017)
[2024] KECA 929 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 929 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 117 OF 2017
M NGUGI, FA OCHIENG & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

ROBERT KIPNGETICH NGENY APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kericho
(M. Muya, J.) dated 12th May 2016 in HC.CRC. No. 17 of 2015)*

JUDGMENT

1. This appeal is against sentence only. The appellant, Robert Kipngetich Ngeny, was charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). The information stated that on 10th September 2015 at Kapsiti Village in Sigowet/Soin Sub-County within Kericho County, the appellant murdered Bornes Magut. Subsequently the appellant entered into a plea bargain agreement dated 9th March 2016 in which he agreed to plead to the lesser charge of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#). He was thereafter sentenced to serve 20 years in prison.
2. When this appeal came up for hearing, learned counsel for the appellant, Ms. Mwangi, confirmed that the appellant was only pursuing the appeal against sentence. Counsel for the appellant and the respondent had filed their written submissions which they sought to rely on.
3. Through the submissions dated 25th January 2024, Ms. Mwangi referred to the South African case of *S. v. Malgas* [2001] ZASCA 30 as highlighting the circumstances under which a sentence can be interfered with on appeal. We were also referred to the Supreme Court decision in [Muruatetu & another v. Republic \[2017\] eKLR](#) for the factors to be considered in resentencing. Counsel submitted that the trial court erred by relying on the aggravating circumstances without considering the appellant's mitigation. According to counsel, this Court, should, in the circumstances, intervene and alter the sentence.



4. On his part, Mr. Omutelema for the respondent through submissions dated 14th March 2024, argued for the dismissal of the appeal. According to counsel, the sentence of 20 years imprisonment was lenient and was passed in compliance with the law and Sentencing Policy Guidelines. Counsel highlighted the circumstances of the commission of the offence and asked us to maintain the sentence as passed by the trial court.
5. In principle, sentencing is a matter that falls within the discretion of the trial court and an appellate court can only intervene in circumscribed circumstances. Thus, in *Bernard Kimani Gacheru v. Republic [2002]* eKLR, it was 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, anyone of the matters already stated is shown to exist.”

6. Counsel for the appellant referred us to the Supreme Court pronouncement in *Muruatetu & another* [supra] on the factors for consideration in sentencing. We must, however, remind counsel that the Supreme Court in the same breath held as follows:

“We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.”

7. Further, we wish to dispel the appellant’s counsel’s contention that the trial court did not consider (or mention) the appellant’s mitigation when sentencing him. Indeed, the trial court stated that:

“After the conviction, the prosecution informed the court that the accused had no previous records of conviction. In mitigation, it was stated that the accused had voluntarily surrendered himself to police and further that his family had forgiven him. The Court ordered for social inquiry report. I have perused the same and I find that [it] is not favourable for non-custodial sentence.”

8. Having said the foregoing, we note that the maximum sentence for manslaughter is life imprisonment. Considering the circumstances of this case, the trial court cannot be faulted for having sentenced the appellant to 20 years imprisonment. This was a case where the appellant attacked and killed his own mother whose only “mistake” was to plead with him to stop fighting his brother. The appellant, despite not being offended by the brother, had engaged in a brawl spanning over 20 minutes and all attempts to stop him fell on deaf ears, ending in the killing of the deceased. Even though we were not able to lay our hands on the probation report, it was said to have been unfavourable to the appellant being given a non-custodial sentence. Despite being a remorseful first offender, the appellant needed an imprisonment term for rehabilitation and atonement for his sins. A perusal of the sentencing proceedings confirm that the trial Judge was alive to the sentencing principles and did not leave any room for us to step into the sentencing arena.



9. In the circumstances, we find and hold that the appellant’s appeal against the sentence has no merit. We dismiss the appeal and uphold the sentence of 20 years imprisonment as imposed upon the appellant by the High Court.

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

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

