Wasike v Republic (Criminal Appeal 190 of 2019)
[2024] KECA 947 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 947 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 190 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JULY 26, 2024

BETWEEN

AMONA WAMALWA WASIKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 24th October 2017 in HCCRA No. 36 of 2014)

JUDGMENT

1. The appellant was arraigned before the Bungoma High Court and charged with a single count of murder contrary to section 203 as read with section 204 of the Penal Code. He was alleged to have murdered Duncan Kasuti (deceased) on the 29th October, 2014 at Nabeki village in Namwela location of Namwela division within Bungoma county.

2. On 24th October, 2017, the appellant agreed to a plea bargain with the prosecution. It was accepted and recorded by the trial court (Ali-Aroni, J., as she then was) on the same day. By the terms of the plea agreement, the appellant pleaded guilty to the lesser charge of manslaughter.

3. The circumstances surrounding the commission of the offence which were agreed to by the parties in the plea agreement were as follows. The appellant was eighteen (18) years old at the time. He went to his mother's house on 29th October, 2014 carrying sukuma wiki and unga. He insisted on cooking in his mother's house. His mother objected. A verbal altercation ensued. It attracted the appellant's elder brother, the deceased, who lived nearby. The deceased joined in the verbal altercation directing the appellant to leave their mother alone. The verbal altercation soon escalated to a physical fight between the appellant and the deceased. The mother raised alarm as she could not separate the two. The deceased's wife responded to the alarm. She helped separate the two. However, as the deceased was

walking away, the appellant, in a fit of anger picked up a piece of wood and hit the deceased once on the head. The deceased fell to the ground. He died later from the injury.

4. However, before the plea agreement was concluded, the mother to the appellant and the deceased had testified on oath as PW1 in the trial. Her uncontroverted story was generally the same as that included in the plea agreement except in one material particular: she testified, without challenge, that the two brothers fought, were separated and the deceased went back to his house. However, the deceased came back carrying a piece of wood and suddenly hit the appellant. A new round of fighting ensued. It was after the separation after the new round of fighting that the appellant hit the deceased with the piece of wood.

5. After taking mitigation, the learned Judge observed that taking away a life is a grave offence and sentenced the appellant to fifteen years imprisonment.

6. The appellant is aggrieved by the sentence imposed. His singular ground of appeal before us is that the learned Judge erred in fact and law in imposing a sentence which was manifestly excessive in the circumstances.

7. As this is a first appeal, this Court is under a duty to re-evaluate the prosecution evidence and reach its own conclusions including on factors that influence a proper sentence - see Okeno v Republic [1972] EA 32.

8. The state opposes the appeal.

9. Both Ms. Lukasile, learned counsel for the appellant, and Mr. Oyiembo, learned prosecution counsel, filed written submissions. Both counsel appeared before us during the plenary hearing and highlighted their submissions. We have considered the rival submissions.

10. The singular question before us is whether the sentence imposed by the learned Judge can be said to be manifestly excessive in the circumstances as to attract the intervention of this Court. In considering this question, we are alive to the argument stridently made by Mr. Oyiembo that sentencing is a discretionary exercise by the trial court with appellate courts only intervening if error is established, not simply because they would have imposed a different sentence. The real question is whether the sentence has exceeded the permissible bound of the appropriate sentencing range in the circumstances of the case.

11. In the present case, the appellant entered into a plea agreement. The setting of the offence is a familial one. All evidence points to a physical altercation between the parties. Evidence on oath indicates that after the first round of fighting ended, it was the deceased who brought the log of wood and gratuitously hit the appellant with it hence renewing the fight. What was before a bare-knuckle altercation was now weaponized. Ultimately, the appellant picked up the self-same log of wood and hit the deceased with it. It is obvious that there was no intention to kill the deceased. It is an extenuating factor that it is the deceased who brought the weapon into the fight after the two brothers had been pacified. It is a mitigating factor that the appellant agreed to a plea agreement. Courts should incentivize parties, in appropriate cases, to enter into plea agreements; and one way to do this is to credit accused persons who conclude plea agreements with discounted sentences. It is a further mitigating factor that this was family setting and the parties have reconciled. Finally, it is an extenuating factor that the appellant was a first offender; and that he expressed remorse in mitigation.

12. Taking all these factors into consideration, we are of the view that the sentence of fifteen (15) years imposed on the appellant was manifestly excessive. We, consequently, set it aside. In its place we substitute it with a sentence of ten (10) years imprisonment. The sentence shall be computed from 24th October, 2017 when it was imposed but by dint of section 333(2) of the Criminal Procedure Code,

the period between 7th November, 2014 and 28th July, 2016 when the appellant was in custody will be discounted as part of the sentence.

13. Orders accordingly.

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