



REPUBLIC OF KENYA



KENYA LAW
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**Sawe v Republic (Criminal Appeal E067 of 2022)
[2024] KECA 816 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KECA 816 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E067 OF 2022
FA OCHIENG, WK KORIR & LA ACHODE, JJA
JULY 12, 2024**

BETWEEN

GEOFFREY KIPTOO SAWE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the Judgment of the High Court in Eldoret
(Githinji J) dated 26th of June 2018 in Criminal Case No. 28 of 2016)*

JUDGMENT

1. The Appellant, Geoffrey Kiptoo Sawe was charged at Eldoret High Court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He pleaded not guilty to the offence of murder and later committed himself to a plea bargain. In the Plea Agreement entered into between the prosecution and the appellant on 11th December 2017 and filed in court on 13th December 2017, the appellant agreed to plead to a lesser offence of manslaughter, contrary to Section 202 as read with Section 205 of the Penal Code.
2. The prosecution produced in evidence the Post Mortem report dated 7th April 2017, prepared by Dr. Narianya, a pathologist at Moi Teaching and Referral Hospital as Exhibit 1, and the Medical Assessment report dated 23rd April 2016 compiled by Professor Benson Gakinya, which confirmed that the Appellant was of sound mental state.
3. The appellant was convicted for the offence of manslaughter contrary to Section 202, as read together with Section 205 of the Penal Code on his own plea of guilty. Upon considering the mitigating factors and the circumstances in which the offence was committed, the learned Judge sentenced him to 30 years imprisonment.



4. The Appellant was dissatisfied by the decision of the High Court and lodged a Memorandum of Appeal in the Court of Appeal at Eldoret on 10th July 2018 and supplementary grounds of appeal dated 13th November 2020. The appeal is predicated on grounds that the trial Judge erred in law and fact by:
 - a. Admitting a defective Plea Bargain.
 - b. Sentencing the appellant to 30 years, which is a harsh and unreasonable sentence.
 - c. Sentencing the appellant on a defective information sheet.
 - d. By sentencing the appellant on an equivocal plea.
 - e. Failing to explain to the appellant the severity of the sentence.
5. The appellant in his written submissions dated 19th February 2023 filed through the firm of M/s Oyaro J & Associate Advocates, urged that this being the first appellate Court, it should take into consideration the principles laid down in *Okeno v Republic* [1972] EA 32. Counsel also referred to the Court to the decisions in *Philip Nzaka Watu v Republic* [2016] eKLR and *Erick Onyango Ondeng' v Republic* [2014] eKLR for the guidelines in determining whether the sentencing by the trial Judge was in order.
6. Counsel submitted that the Appellant was a young, first-time offender and the sentence of 30 years imposed upon him would be disastrous to his life. It was stated that his mother is a peasant with no source of income and hence the appellant wishes to be released to go and support her. That the exhibits produced were not consistent, nor did they corroborate the evidence on record supporting the offence. He contended that the prosecution failed to prove the case beyond reasonable doubt and the trial Judge misdirected himself in making a finding to the contrary. The Appellant urged that the conviction and the sentence were unwarranted and should be quashed and set aside respectively and the appellant acquitted.
7. The respondent filed written submissions dated 27th February 2024 through the Office of the Director of Public Prosecutions submitted that by relying on Section 137A – 137O of the Criminal Procedure Code, the prosecution followed the rules provided for reaching the plea agreement. By signing the Plea Agreement dated 11th December 2017, the appellant acknowledged that he had read the agreement and discussed the contents with his advocate and therefore entered into the agreement voluntarily. He thus forfeited his rights to trial for the charge of murder and as such, no prosecution witnesses could have been called to tender evidence against him, nor could he call witnesses to support his case.
8. Counsel submitted that the consequences of pleading to the charge of manslaughter were duly explained to the Appellant as can be confirmed from the agreement in the record of appeal. He urged that the trial Judge balanced between the mitigating and aggravating factors to arrive at the 30-years sentence, for an offence which carries a maximum punishment of life imprisonment. Thus, the period of 30 years imprisonment was fair and reasonable. He referred the Court to the case of *Bernard Kimani Gacheru v Republic* [22] eKLR on the principles to be relied upon when reviewing sentence. Counsel urged that the appellant cannot feign ignorance of a plea agreement he willingly and voluntarily entered into, while duly represented by an advocate.
9. During the plenary hearing Learned Counsel Mr. Oyaro appeared for the Appellant and confirmed that they had abandoned the appeal on conviction and were pursuing the appeal only on sentence. Learned Counsel M/S Wanjiku appeared for the Respondent and relied entirely on their filed submissions.



10. Based on the foregoing, the singular issue that arises for determination is whether the sentence was justified. The plea of guilty was unequivocal and as such the appellant can only appeal on the legality of the sentence. It was therefore proper for him to abandon the appeal on conviction and pursue the appeal on sentence only.
11. On whether the sentence of 30 years imprisonment was justified, we begin by stating that a person who is convicted of manslaughter is liable to life imprisonment as provided under Section 205 of the Penal Code. This means that whereas the section does not provide a minimum sentence, it provides a maximum sentence of life imprisonment. The trial Judge had the discretion therefore, in deciding the sentence guided by the Sentencing Policy Guidelines, 2023 revised edition.
12. In the instant appeal we observe that during sentencing the trial Judge considered both the aggravating and mitigating factors and stated thus:

“I have considered the mitigation and the circumstances in which the offence was committed. The accused/convict attacked his own parents for leasing out the piece of land next to a river. It was not for leasing his own land and he therefore had no cause at all as young as he is to quarrel let alone physically attack his parents for what they had done. He picked a post and targeted his father’s head hitting him in a sensitive area. He ended up killing his father. This is a serious offence and cannot be justified in any way. There is need for the accused to pay for it which should be reflected in his sentence. I do therefore sentence him to 30 years imprisonment.”
13. We also note that the Appellant was afforded an opportunity to mitigate, during which he pleaded for leniency as reflected in the record. The learned Judge found that the aggravating factors outweighed the mitigating factors.
14. The appellate Court does not interfere with sentence on appeal unless the trial Judge has acted upon wrong principles, or overlooked some material factors as stated by the predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270. We, nevertheless, agree with counsel for the Appellant that sentence should be part of the plea bargain, even as the court retains the discretion as to sentence. For that reason, we are of the view that a material factor was overlooked by the trial court and this allows us to interfere with the sentence.
15. After a careful consideration of the rival arguments and the law applicable, we find that the appeal has merit and is hereby allowed on sentence only. We therefore, set aside the sentence of 30 years imprisonment and substitute therefor a sentence of 20 years imprisonment.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY 2024

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

