Terer v Republic (Criminal Appeal 43 of 2018)
[2024] KECA 1277 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1277 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 43 OF 2018

FA OCHIENG, JM MATIVO & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

NICHOLAS KIPKOECH TERER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kericho (Mumbi Ngugi, J.) dated 2nd May 2018inHC.CR.C. No. 20 of 2016)

JUDGMENT

1. The appellant herein and his co-accused were separately charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. On 29th June 2016, the charges were consolidated.

2. The particulars of the offence as per the information were that on 3rd June 2016 at Kapkitonyi Sub-location in Chemamul Location, Kericho West Sub-county within Kericho County, the appellant, and his co-accused jointly murdered Leonard Kiprotich Sang.

3. The brief facts of this case are that the appellant, his co-accused, and the deceased were cousins. They went to the bar and fought over women and the fight resulted in the death of the deceased.

4. The appellant and his co-accused pleaded not guilty to the charges. To advance their case against the appellant, the prosecution called 10 witnesses. At the end of the trial, the appellant was found guilty, convicted, and sentenced to 20 years' imprisonment while his co-accused was acquitted under Section 215 of the Criminal Procedure Code.

5. This is a first appeal. As a Court, we are mandated to re-evaluate and re-analyze the evidence tendered before the trial Court, bearing in mind that we did not see or hear the witnesses when they gave their

testimonies, and give due allowance to the same. In the case of Chiragu & Another v Republic [2021] KECA 342 (KLR), this Court stated that:

> " However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno v R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also Erick Otieno Arun v Republic [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary."

6. PW1 was the bar owner where a fight broke out. According to her testimony, the appellant and Kelvin came to the bar on the material day at around 9:00 pm while she was serving drinks from the counter. A while later, the deceased also came to the bar and went to a private room. After a while, the deceased came out of the private room, held the appellant by the shirt, and pulled him outside where they started fighting. PW1 tried to separate them but when she failed, she called the watchman, PW5 to intervene.

7. At some point, PW1 saw the appellant and the deceased run to the appellant's house which was five minutes away, and return with a panga. The appellant and his co-accused, the deceased, and one Rono continued to fight while PW1 took her visitors to the house. However, before she got to the house, she heard people screaming that someone had died. As she was scared, PW1 first hid at a neighbour's house. However, she later returned to the bar but she did not witness the deceased being stabbed.

8. She stated in cross-examination that the bar did not use electricity, and outside the bar was dark. However, PW5 had a D-light torch which she used to identify the panga. She told the court that the appellant's co-accused had tried to separate the people who were fighting.

9. PW2 was the one who went to the bar with the appellant. He told the Court that on the material day at around 10:00 pm while paying their bill, the appellant inquired about the women who were in the private room with the deceased. This prompted the deceased to come out of the private room. The deceased then warned the appellant not to inquire further about the said women. The deceased then pulled the appellant outside the bar. When the bar closed, PW2 went outside and found the appellant and the deceased fighting. He decided to run home but before he got there he heard cries from the appellant's house.

10. According to his testimony, the appellant's sister was asking the appellant where he was taking the panga. He decided to go back to the bar and found two people lying on the ground. One of them was the deceased. He told the court that there were many people at the scene, and they had torches which provided light and he could see blood on the ground. He told the court that whilst helping others to carry the deceased to the hospital, he saw that the deceased had a stab in the chest. On arrival at the hospital, they were informed that the deceased was already dead. He did not see the co-accused at the bar. He also did not witness the stabbing of the deceased.

11. PW3 was the area Assistant Chief. He told the court that on the material day at around 9:00 pm, he was at the bar when the deceased came in with two women. However, he left after having a soda. At around 11:00 pm, he was called by Moses and informed that the deceased had been killed. He called the OCS Kericho and reported the incident. He then went to the scene where he saw blood, but there

was no one at the scene. He went back home. Later, PW1, PW5 and two other women came to his house and narrated to him the events of the night.

12. PW4 was a "probox" matatu driver. He told the court that on the material day, he sat with the appellant and PW2 while drinking at the bar. When they went to pay their bill, the deceased came from the private room, pulled the appellant outside, and slapped him across the face. They started fighting, and he tried to separate them. When his efforts failed he went home, only to be called back to assist in taking the person who had been stabbed to the hospital. He did not see the co-accused at the bar.

13. PW5 was the watchman at the bar. On the material day, he found the deceased and the appellant fighting outside the bar. He stood and watched them. He saw the appellant go to his home and come back with a panga. He heard one of the people who was trying to separate the fight, ask the deceased why he was beating up the appellant. According to PW5, when the appellant came back with the panga, he stabbed the deceased in the chest using a knife. He and others went to report the matter to PW3.

14. On cross-examination, PW5 told the court that when the appellant rushed home, the deceased followed him there and they returned together. He told the court that although the deceased had a stab wound, he did not know who had stabbed him because when the appellant and the deceased came back, the appellant sat down for about five minutes and then stood up and left with his panga, leaving the deceased and the person who was injured together, and there were many people at the scene. He did not recognize the panga that was produced in evidence.

15. PW6 was a boda boda rider. He narrated to the court how he assisted in taking the other injured person to the hospital on his motorcycle.

16. PW7 was a matatu driver. He told the court that he was called upon to take the injured persons to the hospital but he did not have his vehicle on that day.

17. PW8 was the father of the deceased. When he received information about what had transpired that night, he went to the hospital where he found the body of the deceased lying on the veranda. He also identified the body for post-mortem.

18. PW9 was a medical officer at Kericho District Hospital. He produced the post-mortem report on behalf of Dr. Daisy Chebet. According to the report, the deceased had a stab wound on the wall of the heart at the junction of the pulmonary vein and left atrium. The doctor formed the opinion that the cause of death was a stab wound to the heart causing cardiac tamponade.

19. PW10 was the investigating officer. He reiterated the testimony of the witnesses. He told the court that the co-accused had surrendered himself to the police and informed the police that he was at the scene of the crime while armed with a panga.

20. On cross-examination, PW10 told the court that although the panga produced in the court had no blood, the one at the scene had blood. He also testified that the panga and the blood thereon were not subjected to an analysis.

21. In a Ruling dated 27th September 2017, the learned Judge made a finding that the appellant and his co-accused had a case to answer.

22. In his testimony, the appellant told the court that he went to the bar on the material day of partake in alcohol. He sat with his friends until when the deceased arrived. He then followed the deceased to the private room where they sat for about 20 minutes. PW3 was also in the private room. He thereafter left the private room and rejoined his friends at the bar.

23. His further testimony was that he was at the counter waiting to escort PW1 to her home when the deceased came out of the private room and slapped him. His friends held the deceased and asked him why he had slapped him, and the deceased stated that he had caused the bar to be closed. He then went home and the deceased chased after him. He found his family members having dinner and they restrained the deceased.

24. He told the court that when he saw that the deceased wanted to fight, he got hold of a panga and went outside the house. He did not see the deceased thereafter but he heard people fighting at the bar. He slept outside as he was too drunk. When he woke up, he did not see the panga he had been holding. He denied stabbing the deceased and told the court that he did not know who had stabbed the deceased. He also denied that the panga produced in court was the panga he was holding. He further told the court that he surrendered himself to the police at Sosiot Police Station.

25. The learned Judge held that there was no dispute over the death of the deceased. The death was proved by the post-mortem report which indicated that the cause of death was a stab wound to the heart.

26. As to what caused the stab wound, the learned Judge held that five of the prosecution witnesses placed the appellant and the deceased at Kambi Giza bar. The appellant was also seen fighting with the deceased and then rushing home, and returning armed with a panga. The learned Judge found the prosecution's evidence was consistent that there was a fight between the appellant and the deceased.

27. The learned Judge held that the only witness who testified that he had seen the appellant stab the deceased was PW5, although his demeanor was such that he wanted to conceal evidence. The witness had retracted his evidence on cross-examination that the appellant came back with a panga and went straight to the deceased and stabbed him, by stating that the appellant returned with a panga, sat down, and did nothing.

28. The learned Judge found that in totality, the evidence before the court pointed to the appellant as the person who stabbed the deceased, thereby causing his death. The learned Judge found that although the deceased was the aggressor, it was the appellant who went home and returned with a panga and stabbed the deceased, even after his family members tried to restrain him.

29. The learned Judge found the defence by the appellant to be a fabrication, which was unbelievable; and proceeded to hold that the prosecution had established beyond reasonable doubt that the appellant, with malice aforethought, killed the deceased.

30. Consequently, the appellant was convicted of murder and sentenced to 20 years' imprisonment.

31. Being aggrieved by his conviction and sentence, the appellant in his memorandum of appeal dated 24th January 2024 raised two grounds of appeal to wit:

    a. The learned Judge erred in failing to consider his mitigation, resulting in a harsh and manifestly excessive sentence.

    b. The learned Judge erred in failing to consider the evidence of intoxication while sentencing the appellant.

32. When the appeal came up for hearing on 15th April 2024, Mr.Owuor, learned counsel appeared for the appellant whereas the respondent was represented by Mr. Omutelema, Assistant Deputy Director of Prosecutions. Counsel relied on their written submissions.

33. From his grounds of appeal and his written submissions, it is clear that the appellant's appeal is on sentence. He submitted that both the appellant and the deceased were drunk at the bar when they

started fighting. The deceased was the aggressor, and the death was not premeditated. The co-accused testified that he had picked the appellant who was still drunk and took him to his house. The appellant was of the view that the offence should have been manslaughter. He relied on the case of Benson Kedisia v Republic [2009] eKLR to buttress this submission.

34. While relying on the case of Bernard Seneyo Letikirich v Republic [2006] eKLR, where the court reduced the sentence of 10 years for manslaughter to seven years where the court found that the appellant had committed the offence while intoxicated, the appellant urged us to consider the circumstances under which the offence was committed and reduce the sentence.

35. The appellant submitted further that had the court considered his mitigation, the same would have impacted the length of the sentence.

36. Opposing the appeal, the respondent submitted that there were aggravating circumstances such as; the use of a lethal weapon,and the stabbing of the deceased in the heart, justifying the imposition of a severe sentence.

37. The respondent further submitted that the appellant's mitigation was considered. The learned Judge had considered the social inquiry report and the appellant's mitigation before sentencing him to 20 years' imprisonment.

38. The respondent relied on the case of John Muendo Musau v Republic [2013] eKLR, submitting that the learned Judge exercised discretion judiciously, acted on the right principles, and considered all material facts, and the sentence was not excessive in the circumstances.

39. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not this Court ought to interfere with the sentence meted against the appellant.

40. It is trite that sentencing is at the discretion of the trial court.

The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of Ogolla s/o Owuor v Republic [1954] EACA 270 wherein this Court stated as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material facts". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky [1912] CCA 28TLR 263)."

41. In the South African case of Mokela v The State (135/11) [2011] ZASCA 166, the Supreme Court held thus:

42.

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

Similarly, in Shadrack Kipkoech Kogo v Republic, Criminal Appeal No. 253 of 2003 the Court of Appeal stated that:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be inferred (see also Sayeka v R. [1989 KLR 306]".

43. In the case of Francis Nkunja Tharamba v Republic [2012] eKLR this Court held as follows with regard to sentencing:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

44. In this case, the learned Judge, in imposing the sentence, considered the appellant's mitigation that he was remorseful as the deceased was his cousin, he was 24 years old, a first offender with a young family, and he was intoxicated at the time. The learned Judge also considered the social inquiry report in which both the appellant's and the deceased's relatives maintained that the appellant was innocent. However, the learned Judge held that the evidence on record pointed to the appellant as the perpetrator of the offence.

45. In the circumstances, we find that the trial court considered the correct principles in imposing the sentence of 20 years' imprisonment, and exercised her discretion in so doing.

46. Accordingly, we will not interfere with the sentence meted out by the trial court.

47. In the result, the appeal is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR