Achochi & another v Republic (Criminal Appeal 123 of 2019)
[2024] KECA 1467 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1467 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 123 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 25, 2024

BETWEEN

JAMES ONSERIO ACHOCHI ..... 1ST APPELLANT

DANIEL OYARO RAGIRA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii (Karanjah, J.) dated 1{{^st}} November, 2016 in HCCRC No. 55 of 2013)

JUDGMENT

1. The appellants, James Onserio Achochi and Daniel Oyaro Ragira, were the accused persons in the trial before the High Court in Kisii High Court, Criminal Case No. 55 of 2013. They were charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on 11th January, 2013, at Omokonge Sub-location in Nyamache District within Kisii County, the appellants jointly murdered Isaac Obita Ongera.

2. They both pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge found that it was apparent that the accused persons did not have a predetermined mind to cause the death of the deceased. He opined that they were caught in a fracas that ensued and in the frenzy, acted not only spontaneously but also "foolishly for a matter which they had nothing to personally gain from". In the circumstances, he found that the prosecution established the charge of manslaughter, and not murder and convicted them accordingly. As a result, he sentenced each of the accused persons to serve fifteen (15) years imprisonment.

3. The appellants were aggrieved by that decision and have lodged the present appeal. However, at the hearing of this appeal, the Court was informed of the death of the 2nd appellant herein which

occurred on 15th May, 2018, whilst undergoing treatment at Kisii Teaching and Referral Hospital. In the circumstance, his appeal herein abates.

4. In his Memorandum of Appeal, the 1st appellant raised two (2) grounds of appeal, which are that:

    1. The learned trial judge failed to appreciate the appellant's mitigation.

    2. The learned trial judge erred in imposing an excessively harsh sentence.

5. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See Okeno vs. Republic [1972] EA 32.

6. We take note of the fact that the 1st appellant did not appeal against his conviction. Rather, his appeal is only against the sentence imposed: it was his contention that the learned trial judge did not appreciate his mitigation and thereby imposed an excessively harsh sentence. Consequently, the facts of the case are not relevant to this appeal except to the extent that they give a glimpse of matters respecting the sentence.

7. The incident that resulted in the manslaughter was a nominations exercise for the Ford People Political Party. The nomination exercise was held at Mokonge Primary School which served as the polling center. The deceased was a teacher at the school and had been appointed as a polling clerk. It would appear that the appellant and his co-accused were unhappy with how the exercise was conducted. They precipitated mayhem during which the appellant stabbed the deceased with a knife handed over to him by his co-accused. The deceased died shortly thereafter from the stab wounds.

8. After conviction, the learned Judge invited the appellant and his co-accused to offer mitigation. Through their advocate, learned counsel Mr. Soire, they stated that: they were remorseful for the offence; they were both married with family members and were the breadwinners; and they were first offenders. Hence, they urged the court to be lenient on them.

9. The trial court also called for Victim Impact Statements, which were duly filed in court. Upon receiving them, the learned Judge sentenced the appellant and his co-accused to fifteen years imprisonment. This is what the appellant is attacking on this appeal.

10. The appeal herein was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Ms. Raburu, appeared for the 1st appellant and learned counsel Ms. Kitoto appeared for the respondent. Both parties relied on their written submissions.

11. The 1st appellant offered three grounds to attack the sentence imposed on him. First, the 1st appellant contented that the trial judge failed to take his mitigation into account. In this regard, the appellant reiterated that he had told the court that he was remorseful for the offence; he was married with family members and was the breadwinner; and he was a first offender. He is of the opinion that had the court taken these factors into account, it would have fashioned a more lenient punishment. Second, the 1st appellant submitted that the trial court was not properly guided on matters of evidence and sound legal principles, and thereby erred in passing a harsh and excessive sentence which amounted to a miscarriage of justice. Finally, the appellant argued that the Sentencing Policy Guidelines provide that similar offences should attract similar sentences in similar circumstances. Drawing on several cases where an accused person was convicted for manslaughter, the appellant attempted to show that the sentence imposed in this case – 15 years imprisonment – was an outlier – and hence a violation of this Sentencing Policy Guideline.

12. The State opposed the appeal. It points out that the learned Judge took into consideration the mitigation offered by the 1st appellant before imposing sentence; and argues that there is no proof that the learned Judge was not properly guided on matters of evidence and the law as to arrive at an excessive sentence. The sentence imposed, the State argues, is not excessive and reflects the aggravating circumstances in the case.

13. The twin but related questions for this Court is whether the trial court failed to take into consideration the mitigation offered by the 1st appellant and whether the sentence imposed is harsh and excessive in the circumstances of this case.

14. Turning to the first issue, we simply note that the trial court record resolves it rather transparently. Upon receiving the mitigation of the 1st appellant, the learned Judge remarked thus:

> " Accused are first offenders. Mitigation noted. Circumstances of the offence also noted. It was unfortunate but the accused had no justification in using unreasonable force against the deceased using an offensive weapon which they ought not have carried to an exercise of voting which was supposed to be peaceful. The fact that they had a knife showed that they were up to no good and were probably hired goons of some of those participating in the elections. However, prior to sentencing, the prosecution may avail to the court victim impact statements from the family of the deceased."

15. On 3rd November, 2016, the prosecution submitted victim impact statements from the deceased's wives and brothers. The learned Judge, then, made the ultimate sentence ruling thus:

> "Victims impact statements considered. It would appear that the death of the deceased has occasioned great loss to his family both emotionally and economically. The two accused shall each serve 15 years imprisonment."

16. Does this demonstrate that the learned Judge did not take into consideration the mitigation offered by the 1st appellant? We think not. While the format taken by the learned Judge was certainly odd – taking in the mitigation and commenting on it at the front end before requesting for Victim Impact Statements and ultimately imposing the sentence – we think the record is clear that the learned Judge did, in fact, consider the mitigation that was offered. Indeed, there is no other explanation for the fact that the sentence imposed was far less than the maximum sentence for the offence convicted, which is life imprisonment.

17. We will now turn to the question whether the sentence was, in the circumstances of this case, harsh and excessive.

18. The circumstances under which this Court can interfere with a sentence imposed by the High Court and the applicable principles were set out by the court in the famous Bernard Kimani Gacheru v Republic [2002] eKLR thus:

> " 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 states is shown to exist."

19. Differently put, an appellate court cannot interfere with the sentencing discretion merely because it would have imposed a different sentence. It can only do so where there has been a material misdirection with regard to the sentence. In Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003, this Court in a differently constituted bench observed 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 interfered (see also Sayeka v R (1989 KLR 306)."

20. We have considered the circumstances and facts of the present case. We have concluded that it is not possible to rationally say that the sentence of imprisonment for fifteen years imposed is, in any way, manifestly excessive or perverse. Neither is there any evidence that the learned Judge failed to take into consideration any relevant factor or, conversely, took into consideration any extraneous factor in reaching his sentencing decision.

21. The upshot is that the 1st appellant's appeal against sentence is dismissed. The appeal by the 2nd appellant is marked as abated.

22. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 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