Losiangura v Republic (Criminal Appeal 68 of 2020)
[2024] KECA 1855 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1855 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 68 OF 2020

MA WARSAME, LA ACHODE & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

WILLIAM LOSIANGURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kapenguria (R. Sitati, J.) dated 27th November 2019 in Kapenguria HC CRC No. 4 of 2019)

JUDGMENT

1. William Losiangura, the appellant herein, is through this appeal expressing his dissatisfaction with the sentence of 15 years' imprisonment handed to him upon conviction, pursuant to a plea bargain agreement, for the lesser charge of manslaughter contrary to section 202 as read with 205 of the Penal Code.

2. In his memorandum of appeal, the appellant raises six grounds of appeal as follows: that the period already spent in custody was not considered; that he pleaded guilty; that the sentence is harsh and excessive; that his mitigation was not considered; that he was a first a first offender; and that he was remorseful.

3. When this appeal came up for hearing on the Court's virtual platform on 24th June 2024, learned counsel, Ms. Oduor appeared for the appellant while learned state counsel, Mr. Majale appeared for the respondent. Counsel having filed their respective written submissions, opted to rely on them entirely.

4. The submissions by Ms. Oduor were dated 20th June 2024. In the submissions, learned counsel referred to the case of Ahamad Abulfathi Mohammed & Another vs. Republic [2018] eKLR to urge that under section 333 (2) of the Criminal Procedure Code, the period already spent in custody ought to have been deducted from the sentence imposed on him. Counsel also submitted that the trial court considered irrelevant and extraneous factors hence arriving at a harsh and excessive sentence. Counsel

took issue with the trial court's reliance on the pre-sentence report which contained negative views on the appellant. Asserting that the appellant's mitigation was not considered, counsel relied on the decisions in Republic vs. Ezekiel Lokatukon [2021] eKLR and Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, in support of the proposition that mitigation is an important aspect of sentencing. She urged the Court to consider the appellant's mitigation. Consequently, counsel urged us to reduce the sentence to the period already served.

5. For the respondent, the appeal was opposed through the submissions dated 19th June 2024. Learned counsel relied on the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR, in support of the argument that sentencing is a matter of discretion of the trial court. According to counsel, there was no evidence that the trial Judge injudiciously exercised her discretion. Counsel highlighted the sentencing objectives as found in the Judiciary Sentencing Policy Guidelines and submitted that by sentencing the appellant to 15 years imprisonment, the trial court properly exercised its discretion. According to counsel, the sentence was lenient because the maximum sentence provided for the offence is life imprisonment.

6. In considering the appeal before us, we start by taking cognizance of the fact that ordinarily sentencing remains a matter within the trial court's discretion. As an appellate Court, we are obliged to approach the appeal with circumspection and must not interfere with the sentence unless there are concrete grounds for doing so. Thus, in Ahamad Abulfathi Mohammed & Another vs. Republic (supra) it was held that:

> " As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive." (Emphasis ours)

7. Earlier, this Court in Bernard Kimani Gacheru vs. Republic (supra), listed the grounds upon which an appellate court can interfere with sentence when it 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."

8. In this appeal, it was the appellant's contention that he was in custody for about 8 months prior to his sentencing and that period ought to have been taken into consideration in the sentence. On this ground, we agree with counsel for the appellant that, indeed, under section 333 (2) of the Criminal Procedure Code, this period ought to be deducted from the appellant's sentence. An argument similar to that of the appellant was considered by the Court in Ahamad Abulfathi Mohammed & Another vs. Republic (supra), which held that:

> " There are however two grounds upon which we must fault the first appellate court, as regards sentence...The second is the failure by the court to take into account in a meaningful

way, the period that the appellants had spent in custody as required by section 333 (2) of the Criminal Procedure Code ...

The appellants have been in custody from the date of their arrest on 19th June 2012. By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced."

We will therefore make an order that the period of 8 months spent by the appellant prior to his sentencing be taken into account by the prison authorities when computing the appellant's days in prison.

9. The other grounds alluded to by the appellant challenge the severity of the sentence. We are cognizant and appreciate the principle that there should be consistency in sentencing and that offences committed in similar circumstances should attract relatively similar sentences. Our perusal of the High Court decisions affirms that 15 years' imprisonment is reasonable for the offence of manslaughter where an accused person has pleaded guilty. For example, in Mathew Langat vs. Republic [2020] eKLR and Eiton vs. Republic [2023] KEHC 23575 (KLR), the High Court imposed a sentence of 15 years for the offence of manslaughter. Similarly, this Court in Abraham Kibet Chebukwa vs. Republic [2020] eKLR, affirmed a sentence of 15 years imprisonment passed by the High Court. In our view, the sentence imposed upon the appellant cannot be said to be harsh or excessive to warrant the intervention of the Court.

10. Another complaint by the appellant is that the learned Judge took into consideration irrelevant factors by considering the pre- sentence report. The Judiciary Sentencing Policy Guidelines, 2023 at page 45 provides that:

> "It is vital that the court receives and considers relevant information. The court should, as a matter of course, request a pre-sentence report in appropriate cases. The court should be guided by the pre-sentence reports presented and should be satisfied that the enquiry has been adequately conducted for the purposes of sentencing. While appreciating that pre-sentence reports are not binding, the court should give reasons for departing from the recommendations therein."

11. A review of the sentencing proceedings discloses that the pre- sentence report was availed to the court, and counsel for the parties had a glance of it before the sentence was passed. Neither the appellant nor his counsel had an issue with the contents of the report or the procedure of its preparation. The trial court was therefore within its discretion to consider the report while determining the appropriate sentence to impose. In the circumstances, we cannot therefore, find fault on the part of the learned Judge.

12. Finally, the appellant complained that his mitigation was not taken into account by the trial charge. The record speaks to the contrary. On 6th November 2019, the appellant's counsel presented the appellant's mitigation after which the learned Judge indicated that she had "heard" the mitigation and thereafter called for the pre-sentence report. It cannot therefore be said, as the appellant alleged, that his mitigation was not considered. This particular ground of appeal also fail. In the end, this appeal fails and is dismissed.

DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF DECEMBER 2024.

M. WARSAME

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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