**Nyatigo v Republic (Criminal Appeal 71 of 2019)**
**[2024] KECA 1820 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1820 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 71 OF 2019**

**HM OKWENGU, HA OMONDI & JM NGUGI, JJA**

**DECEMBER 20, 2024**

**BETWEEN**

**DENNIS OSORO NYATIGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the judgment of the High Court of Kenya at Kisii J.R. Karanjah, J. dated on 2nd February, 2017 in HCCR Case No. 27 of 2016)***

## JUDGMENT

1. The appellant, Dennis Osoro Nyatigo, was arraigned before the Kisii High Court and charged with murder contrary to section 203 as read with section 204 of the Penal Code. He was alleged to have murdered Zipora Kwamboka Mochama (deceased) on the 3rd of September 2016 at Ibenio Sub-location, Kisii Central Sub-County within Kisii County.

2. On 7th November, 2016 the appellant agreed to a plea bargain with the prosecution. It was accepted and recorded by the trial court (Okwany, J.) on the same day. On the 7th December, 2016 by the terms of the plea agreement, the appellant pleaded guilty to the lesser charge of manslaughter.

3. The appellant admitted the facts as laid by the prosecution. The trial court convicted the appellant on his own plea of guilty and sentenced him to 30 years' imprisonment having considered the mitigation proffered by the appellant.

4. Being dissatisfied, the appellant preferred the present appeal faulting the learned judge for failing to consider the importance of plea bargaining, failing to adhere to the sentencing principles, failing to consider the mitigation offered, and being impartial.

5. Briefly, the facts of the prosecution case as detailed in the accepted Plea Agreement were that on the material day, the appellant and the deceased, who was his wife, engaged in a domestic quarrel. They

disagreed and when the deceased threatened to leave the appellant, he became angry, picked a panga and cut the deceased several times. The deceased suffered fatal injuries. The matter was reported to the police and the appellant was arrested.

6. A post-mortem was conducted and a report a report which was attached to the plea Agreement showed that the deceased died from severe injury to the head. The appellant was charged with murder which was reduced to manslaughter.

7. In support of the appeal, the appellant submits that although the case was disposed of through plea bargaining, the court sentenced him to 30 years' imprisonment. He lamented that the trial court failed to discharge its obligation and meted out an excessive sentence in the circumstance; failing to consider that plea bargaining had been voluntarily made by the appellant; and with the full understanding of the consequences; the learned Judge erred in law and fact by failing to adhere to the sentencing policy guidelines which provide a framework within which courts can exercise their discretion during sentencing; and failed to apply his discretion judiciously, by ignoring the mitigating facts given by the appellant. Reference is made to the case of Elijah Njihia Waki and Anor' vs. Republic where the court remarked that:

> " ...The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process."

The appellant urges the court to consider the mitigating factors, quash the sentence, and give an alternative sentence.

8. In reply, the respondent contends that pursuant to section 348 of the Criminal Procedure Code, no appeal lies before this court. Further, that the appellant was represented at the High Court as such, was well advised; and there was no evidence on record to suggest that the plea of guilty was equivocal.

9. On sentence, it is contended that the appellant pleaded guilty to the charge of manslaughter; was convicted on his own plea of guilty, and sentenced to 30 years' imprisonment, which is not excessive as section 205 of the Penal Code provides for imprisonment for life.

10. The respondent further points out, that upon conviction, the appellant presented his plea in mitigation, but the trial court noted the case was one of gender-based violence, and given the circumstances of the case, the offence called for a deterrent sentence; as such, the sentence imposed upon the appellant was proportionate with the offence.

11. As the first appellate Court determining such an appeal, the Court must bear in mind its duty as enunciated by this Court in Okeno vs. Republic [1972] EA 32 as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424." See also Kariuki Karanja vs Republic 1986 KLR 190"

12. Having considered the record of appeal, the submissions, the authorities cited, and the law, the singular issue for determination 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.

13. We have been urged to interfere with the sentence imposed on the appellant by the High Court. Section 202[1] of the Penal Code provides as follows:

> " (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."

14. Section 205 of the Penal Code provides as follows:

> " Any person who commits the felony of manslaughter is liable to imprisonment for life."

15. The maximum sentence for an accused found guilty for the offence of manslaughter attracts a maximum penalty of life imprisonment. The appellant herein was sentenced to 30 years' imprisonment. Can an appellate court in the circumstances interfere with the sentence imposed on the appellant? In principle, sentencing remains a matter within the discretion of the trial court, and as an appellate Court, this Court is required to approach the issue with deference to the discretion of the trial court and should not interfere with the sentence imposed by the trial court unless there are concrete grounds for doing so. It has been held in several decisions of this Court, including Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR

that:

> " 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."

16. Similarly, this Court in Bernard Kimani Gacheru vs. Republic [2002] eKLR stated as follows:

> " 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."

17. One of the benefits that accrues to an accused person who surrenders arms by pleading guilty is a reduced sentence. That is one of the cornerstones of the plea bargain procedure, as affirmed by the fact that Parliament specifically legislated the factors to be taken into consideration in sentencing an accused person who has entered a plea bargain agreement. Thus, at section 137(I)(2) & (3) of the Criminal Procedure Code it is provided that:

> " (2) In passing a sentence, the court shall take into account:
>
> a. the period during which the accused person has been in custody;

b. a victim impact statement, if any, made in accordance with section 329C;

c. the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;

d. the nature and amount of any restitution or compensation agreed to be made by the accused person.

(3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report."

18. A person who pleads guilty saves the court time that would have been used to conduct a trial and also guarantees the prosecution a conviction, which is not a certainty where a trial is held. Unless there are aggravating factors, a person who pleads guilty whether on the day he first appears in court for a plea or through a plea bargain agreement should reap the fruits of his or her surrender.

19. Regarding the factors to be considered in sentencing, the Supreme Court in Muruatetu & Another vs. Republic [supra] identified factors for consideration in sentencing as, the age of the offender, being a first offender, plea of guilty, character and record of the offender, the commission of the offence remorsefulness of the offender, and the possibility of reform and social re-adaptation of the offender. The Supreme Court pointed out that despite these factors being advisory, the doctrine of stare decisis was still applicable, hence this Court is bound to consider the factors in determining the appropriateness of a sentence.

20. The appellant's mitigation was that he was 38 years old, and was remorseful for what happened. He reacted in a fit of anger. He has been with his wife since 1989 and they were blessed with 4 children who were still minors; and who now live with their grandmother who is elderly and sickly.

21. In the instant appeal, the appellant took plea on 7th November, 2016 where it was intimated to the trial court of the appellant's willingness to plead to a lesser charge of manslaughter under a plea bargain and on 7th December, 2016, the appellant pleaded guilty to the lesser charge of manslaughter.

22. The circumstances surrounding the commission of the offence also assist the trial court in determining the appropriate sentence. In the instant case, the evidence on record shows that the appellant and his deceased wife engaged in a domestic quarrel. They disagreed and when the deceased threatened to leave the appellant, he became angered, picked a panga and cut the deceased multiple times. It must be recalled that the appellant pleaded guilty to the lesser charge of manslaughter whose maximum sentence is life imprisonment. In the circumstances, passing the sentence of 30 years' imprisonment against the appellant who had pleaded guilty was too severe.

23. As pointed out, Section 205 of the Penal Code provides life imprisonment as the maximum sentence for the offence for which the appellant had been convicted. Counsel for the appellant asked the Court to consider the mitigating factors and interfere with the sentence.

24. What then would be the appropriate sentence in this case? It should be restated that the appellant pleaded guilty and indicated to the court that he was remorseful. He was a first offender. On the other hand, a life was lost in the twinkle of an eye. The appellant not only failed to accept rejection but also failed to appreciate the deceased's freedom to choose the person to surrender her heart to, since apparently they were not on good terms. Whereas this is an aggravating factor that would disentitle

the appellant a lighter sentence; we take note that nothing on record suggested that the appellant had a history of gender based violence.

25. We are cognizant, and appreciate the principle that there should be consistency in sentencing and that the same offences should attract relatively similar sentences. This Court in Abraham Kibet Chebukwa vs. Republic [2020] eKLR affirmed a sentence of 15 years' imprisonment meted out by the High Court. Given his age, his social circumstances, especially the children who are now under the care of an elderly grandmother, we are inclined to interfere with the sentence; and are of the view that 10 (ten) years' imprisonment would suffice in this case.

26. The appeal against the sentence has merit and succeeds to the extent that the sentence of 30 years' imprisonment be and is hereby set aside, and the appellant be sentenced to serve 10 years in prison from the date of his conviction.

We so order.

**DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**