Wanema v Republic (Criminal Appeal 90 of 2018)
[2023] KECA 130 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 130 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 90 OF 2018

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

LOSSI WAMBULWA WANEMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgmentof High Court at Eldoret (G. K. Kimondo, J.) delivered on 15th March, 2016 in HCCRA NO. 28 OF 2011)

JUDGMENT

1. Lossi Wambulwa Wanema, the appellant herein, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The appellant was charged with the murder of one Henry Silungai Kaskon on 21st April, 2011 at about 9.30 pm within Chimoi market, Lwandeti Sub-Location, Lwandeti Location, Lugari District within the former Western Province. The appellant denied the charges and the matter proceeded to full hearing upon which the appellant was found guilty of the offence of murder and consequently sentenced to suffer death.

2. The prosecution's case as gleaned from the record is that on 20th April, 2011 at about 9.30pm, the appellant and the deceased went and purchased chang'aa at the house of their neighbor, Peter Juma Makokha (PW1). Thereafter, a quarrel ensued between the appellant and the deceased after the appellant accused the deceased of being proud because of the money he had received after disposing land. Shortly thereafter the appellant went out of the house and returned with a sharp stone which he used to hit the deceased on the right side of the head near the ear. The appellant then fled from the scene while the deceased remained bleeding. The wife of PW1 by the name Violet Nabwire testified as PW5 and confirmed the testimony of her husband. The deceased was later taken through various health facilities before landing at Moi Teaching and Referral Hospital in Eldoret where he succumbed to the injury two days later. Post-mortem conducted on the body of the deceased by Dr David Chumba (PW3 "B") revealed a fracture on the right palatal wall with massive brain hemorrhage. The pathologist

formed that opinion that the deceased had died from a blunt head trauma and brain hemorrhage. The post-mortem report was produced as an exhibit.

3. In his defence the appellant denied being with the deceased on the material day or taking alcohol at the home of PW1 and PW5 stating that he was away at Mumias picking molasses for his employer since he worked as a turnboy.

4. The High Court in its judgment dismissed the appellant's alibi defence noting that it was discounted by the consistent eyewitness evidence of PW1 and PW5 as well as the evidence of PW2 Catherine Kaskon and PW3 "A" Andrew Sulungai Harry, the latter two having been informed by the deceased on what had transpired. The trial court also ruled that the defence of intoxication was not available to the appellant because it was a self-induced intoxication. In the end, the learned Judge ruled that even though the murder weapon was not produced as evidence in court, the failure to do so was not fatal to the charge. The appellant was found guilty of the offence of murder and consequently sentenced to suffer death.

5. The appellant is aggrieved by both the judgment and sentence meted on him by the High Court. He has approached this Court on appeal and his memorandum of appeal raises five grounds of appeal namely that the trial court erred in both law and fact by convicting him without considering the evidence of drunkenness or intoxication under Section 13(4) of the *Penal Code*; that the trial judge erred in law by convicting him of the offence of murder yet malice aforethought was not proved beyond reasonable doubt as required by the law; that the learned Judge failed to take note of the variance between the information of the charge and the evidence tendered; that he was convicted on contradictory evidence of the prosecution witnesses; and, that the trial court erred by rejecting his defence without any cogent reason in contravention of Section 169(1) of the *Criminal Procedure Code*.

6. When the appeal came up for hearing on 18th October, 2022, counsel for the appellant, however, informed the Court that they were abandoning the initial grounds of appeal and would only rely on the supplementary grounds of appeal dated 9th June, 2022. In the supplementary grounds of appeal, the appellant raised one ground of Appeal, namely, that Section 204 of the *Penal Code* is inconsistent with the Constitution and invalid to the extent that it provides for a mandatory death sentence for murder. The appellant consequently prays for his appeal to be allowed and the matter referred back to the trial court for sentence re-hearing.

7. The parties filed their written submissions. The appellant's submissions are dated 17th September, 2021 while those of the respondent are dated 11th October, 2022. In his submissions, Mr. Oduor, counsel for the appellant, urges this Court to rely on the Supreme Court decision in the case of *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR and find that the death penalty as issued by the trial court against his client was illegal and unconstitutional. Counsel urged this Court to remit the file back to the trial court for resentencing in line with the just cited decision. While highlighting his submissions, counsel also urged the Court to take into consideration the age of the appellant and the fact that he was a first offender.

8. On her part, Ms Patricia Kirui for the respondent submitted that the appellant cannot claim the defence of intoxication on appeal yet he denied being drunk or ever taking alcohol. She referred to the decision of this Court in the case of *Bakari Magangha Juma vs. Republic*, Criminal Appeal No. 107 of 2014 and urged us to adopt the threshold set therein with regard to the defence of intoxication. Counsel further relied on Section 13(4) of the *Penal Code* and the case of *Rex vs. Retief* [1940-1943] EA 71 and urged this Court to find that the defence of intoxication was not available to the appellant in the circumstances of this case.

9. Still on the issue of intoxication, counsel for the respondent also submitted that according to the evidence on record, the appellant was not intoxicated and that he knew what he was doing. Further, that the actions of the appellant amounted to malice aforethought as he had sufficient time to cool off his anger.

10. On the question as to whether the prosecution proved malice aforethought, counsel cited the cases of Ernest *Asami Bwire Abanga alias Onyango vs. Republic* (CACRA No. 32 of 1990) and *Said Karisa Kimunzu vs. Republic*, Criminal Appeal No. 266 of 2006 and urged the Court to infer malice based on the circumstances surrounding the commission of the offence.

11. Urging that the contradictions in the prosecution case, if any, were not grave, counsel for the respondent cited the case of *Twehangane Alfred vs. Uganda* (Cr. App. No. 139 of 2001), (2003) UGCA to submit that not all contradictions in the prosecution's case warrant rejection of the evidence and that it is only grave contradictions that can lead to the rejection of the evidence.

12. Finally, in addressing the issue of sentencing, counsel for the respondent urged the Court to consider the aggravating circumstances in the case even when adopting the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR which has been cited by the appellant.

13. This being a first appeal on conviction and sentence by the High Court, the mandate of this Court as the first appellate court is to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. In doing so, we are mindful of the fact that we have not had the opportunity, like the trial court did, of seeing and hearing the witnesses testify in order to gauge their demeanour. Only after carrying out this task can we decide whether to uphold the decision of the trial court or not. See the decision of this Court in *Dickson Mwangi Munene & another v Republic* [2014] eKLR.

14. Having considered the evidence on record as well as the rival submissions by both parties, it is clear that certain aspects of the case were never in dispute. The record shows that the death of the deceased is not disputed. The cause of the deceased's death is also not disputed and remains as is captured in the post-mortem report and the testimony of PW3 who performed the autopsy and concluded that the deceased died from a blunt trauma and brain hemorrhage.

15. Further, we note that counsel for the appellant informed this Court during the hearing of the appeal that they were no longer pursuing the appeal against the conviction and were only challenging the sentence as per the supplementary grounds of appeal. It would then appear to us that the only issue for our determination is whether Section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for mandatory death sentence for murder. We will therefore restrict ourselves to this issue in as far as this appeal is concerned.

16. In *Ahamad Abolfathi Mohammed & another vs. Republic* [2018] eKLR, this Court stated in regard to sentencing by an appellate court as follows:

> "...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."

17. It is therefore clear that an appellant seeking this Court's intervention on sentence must first convince this Court that the trial court either acted on wrong principle, ignored material factors, took into account irrelevant considerations, or that the sentence is manifestly excessive.

18. On illegality or unconstitutionally of the death sentence as submitted by the appellant, we note that at the time when the appellant was sentenced, the Supreme Court was yet to render itself in the now famous *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR on the issue of the mandatory nature of the death sentence under Section 204 of the *Penal Code*. Therefore, in as much as we agree with the appellant that the death sentence for the offence of murder is currently not mandatory, we do not agree that the learned Judge erred when he passed the sentence back then in 2016. We also note that although the Supreme Court found the mandatory nature of the death sentence for the offence of murder not to be in sync with the Constitution, the sentence was not outlawed and is still available where the circumstances of the case call for its imposition. On this we cite the Supreme Court in Francis Karioko Muruatetu (*supra*) thus:

> "(69) Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."

19. Turning to the circumstances of this case, we note that the sentence proceedings read:

> "I have considered that the accused is a first offender. I have also considered the mitigation tendered. A petty argument between the two friends in the environment of a drink of chang'aa led to the unnecessary loss of a life. Murder remains a grave felony. The sentence must always reflect the moral blameworthiness of the accused. In this instance, the law in section 204 of the penal code prescribes mandatory sentence. I accordingly sentence the accused to suffer death."

20. This is a court of law and the appellant's appeal having come up post the Supreme Court decision in Francis Karioko Muruatetu (*supra*), this Court is bound to impose a sentence that is appropriate to the circumstances of the case. It is apparent from the record that the trial Judge did not exercise his discretion in sentencing the appellant because he considered himself bound by the death penalty provided under Section 204 of the *Penal Code*. In the circumstances, we are convinced that the appellant's appeal against the death sentence is merited and calls for this Court's review.

21. What then is the available recourse that this Court can grant to the appellant? Even though the appellant prays that this Court remits the case back to the trial court for sentencing proceedings, it is our view that although remittance of the matter to the trial court is indeed one of the orders this Court can make, this Court has the power to vary the sentence as passed by the trial court. This will avoid the unnecessary outcome of keeping the appellant in the court system longer than is necessary. This Court, we must unequivocally state, has the skills to determine the appropriate sentence for the appellant. Moreover, the issue before us has arisen during a routine appeal and the question is more about the appropriateness of the sentence in light of the jurisprudence that has been developed between the time the appellant was sentenced and the time his appeal was heard. We will therefore proceed to determine and impose an appropriate sentence for the appellant.

22. The purpose of sentencing was well captured by the Supreme Court of India in *Alister Anthony Pereira vs. State of Maharashtra* at paragraphs 70-71 (as cited by this Court in *Thomas Mwambu Wenyi/akn/ke/judgment/keca/2017/756 vs. Republic* [2017] eKLR) where it was stated that:

> "70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just

and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

23. We have reviewed the whole record of appeal and are cognizant of the circumstances of this offence. We have also considered the appellant's mitigation upon being convicted. This is an offence that occurred when two village mates set out to have a drink with the deceased being oblivious that his drinking partner would end his life. Despite being asked not to take the grievous action, the appellant proceeded and hit the deceased after which he ran away leaving the deceased helplessly bleeding.

24. We note from the proceedings that the appellant herein was not admitted to bail or bond. The appellant was therefore in custody for about 5 years before being convicted and sentenced. He has since the sentencing served about 6 years and 8 months. Cumulatively, the appellant has been in custody for approximately 11 years and 8 months. We have taken all these factors into account including the fact that the appellant only hit the deceased once. In the circumstances, we allow the appeal against sentence, set aside the death sentence imposed by the trial court and substitute therewith a sentence of twenty-five (25) years imprisonment to take effect from 26th April, 2011 when the appellant was first arraigned in court and held in custody.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR