Khakali v Republic (Criminal Appeal 26 of 2021)
[2023] KECA 556 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 556 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 26 OF 2021

MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA

MAY 12, 2023

BETWEEN

CHRISPINUS NATEMINYA KHAKALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court at Nairobi delivered on 11th May 2015 by Mutuku, J. in Criminal Case No. 98 of 2013)

JUDGMENT

1. The Appellant was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on September 8, 2013 at about 11pm at Wanyee Estate in Riruta Satellite within Nairobi County, the appellant murdered Rose Makhungu.

2. During trial, the prosecution called 9 witnesses to advance its case.PW1, Sylvia Musimbi used to stay with her aunt, the deceased.

   The appellant was the husband to the deceased. On September 8, 2013 at about 11.00 o'clock both the appellant and deceased went to a social group meeting and returned home at 5.00pm. PW1 had been left with the couple's children aged 1 and 6 years respectively. She made them tea and at 7.00pm the deceased left to a friend's house and returned at about 9.00pm. That is when a quarrel ensued between the two. The appellant was not happy that the deceased had left the house without informing him where she had gone to. On the other hand, the deceased was unhappy with the appellant over allegations that he had impregnated a certain girl by the name Rose. Because of the disagreement, the deceased wanted to sleep on the seat as the appellant wanted to beat her. He pushed her to the kitchen area of the house which was single roomed and divided in the middle with a curtain.

3. The appellant beat the deceased using hands and twice with a metal bar which he picked from the top of a bed. The deceased bled on the left side of her eyes and nose and abdomen. She screamed and

neighbours came in response to the distress call but they could not gain entry into the house as the door was locked from the inside. On realizing that the deceased was dead, the appellant tied a sheet round his neck and attempted to hang himself but PW1 managed to locate the key to the door which she opened and the appellant was rescued from hanging himself. Police later arrived together with the landlord and took the deceased's body and arrested the appellant.

4. PW2, Paul Mitsotso Mukoko testified that he was called by the appellant at around 10.00pm to go and collect his sister's body and take it to the mortuary. He proceeded to the scene whereat he found police, the deceased was lying on her stomach. He turned her over and saw stab wounds on the right side of the abdomen and injuries on the head. A knife was sticking out off the wound on the stomach and there was a metal bar on the side.

5. PW3, Fredrick Isiji Shihenza heard screams and as he rushed to the scene, he met one of the children of the deceased, one Ashley who told him that her father had stabbed her mother to death. At the scene, he found the deceased lying on her stomach and a lot of blood was visible. He and other neighbours agreed to prevent the appellant from leaving the house; the landlord called the police who came and arrested the appellant.

6. PW4, Lawrence Kinyua Muthumi a Government Analyst testified that on October 8, 2013 he received two items from CPL Gideon Mugambi being a knife in a khaki envelope and blood sample indicated to be from the deceased. Upon analysis he concluded that the DNA profile generated from the blood stains on the knife matched the DNA profile developed from the blood sample of the deceased. He prepared a report which he produced in court in evidence.

7. PW5, PC Barnabas Too and PW6, CPL Elizabeth Thuku attached to Riruta Police Station testified that on the material day they were on patrol duties with CPL Wambua and PC driver Njeru when they were informed of the incident. They proceeded to the scene whereupon they found the deceased lying in a pool of blood; the appellant was also present. Besides the body was a blunt kitchen knife with blood stains and a metal rod. The appellant looked confused and when they interrogated him, he said he had murdered his wife. They collected the murder weapons and called the scene of crime personnel who came and took photographs of the scene of crime. The body was taken to the mortuary.

8. PW7, Dr Dorothy Njeru a pathologist conducted the postmortem on the body of the deceased on the September 13, 2013. Externally, the body had multiple stab wounds on the right cheek 5cm long sharp on one edge, on left and right armpit 5cm long sharp on one edge, on left and right thigh sharp on one edge, left side of abdomen 5 cm long sharp on one edge and in umbilical region, the intestines were protruding. Internally, there was bleeding on the right side of the chest, half a litre of blood was collected in the chest cavity, right lung was incised, abdomen had collected 1 litre of blood, small intestines were punctured and blood vessels supplying blood of intestines were punctured. She formed the opinion that the cause of death was abdominal injuries due to penetrating force stabs.

9. PW8, CPL Polycarp Magai attached at CID Dagoretti assisted PW9, CPL Gideon Mugambi to investigate the matter. They took possession of the murder weapons and on September 10, 2013 escorted the appellant to the scene where he narrated what had transpired. A sketch plan of the scene was also drawn and adduced in evidence. They then escorted the appellant to Mathari Mental Hospital on September 16, 2013 and a medical report by Dr Kamunge of even date stated that he was of unstable mind and could not stand trial. He was admitted in the hospital on September 18, 2013 and discharged on September 25, 2013 after being declared fit to stand trial. A second medical report in this respect was adduced in evidence.

10. At the close of the prosecution case, the trial court found that a *prima facie* case had been established and the appellant had a case to answer and was placed on his defence. He gave a sworn testimony and

called no other witness. He stated that the deceased was his wife with whom he had two children. That on September 8, 2013 he and the deceased got into an argument and started quarrelling and fighting using fists. He picked something from the table which he did not know was a knife and stabbed her with it. He also hit her with an iron bar; he was very angry and could not reason. When she fell down unconscious he decided to kill himself. He then became aware that he had done something he had not intended to do. He did not know who rescued him but he recalled finding himself on the floor. He did not attempt to escape and police found him at the scene. It was his further defence that he had not planned to kill the deceased. He indeed regretted killing her as he loved her.

11. The trial court held that the evidence on record portrayed a couple that was at peace with each other until they went to bed. That after the appellant killed the deceased, he tried to commit suicide. Indeed, the police found him looking confused. This was buttressed by the first doctor's report which showed that he was mentally unstable and so he lacked the intention to commit the offence. In view therefore, the court concluded that the ingredients of the offence of murder were not established and accordingly acquitted him of that offence. He was instead convicted for the offence of manslaughter and sentenced to serve 20 years imprisonment.

12. Aggrieved by both the conviction and sentence, the appellant preferred the instant appeal to this Court and has raised four grounds of appeal, namely that: the trial court failed to appreciate the first medical report which indicated that he was suffering from mental challenges, the court misdirected itself as to the meaning of *mens rea*, his plausible defence was not considered; and that the sentence was harsh and excessive.

13. When the matter came up for hearing on November 16, 2023, learned counsel, Mr Ondieki appeared for the appellant while learned prosecution counsel, Mr Omondi appeared for the respondent.

14. Mr Ondiek indicated to the Court that the appellant was only challenging the sentence, thus abandoned appeal against conviction. While pleading for a more lenient sentence, counsel submitted that the appellant suffered from mental challenges and anger and rage led him to kill his wife. To him, this was good ground on which the Court ought to interfere with the sentence. He pleaded that we reduce the sentence to 10 years imprisonment, adding that the appellant was remorseful, had reformed and was the only surviving parent of his household. He placed reliance on the cases of *The Queen Vs CAM*, Supreme Court of Canada 1972 and *Okeno Vs. Republic* [1973] EA, 32.

15. Mr Omondi appeared for the Respondent. Relying on submissions dated November 14, 2022, Mr Omondi on his part submitted that the sentence was lawful as section 205 of the *Penal Code* provides that any person found guilty of manslaughter is liable to imprisonment for life. He relied on the case of *Bernard Kimani Gacheru Vs Republic* (2002 eKLR), for the proposition that an appellate court will not normally interfere with a sentence unless it is demonstrated it is excessive or that material facts were overlooked when the sentence was imposed. In his view, these principles had not been met as the sentence of 20 years imprisonment meted was lenient in the circumstances of the case.

    In any event, there was no evidence that the appellant had reformed, was remorseful or could readapt to the society if he was released. Furthermore, the Supreme Court in the case of *Francis Karioko Muruatetu & Another Vs Republic* (2017) eKLR set out factors that ought to be considered if a more lenient sentence other than the one provided in law were to be meted. He urged us to uphold the sentence.

16. In a quick rebuttal, Mr Ondieki restated that as a first appellate court, we had powers to interfere with a sentence of the trial court. Since the appellant had demonstrated remorse, we should temper justice with mercy. Further that, decided case law had settled on sentences of between 5 and 15 years imprisonment for the offence of manslaughter.

17. We have accordingly considered the circumstances of the case as elucidated in the summarized evidence, the respective submissions and the law. The appellant is pursuing the appeal only against the sentence on the grounds that he is remorseful, had reformed, would easily reintegrate with the society and is the only surviving parent of his household.

18. On sentence, this Court can only interfere with a sentence passed by the trial court if it is satisfied that the trial court erred in the exercise of its discretion. In *Ogolla s/o Owuor v Republic*, (1954) EACA 270 the then East African Court of Appeal stated as thus:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". 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)."

19. Our mandate on sentence was also spelt out in the case of *Wanjema v Republic* (1971) EA 493 where it was held that:

> " [The] Appellate court should not interfere with the discretion which a trial court exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

20. Our first observation is that the sentence meted out by the trial court was a lawful sentence as provided for under Section 205 of the *Penal Code*. We have however noted from the record of appeal that, after parties made respective submissions for, and against, mitigation, the learned trial Judge was to deliver the ruling on sentence on May 12, 2015. Unfortunately, the ruling is not part of the record of appeal, which we think may have been delivered separately and by oversight was not included in the record. The same would have been crucial in informing us what led to the sentence meted on the appellant.

21. Be that as it may, we have concluded that this was a crime of passion. It is clearly demonstrated by the fact that the appellant was angered by the deceased leaving the house at night and returning after an inordinately long period without alerting him yet he was in the house. Although the deceased had a counter accusation against the appellant of a suspected love affair which ended up with a pregnancy, it seems to us he was unable to hold anger against the deceased whom he felt he had authority over and so ought to have informed him that she was stepping out of the house, more so at night. We do not justify the death, but we are alive that matters love are very personal and different people react differently while expressing their passion. The appellant reacted viciously and ended up fatally assaulting the deceased. It is clear that he never intended her death as he even tried to commit suicide upon learning that the deceased had died.

22. Cognizant of this fact, we are minded that, in addition to a sentence serving the deterrence objective, it should also reform the offender after which he would be in a position to reintegrate with the society. The appellant pleaded remorse, reformation and the need to take care of his young children in his mitigation. He urged for clemency. We have to balance the circumstances of the case with the mitigation offered. Additionally, we recognize, as submitted that the deceased left behind very young children who the appellant has expressed willingness to take care of. Certainly, these children require parental care which is now only available from the appellant. We should accord them this opportunity by ensuring that the appellant is not incarcerated for an inordinately too long a period. Thus, weighing the scales of justice on these grounds, we are inclined to temper justice with clemency and accordingly interfere with the sentence.

23. In the end, we allow the appeal on sentence. We set aside the 20 years jail term and substitute it therefor with a sentence of 10 years imprisonment to commence from the date of arrest which is September 8, 2013.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY MAY, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

WELDON KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR