



REPUBLIC OF KENYA



KENYA LAW
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**Munyili v Republic (Criminal Appeal 18 of 2021)
[2023] KECA 531 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 531 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 18 OF 2021
MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA
MAY 12, 2023**

BETWEEN

KASYOKA MUNYILI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court at Nairobi delivered
on 19th July, 2019 by C. Kariuki, J. in Criminal Case No. 73 of 2015)*

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 6, 2015 at Kasengeini Village, Kibwezi District within Makueni County the appellant murdered Agnes Kanza Nyamai.
2. During trial, the prosecution called 6 witnesses. It was their case that, the deceased and the appellant were a wife and husband respectively but had separated due to marital problems. On the fateful day, the deceased was to attend a women's group meeting with PW3, Angelina Wanza Kimilu and PW4, Dorcas Muthini Kanini at one Mueni Ngumbo's home at Katilamuni. On arrival at the venue, the appellant who had been waiting for her pulled her aside and she later emerged oozing blood from the left side of her stomach. The right arm had multiple injuries. The deceased then shouted that "Kasyoka ameniua" meaning that "Kasyoka has killed me." She then fainted and they looked for a motor vehicle to take her to hospital, where she was pronounced dead upon arrival at Kibwezi Hospital. PW1, Kyalo Kasyoki a son of the deceased visited the scene whereupon she was informed by one Nduku Masila that his mother was attacked by his father. The deceased was unfortunately not able to talk to him due to the injuries. He noted blood oozing from the left side of the rib cage and both hands had wounds. He witnessed the post mortem exercise. PW2, Simon Ngovi Mwanzia a cousin of the deceased found the deceased at the scene already injured. He had gone to take his wife to the women group meeting.



- He corroborated the evidence of PW1 and he too, witnessed the post mortem exercise on September 10, 2015.
3. The post mortem was conducted by PW5, Dr Kelvin Maua an Orthopedic Surgeon at Kibwezi Hospital. The body had a deep cut on the medial left arm extending to the bones and blood vessels, laceration on abdomen, intestines were protruding and the right hand had a cut on the palm. There was blood in the chest cavity left side and in the abdominal cavity and spleen was lacerated. He formed the opinion that the cause of death was cardio respiratory arrest secondary to hemorrhage or bleeding from multiple penetrative injuries to the spleen and deep cut upper limb severing upper limb vessel.
 4. PW6, PC Wellington Mutunga was the investigating officer who summed up the prosecution case.
 5. The trial court placed the appellant on his defence and he gave a sworn testimony, in which he denied any involvement in the offence.
 6. At the conclusion of the trial, the court held that the viciousness of the attack without any provocation, prima facie, smacked malice aforethought and the magnitude of the injuries demonstrated that the attacker was forceful. The appellant was found guilty as charge, convicted accordingly and sentenced to 35 years imprisonment.
 7. Dissatisfied with the trial court judgment, he preferred this appeal. He has raised 5 grounds of appeal, all against the sentence stating that, it was harsh, dehumanizing, degrading and excessive thus contravened article 29(d)(e)(f) of the Constitution, it did not take into account that he was an old man and would go beyond the normal life expectancy period contrary to the tenets of articles 19 and 28 of the Constitution and that it ignored he was a family man who needed to go back home to look after his family.
 8. The appeal was heard on a virtual platform on the November 15, 2022. Learned counsel, Mr Kipkemoi Sang appeared for the appellant while Ms Ngalyuka, learned prosecution counsel appeared for the respondent. Both counsel highlighted their filed submissions; those of the appellant were filed on November 11, 2022 and of the respondent on November 10, 2022.
 9. Mr Kipkemoi reiterated that the appellant was pursuing the appeal only against the sentence, thus conceded to the conviction. He submitted that the sentence was excessive as the learned trial Judge failed to take into account the age of the appellant who was 49 years while life expectancy of a male adult in Kenya is 64 years. This meant that the appellant would leave prison at the age 84 years, way beyond the life expectancy period. He relied on the case of Ali Abdalla Mwanza v Republic [2018] eKLR for the proposition that, had the learned Judge taken into account the life expectancy period, a more lenient sentence would have been meted out.
 10. Ms Ngalyuka in rebuttal, urged us not to interfere with the sentence which she considered commensurate with the circumstances of the case. She referred us to the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR adding that the trial court, in meting out a sentence of 35 years imprisonment had regard to the appellant's mitigation which was outweighed by the grave circumstances of the case, in particular that the children of deceased lost their mother.
 11. On sentence, it is important to state that 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 Shersbousky (1912) CCA 28TLR 263*)."

12. 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.”

13. In arriving at the sentence herein, the learned trial judge stated: -

“ The court has gone through the mitigation and the probation report. It notes, the accused age and that he is repentant and remorseful. He says he reformed and a theologian undertaken in prison. He has been in custody since 2015 and is a first offender.

However, he brutally killed his wife in broad daylight without any justification and provocation. He deprived his children their mother. He has to be appropriately sentenced. Thus, he will serve 35 years which will run from the date of arrest.”

14. Our first observation is that the sentence meted out by the trial court was a lawful sentence as provided for under Section 204 of the *Penal Code* together with the sentencing guidelines in the Muruatetu case (supra). The appellant decries that if we uphold the sentence, he will serve way beyond his life expectancy. We have outlined the background to the case, which demonstrates the fact that the deceased met her death in a rather inhuman and cruel manner. The appellant viciously attacked her unprovoked, thus unwarrantedly took away a life and deprived young children of dearly needed mother’s love.
15. 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 and reformation in his mitigation. He urged for clemency. We have to balance the circumstances of the case with the mitigation of the appellant. Weighing the scales of justice on these grounds, we are inclined to exercise our discretion in interfering with the sentence.
16. In the upshot, we allow the appeal on sentence. We set aside the 35 years jail term and substitute it therefor with a sentence of 30 years imprisonment to commence from the date of arrest which is September 6, 2015.

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

ASIKE-MAKHANDIA

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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

