Getanda & 2 others v Republic (Criminal Appeal 279 of 2018)
[2023] KECA 1152 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KECA 1152 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 279 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

SEPTEMBER 27, 2023

BETWEEN

DANIEL GECHURU GETANDA ..... 1ST APPELLANT

JOSEPH MWANGI MANG'ERA ..... 2ND APPELLANT

FRANCIS OGANYO KARANI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (Sitati, J.) dated and delivered on 5th June, 2014 in High Court Criminal Case No. 43 of 2009)

JUDGMENT

1. The Appellants herein, Daniel Gechuru Getanda, Joseph Mwangi Mang'era and Francis Oganyo Karani, were the accused persons in the trial before the High Court in Kisii High Court, Criminal Case No. 43 of 2009. They were charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on the night of 7th/8th February, 2009, at Bogitaa Sub-location in Kisii South District within Nyanza Province, the Appellants jointly murdered RN (Deceased).

2. The Appellants pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the Appellants and sentenced them to death as the law then provided.

3. The Appellants were aggrieved by that decision and have lodged the present appeal. In their Memorandum of Appeal, the Appellants have raised two (2) related grounds of appeal, which are that:

    1. The Learned Judge of the High Court erred in law and in fact by imposing the mandatory death sentence upon the Appellants.

2. It was a misdirection on the part of the Learned Trial Judge by imposing a harsh and excessive sentence taking into account the mitigation on record as well as the circumstances under which the offence was committed.

4. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See *Okeno vs. Republic* [1972] EA 32.

5. At the trial court, the prosecution called a total of nine (9) witnesses. The prosecution evidence reveals that the genesis of this case arose on 7th February, 2009, at 4.00pm when PW8, RB, the alleged girlfriend to the Deceased, visited him in his house and stayed until about 8.00pm. It emerged from the evidence of both PW8 and PW3, that PW8's mother and the Appellants disapproved of the relationship between PW8 and the Deceased. This was because the two were, apparently, cousins and it was considered a taboo for them to date. Consequently, when PW8 went to her sister's house, PW3 informed her mother who, it emerged, called the Appellants.

6. The three Appellants were members of the local Community Policing (and were variously described by witnesses as vigilantes). It was the evidence of PW3 that when the Appellants learnt about the affair between PW8 and the Deceased and their plans to marry, they decided that both of them needed to be "disciplined".

7. The Appellants went to the Deceased's house that same night, took him from his house, assaulted him, then dropped him off at his father's (PW5) compound in an unconscious state, whilst informing PW5 that the Deceased had committed an offence by having a love affair with PW8. They, then, ran away. Shortly thereafter, PW5 and PW6 (the Deceased's mother) confirmed that the Deceased had died and called the Police.

8. In short, this was the evidence that emerged during the trial. We take it as the established facts because on this appeal the Appellants do not contest conviction. Instead, as reproduced above, they only challenge the sentence imposed upon them as both unconstitutional and manifestly excessive.

9. During the plenary hearing of the appeal, Learned Counsel for the Appellants, Ms. Omollo confirmed that the appeal was only with respect to the sentence and that the Appellants did not contest the conviction. She relied entirely on her written submissions.

10. Likewise, Learned Counsel for the Respondent, Mr. Okango, relied entirely on his filed submissions.

11. Consequently, only two matters fall for determination:

    a. First, whether, given our state of jurisprudence as it presently stands, the death penalty imposed on the Appellants in the present case should be set aside; and

    b. Second, if the first question is in the affirmative, what sentence this Court should impose as the appropriate sentence.

12. The Respondent concedes that the death sentence should be set aside given the jurisprudence spawned by the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR. In that case, the Supreme Court held that the mandatory death penalty prescribed in section 204 of the Penal Code for the offence of murder is unconstitutional. Based on this jurisprudence, we agree that the death sentence is one for setting aside. We need not belabor the analysis.

13. We have looked at the record of the trial court as rehashed above. Even though by the time sentence was passed the Muruatetu Case had not been decided, we have noted that the Appellant adequately mitigated. In cases where there is sufficient address on mitigation on record, this Court avoids needlessly congesting the High Court by remitting such cases for re-sentencing. We have noted that the Appellants were first offenders. We have further noted that they mitigated at length. First, they were all first offenders. Second, each of them explained their familial circumstances and the fact that they were the bread winners of their families. This is what they told the Court in mitigation:

    1. 1st appellant's mitigation

       I have got young children whose fate I do not know. I pray that I be given a lenient sentence. That is all.

    2. 2nd appellant's mitigation

       Both my parents are dead. I have a younger sister. My wife also died and left me with one child. They were all depending on me for upkeep. I do not know whether my child goes to school or not. That is all.

    3. 3rd appellant's mitigation

       When I was a free man, I was taking care of my children and some have since dropped out of school since they were depending on me. They are also suffering. That is all.

14. However, we note that this was an unnecessarily violent response to a perceived taboo. The Appellants not only took the law into their hands but rather arrogantly and recklessly inflicted horrific violence on a defenseless young man whose only crime was, apparently, to fall in love (with the wrong woman). They dragged him from his home when he was healthy and hale. They returned him there later - barely a breath from death – and arrogantly announced to his parents, rather insensitively, the (petty) reason for their atavistic actions.

15. There is no doubt that there are weighty aggravating circumstances attending to this disturbing murder. The only sliver of light emanating from the tenebrous circumstances is, perhaps, only that the Appellants belatedly realized the futility of their denials and conceded to the correctness of their conviction.

16. The upshot is that considering all these factors, we hereby allow the appeal against sentence, set aside the death sentence that was imposed by the trial judge and substitute thereto a sentence of imprisonment for twenty (20) years for each Appellant. The custodial sentence will begin running from 17th July 2009, the date each Appellant was arraigned in Court for plea, since all the Appellants were in custody during the pendency of the trial.

17. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 27TH DAY OF SEPTEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR