Kering v Republic (Criminal Appeal 6 of 2015)
[2023] KECA 1098 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1098 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 6 OF 2015

F SICHALE, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 22, 2023

BETWEEN

PETER KIPRONO KERING ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated and delivered on 11th December 2014 in HCCRC No. 113 of 2010)

JUDGMENT

1. When this appeal came up for virtual hearing before us on May 22, 2023, Ms Mwango who was holding brief for Mr Ooga for the appellant indicated to us that they were limiting the appeal to sentence only. Peter Kiprono Kering, the appellant herein, was convicted of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He was sentenced on December 11, 2014 and the penultimate order of the trial court read:

> "I sentence him to forty-five years imprisonment to commence from the date of his conviction, and not eligible for parole until he has served at least twenty-five
>
> (25) years"

2. We will briefly state the facts of the case because the circumstances of a case play a role in the determination of the appropriate sentence. In a nutshell, PW1 Vincent Kibet Rotich and PW2 Samuel Kipkorir Toroitich were having a meal at the local trading centre when the deceased turned up and sought to join them for the meal. They told the deceased that the food was finished. As they were conversing, the appellant also joined them. It was then that the deceased walked away and the appellant followed him. When the deceased asked the appellant why he was following him, the appellant told the deceased he was disturbing him. It was then that the appellant stabbed the deceased with a knife,

killing him on the spot. PW3 Leonard Kipngetich Ruto, a police officer who lived nearby, was called to the scene. He disarmed the appellant, arrested him and took him to the police station. Relevant to this appeal is the statement by PW3 that the appellant appeared sober but was in shock. On his part, PW2 testified that the appellant and the deceased were not so drunk to the extent that they could not know what they were doing. The testimony of PW5 Dr Magari Gikenyi was to the effect that the deceased was stabbed once.

3. During the hearing of this appeal, both parties sought to rely on their written submissions. For the appellant, Ms Mwango reaffirmed this Court's jurisdiction to deal with appeals on sentence. Substantively, counsel's submission was that the trial court erred in overemphasizing the aggravating circumstances in the case thereby failing to consider the mitigating circumstances on record. According to counsel, this error led to the court meting a deterrent sentence which was not merited in the circumstances. Counsel reiterated that the appellant was a remorseful first offender who had been in custody for about 4 years prior to his sentencing and which period was not taken into consideration by the trial court. To buttress these submissions, counsel relied on the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR and the Court of Appeal decision in *Felix Nthiwa Munyao vs Republic*, Nairobi CRA No 187 of 2000.

4. For the respondent, Ms Kisoo submitted that even though the trial Judge indicated in his sentencing notes that he was imposing a "more deterrent sentence", the sentence passed was lenient. Counsel pointed out that the trial court considered all the relevant factors including the mitigating and aggravating factors before handing down the sentence. Counsel therefore urged us to dismiss the appeal and uphold the sentence passed by the trial court.

5. This is being an appeal against sentence, we are cognizant that ordinarily, sentencing is a matter that falls within the trial court's discretion. As an appellate court, we must approach the issue of sentencing with deference to the discretion of the trial court unless the trial court imposed a manifestly excessive sentence, overlooked a material factor or took into consideration irrelevant factors or, it adopted wrong legal principles in arriving at the sentence. These principles were clearly enunciated by this Court in *Bernard Kimani Gacheru vs Republic* [2002] eKLR 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 stated is shown to exist."

6. The above stated guidelines set the basis upon which we will consider the appeal before us. In our view, this appeal turns on the issue as to whether the sentence adhered to the law and established jurisprudence.

7. In resolving the issue, we note that the trial court sentenced the appellant to forty-five years imprisonment with a rider that he would only be eligible for parole after serving at least twenty-five years. Although none of the parties raised issue with the learned Judge's reliance on the concept of parole, we are of the view that the application of the concept brings into question the legality of the

sentence. In Kenya, the concept of parole is provided for under Section 49 of the *Prisons Act* which states that:

> "49. Release on parole
>
> 1. Within three months of the date upon which a prisoner serving a sentence of or exceeding four years is due for release, the Commissioner may allow such prisoner to be absent from prison on parole for such length of time and upon such conditions as the Commissioner may specify.
>
> 2. The Commissioner or an officer in charge may at any time recall a prisoner released on parole.
>
> 3. Any prisoner who fails to return to prison in accordance with the conditions of his parole or when informed that he has been recalled under subsection (2) of this section may be arrested without warrant, and he shall be guilty of an offence and liable to the same punishment as if he had escaped from prison.
>
> 4. A prisoner who, when released on parole, contravenes or fails to comply with the conditions imposed upon him shall be guilty of an offence and liable to imprisonment for a term not exceeding six months."
>
> [Emphasis ours]

8. A plain reading of Section 49(1) of the *Prisons Act* shows that the concept of parole is incorporated as a discretionary power bestowed upon the Commissioner of Prisons and which should only be exercised within three months of the date when a prisoner's incarceration is due to lapse. This is what our law is in so far as the concept of parole is concerned. In our view, the application of the concept of parole as was done in this matter amounts to judicial overreach in that the concept was applied as done in other jurisdictions and not as provided by the laws of Kenya. In our view, courts have no jurisdiction over the power of release on parole or remission of sentence as those are powers reposed on the Commissioner of Prisons by the *Prisons Act*. We are of the view that W Musyoka, J of the High Court was right when he opined in *Solomon Tabu Khalili vs Republic* [2022] eKLR that:

> "Under the *Prisons Act*, Cap 90 Laws of Kenya, there is provision of parole or remission. The *Constitution* also provides for exercise of mercy by way of Presidential clemency, under Article 133 of the *Constitution*. Primarily, a court can only exercise jurisdiction, with respect to sentencing, within the confines of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, upon conviction and through revision, and appeal... However, once a person has been properly convicted and sentenced, whether remission or parole or review of sentence should be done, outside a sentencing hearing, appeal or through a proper constitutional petition, are administrative matters that ought to be dealt with through the Ministry of Interior, which is responsible for prisons and other correctional institutions. The court can only intervene where there is allegation of abuse of process by the Ministry or the relevant agencies within the Ministry."
>
> [Emphasis ours]

9. From the foregoing, we find that the learned Judge erred in invoking the concept of parole in the manner in which he did. The concept was invoked in the manner applied in foreign jurisdictions which not only went against the provisions of Section 49(1) of the *Prisons Act* but also resulted in the court usurping the powers donated to the Commissioner of Prisons by the *Prisons Act*. Thus, on this ground alone, our interference with the sentence of the trial court is warranted.

10. Having found so, we are inclined to assess whether the trial court took into consideration all the relevant provisions and factors when sentencing the appellant. To start with, Section 333(2) of the *Criminal Procedure Code* provides as follows:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

11. Section 137I(2)(a) of the *Criminal Procedure Code* also provides that one of the factors to be taken into account by the court when passing sentence is the period during which the accused person has been in custody.

12. We have perused the sentencing proceedings and ruling part of which we re-produced at the onset of this judgment. From the record, we find no basis upon which to agree with the counsel for the appellant that the learned Judge failed to take into consideration the mitigation put forth by the appellant. However, we note that the learned Judge did not give consideration to the period already spent by the appellant in custody prior to sentencing. He expressly stated that the sentence would run from the date of conviction. This clearly went against the cited provisions of the law as affirmed by this Court in *Ahamad Abolfathi Mohammed & another vs. Republic* [2018] eKLR That being the case, we find another reason in support of the appellant's submission for interference with the sentence imposed by the learned Judge.

13. The remaining issue therefore is the consideration of the appropriate sentence for the appellant. During the pre- sentencing hearing, the appellant's mitigation was that he was remorseful and a first offender. Counsel also submitted that the appellant was drunk as at the time of the offence and did not attempt to escape from the scene. He also submitted that the appellant was a visitor to the locality of the crime and therefore harboured no ill-will towards the deceased. Apart from what was stated by counsel of the appellant, other mitigating factors can be discerned from the record. For instance, on May 17, 2011 the appellant had requested to plead to a lesser charge but on June 16, 2011, the prosecutor informed the trial court that no plea bargain was arrived at as the deceased's family members were not available. The record also shows that when the information was first read to the appellant on November 11, 2010, he told the trial Judge that "ni kweli lakini si kupenda kwangu." Loosely translated to English, the appellant was acknowledging that he had killed the deceased although it was not intentional. On the other hand, the only aggravating factor in this case was that a life was unnecessarily lost when the appellant fatally stabbed the deceased.

14. We have taken all the above stated factors into consideration. We are also cognizant of the fact that the appellant was in custody as from November 4, 2010 until March 10, 2011, approximately 4 months and 6 days, prior to his release on bond. In the circumstances, we agree with the trial Judge that the appellant was deserving of a custodial sentence considering that an innocent life was unnecessarily lost. However, the appellant immediately recognized his mistake, became remorseful and made an offer of plea bargain. Even if the same was not achieved, that cannot derogate his remorse and the

express intention to plea bargain. We also note that even in the opinion of the trial court, the objectives of sentencing would have been achieved were the appellant to be released after 25 years. In the circumstances, and having taken into account the period of 4 months and 6 days spent in remand during the trial, we find a sentence of 20 years imprisonment to be appropriate.

15. The upshot of the foregoing is that the appeal against sentence is hereby allowed. The sentence imposed by the trial court is hereby set aside and substituted with a sentence of 20 years imprisonment from the date of his conviction by the trial court, being December 5, 2014. For avoidance of doubt, the new sentence imposed by this Court has taken into account the period spent by the appellant in custody prior to conviction and is thus compliant with the proviso to Section 333(2) of the *Criminal Procedure Code*.

16. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR