Onware v Republic (Criminal Appeal 116 of 2020)
[2023] KECA 1238 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1238 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 116 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

OCTOBER 6, 2023

BETWEEN

ELIZABETH OWUOR ONWARE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Korir, J.) dated 25th June 2015 in HCCRC No. 91 of 2012)

JUDGMENT

1. The appellant, Elizabeth Owuor Onware was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the information were that on October 29, 2012, at 11.00pm, the appellant murdered Linet Osanya at Glu Cola Estate within Nairobi County.

2. The appellant denied the charge and the hearing ensued. At the tail end of the trial, the appellant was found guilty of the offence of manslaughter and sentenced to 17 years imprisonment. Dissatisfied, the appellant has proffered this first appeal on sentence only. In order to contextualize and appreciate the appeal, there is need to look at the evidence tendered in the trial court albeit in an abridged fashion.

3. PW1, Christopher Ngotho the caretaker in the plot where the incident happened testified that on the night of October 29, 2012, at about 11.00pm whilst in his house in the plot, he heard the appellant knocking at the gate. He opened the gate and as she entered, she was using insulting words like "Malaya, Mbwa, Shetani" but he did not know at first, whom she was quarreling with or referring to. Upon the appellant entering the plot, PW1 went back to his house but then he heard the appellant quarreling with the deceased, whose house was opposite his. He got out of the house and separated the two and escorted the deceased to her house. Some neighbours, Siprosa Auma Otuto (PW5) and a Pastor came out of their houses and talked to the appellant in a bid to dissuade her from violence whereupon the

appellant entered her house. Soon thereafter, PW1 heard noises like falling utensils from her house, which prompted him to lock the appellant's house from outside. However, she forced the door open from inside whilst armed with something in her hand. The deceased equally came out of her house and a fight erupted. However, as he tried to separate them, he heard the deceased yell "Amenidunga, Eliza amenidunga" and realized that the deceased had been stabbed.

4. PW2, Samuel Ochuka's evidence was that while in his house in the same plot, he heard noise at the gate which was being knocked violently and someone shouting "Leo nitamuua huyu malaya kama mama yake". That he got out and found PW1 trying to separate the foes. With the help of other neighbours and his wife, they separated and forced the two back to their respective houses. Later, he heard the deceased shouting "Umenidunga na kisu" and immediately went out and found the deceased lying near the gate.

5. On her part, PW3 Mercy Ochola, also a resident of Glu Cola stated that while in her house, she heard the appellant shouting "Leo utaniona, utanijua leo, nitakuua hata kama wewe hujui nakunywa bhangi utajua leo". The deceased got out of the house and a fight thereafter ensued. Shortly thereafter, she heard the deceased scream that "Eliza Umenidunga".

6. PW4 Peter Osanya Owuor, the father to the deceased, stated that on the material night, he heard noise at around 11:00 p.m. and on going to the scene, he saw the deceased on the ground with a wound on the neck and took her to the clinic and later to Kenyatta National Hospital where she was pronounced dead.

7. PW5 Siprose Auma Otuto, a neighbour of both the deceased and the appellant heard a quarrel outside. She got out and found other neighbours persuading the appellant not to fight. That she went to look for the deceased's father and just after taking a few steps, she heard the deceased screaming, "amenidunga". She turned and noticed that the appellant had stabbed the deceased. She grabbed the knife from her.

8. PW6 Sgt. Nyaboke Clement, was the duty officer at Ruaraka Police Station that night. At around 2.00 a.m, she received a call from a fellow police officer P.C. Mawasa who was on patrol, reporting the incident. She together with PC Martin Mutembei Nyaga and police driver PC Mwangi visited the scene and found PC Mawasa who had arrested and hidden the appellant so that she is not lynched by the crowd. They put the appellant in the police car and took her to the police station where she confessed to killing the deceased but that it was the devil that had pushed her to do so. They later recovered the knife used to stab the deceased from PW5. PW7, PC Martin Mutembei Nyaga's evidence was similar to that of PW5.

9. PW8, Dr. Okemwa Minda Hamed conducted an autopsy on the deceased. It was his evidence that the cause of death was a stab wound on the right neck.

10. PW9 Anne Wangechi Nderitu, a Government Analyst stated that on 1st and November 2, 2012, she received samples from PC Martin Nyaga (PW7) which included a knife in a khaki envelope, blood sample of the deceased and blood sample of the appellant and she was required to do a DNA profile on the blood samples and the blood on the knife. She conducted the required investigations and it was her evidence that they generated DNA profile from both samples of blood but could not do any matching.

11. PW10 CI Nahashon Mutua, the OCS Ruaraka Police Station stated that the appellant made a statement under inquiry. That as per the statement, the appellant had come home on October 29, 2012 at night and was confronted by a neighbour with whom they had an argument and that during the argument, a fight broke out and the deceased had a metal bar intending to hit her and was restrained

by neighbours. That the deceased dashed back to her house and came with a kitchen knife and wanted to stab her whereupon she grabbed it and stabbed her.

12. Upon considering the evidence by the prosecution, the court found that the prosecution had made out a case against the appellant and placed her on her defence. She elected to give an unsworn statement and called no witnesses. It was her defence that when she arrived at the plot at around 11:30p.m, PW1 opened the gate for her. The deceased then got out of her house and asked her why she had left her luggage at the gate and started abusing her while holding her braids. The deceased ran outside the gate and her father came and started assaulting her only to be rescued by the neighbours who hid her for about 5 minutes before the police arrived and took her to the police station and charged her with the offence.

13. The trial court after evaluating the evidence found the appellant guilty of manslaughter contrary to section 202 of the *Penal Code* on account of want of malice aforethought for which she was convicted and sentenced 17 years imprisonment.

14. Being aggrieved by the sentence, the appellant has approached this court on first appeal. In an undated memorandum of appeal, the appellant complains that she was sentenced to 17 years imprisonment whereas she was a first offender, an orphan and a single mother with a young child to whom she was the sole breadwinner. She prayed that this Court considers the time she had spent in custody and give her a second chance to be the mother to her child, fend for the family and build the nation.

15. The appeal was heard on June 7, 2023 on a virtual platform. The appellant was represented by Mr. Kogi, learned counsel whereas the respondent was represented by Mr. Omondi, learned prosecution counsel. Both counsel had filed written submissions and wished to rely on them subject to limited oral highlights.

16. It was Mr. Kogi's submission that the appellant was remorseful for the crime she had committed which according to her at the time of commission, her decision-making skills were poor and her reasoning blurred with anger which she will forever regret. That while in prison, she had learned important lessons and life skills, which had changed her ways and perspectives in life. It was her further submission that since her imprisonment, her only child had suffered psychological, emotional and social torture for lack of parental love and care, which had forced her to drop out of school. Lastly, that she had been in custody for ten years, an ample time that has enabled her to reflect on the effects and consequences of her actions.

17. Counsel further submitted that in weighing the scales of justice, the court should tamper it with clemency and find that the sentence meted out on the appellant was manifestly excessive. That the Court should borrow a leaf from the recent decision of this Court in Criminal Appeal No. 26 of 2022, Chrispinus Kakai vs. Republic where this Court reduced a sentence of 20 years to 10 years. The appellant invited the Court to consider that the trial court while determining the sentence, did not factor in the probation officer's report and had it been done, the sentence that was meted out might as well have been different.

18. On his part, Mr. Omondi submitted that he was not opposed to the appeal on sentence. However, he was of the view that the sentence meted out was not manifestly excessive. It also came out in evidence that the appellant and the deceased were close friends who at a time lived together and that the differences between them were to be resolved by the mother of the deceased. Unfortunately, this did not come to pass and that is what led to the fight which resulted in the unfortunate death of the deceased. Further, noting that the appellant had been in custody for close to 11 years, the respondent suggested that the sentence we should impose should be for the period so far served by the appellant.

19. The main issue in this appeal is sentence. The appellant complained that the sentence of 17 years imposed was manifestly harsh and excessive which ought to be reduced. The respondent concedes that much and offers that the same be reduced to the term already served which is 10 years.

20. Sentencing is essentially an exercise in discretion and as a principle, this Court will normally not interfere with the exercise of such discretion by the trial court unless it is demonstrated that the trial court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or failed to consider relevant factors or on the whole that the sentence is plainly and manifestly excessive. In *Bernard Kimani Gacheru vs. Republic* [2002] eKLR this Court stated thus:

> " 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."

We remind ourselves that under section 361 (1) (a) of the *Criminal Procedure Code*, severity of sentence is a question of fact, not one of law. Absent demonstration that the trial court erred on principle as outlined above, we will have no basis for interfering with the sentence.

21. The *Sentencing Policy Guidelines* require the court in sentencing an offender to a custodial sentence, to take into account both aggravating and mitigating factors. The aggravating factors include the use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, the offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender and the victim in the commission of the offence, and whether the offender is remorseful.

22. Section 354 of the *Criminal Procedure Code* provides for the powers of this Court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under subsection 3(b), "in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence".

23. In this appeal, the appellant was a first offender, remorseful and the deceased also played a significant role that led to the commission of the offence. There is uncontroverted evidence of a good relationship between the appellant and the deceased before the fatal fight and at one point, they had even lived together at the deceased parents' house. The appellant has a minor child who was wholly dependent on her and now needs her more than before given that she is a girl and of teenage age who should benefit from her counsel. The fact that there was a probation report that the trial court did not revert to, has not been controverted.

24. We also note that the appellant has been in prison for slightly over 10 years. The trial court was of the view that the long custodial sentence was necessary so as to enable her to undergo rehabilitation. From the record, it is apparent that the appellant has undergone the said rehabilitation. We also note that the respondent conceded to the appeal and even suggested the sentence that we should impose should we allow the appeal.

25. In imposing the sentence, the trial court limited its consideration to the aspect of rehabilitation. However, that is not the only consideration under the sentencing guidelines. We do not know whether, if the court had considered the other factors that we have already alluded to above and particularly the probation report, it would have come to the same conclusion on the sentence. The principle is that the trial court is under a duty to consider all matters in favour of and against an accused person. See *Felix Nthiwa Munyao vs. Republic*, Cr. App. No. 187 of 2000, Gideon Kenga Maitha vs. Republic, Cr. App. No. 35 of 1997 and *Kenneth Kimani Kamunyu vs. Republic* [2006] eKLR.

26. Accordingly, we are satisfied that the exercise of discretion by the trial court was vitiated by the failure to consider the facts and circumstances of the case in their entirety before settling on the sentence. In the premises, we allow the appeal against sentence, set aside the sentence of 17 years imprisonment and substitute therefore with sentence of the term so far served. Accordingly, the appeal on conviction fails and is dismissed, whereas, the appeal on sentence succeeds to the extent that the appellant is sentenced to the term so far served. She shall therefore forthwith be set free unless otherwise lawfully held.

Dated and delivered at Nairobi this 6th day of October, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR