Kathambi v Republic (Criminal Appeal 48 of 2020)
[2022] KECA 1130 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1130 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 48 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 21, 2022

BETWEEN

DOREEN KATHAMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Voi of Hon. Farah Amin J. arising from the judgment delivered on 16th October 2019 in Criminal Case (Murder) No. 3 of 2017)

JUDGMENT

1. On February 18, 2017, Maurice Otieno (PW1), who was at Njukini location, saw a burning kiosk, and upon rushing to the kiosk, he saw Zakayo Theuri Muthuri (hereinafter "the deceased") who was known to him in flames outside the kiosk, crying out in Kiswahili that "the woman has burnt me" and "I have been burnt by my wife. Will I get well?". He also saw Doreen Kathambi, the deceased's wife and Appellant herein, who was also known to him, at the door of the kiosk, and heard her tell the deceased in Kiswahili "Don't say you are dying, I could have killed you completely". He saw a smoking stove between the Appellant and deceased, and he and others threw soil on the deceased to stop the fire and removed pieces of clothing that were stuck to his body. On the same day, Sgt Adam S. Jarso (PW3), was on patrol and he heard screams that someone was burning and saw people running. When he went to the scene of the screams, he saw a person who had been burnt sitting on the ground, and a stove on the ground that appeared to have been thrown at the person. He also saw the Appellant standing at the door of the kiosk, and took her to the AP post to save her from being lynched, and arranged for the deceased to be taken to hospital.

2. Corporal Geoffrey Kaunda (PW5) from CID Taveta was instructed to visit Njukini AP Post on February 18, 2017 with other officers, upon a report that members of the public wanted to invade the AP Post. Upon visiting the scene of the incident and interviewing Sgt Adam S. Jarso, members of the

public and the Appellant, he established that there was an overnight dispute between the Appellant and the deceased that spilled over to the morning, which resulted in the deceased being burnt. However, that the Appellant stated that the deceased hit her with blows as a result of which the stove that she was holding fell down and burst into flames, but according to the members of the public at the scene, the Appellant poured hot water on the deceased before throwing a stove at him. However, none of the members of the public saw the Appellant throwing the stove at the deceased. PW5 found the stove and deceased's burnt clothes at the scene of the incident and took them as exhibits. He established from the deceased, who at the time was being treated at Njukini Clinic, that the Appellant indeed poured hot water on him and then threw a burning stove at him. PW5 stated that the deceased was later transferred to Taveta Sub-County Hospital and then to KCMC Hospital in Tanzania, where he died on February 23, 2017. PW5 was present when the post mortem was done on the deceased.

3. A similar account was given by Cpl Elijah Mongare Orango of Chumvini Police Base (PW6) who received a report of the incident on 18th February, 2017 and went to the AP post at Njukini where he found the Appellant, who had been arrested, and who admitted to having burnt the deceased. He also went to Njukini Health Centre where the deceased was receiving medical attention, and the deceased told PW6 that the Appellant who was his wife had burnt him with a stove after a domestic dispute. PW6 was present when PW5 took the stove and burnt clothes from the scene of the incident. Photographs taken of the deceased when he was in hospital were processed by PC Shem Asher (PW4), a forensic crime scene investigator, who prepared a report and certificate on the same.

4. On receiving the news that the Appellant and deceased had fought and one of them had been arrested, the deceased's father, Joseph Muthuri (PW2), travelled from Meru to Njukini on February 18, 2017 and interviewed the Appellant at the police station on February 19, 2017, who told him that she had a fight with the deceased on February 18, 2017 and hit the deceased with a stove but did not know that the deceased would be that badly injured. PW2 went to the KCMC hospital on February 20, 2017 and found the deceased in ICU, not able to talk and bandaged all over the body, and the deceased later died on February 23, 2017. PW2 was present when a post mortem was conducted on the deceased on February 26, 2017.

5. The post-mortem was conducted by Dr Mohammed Machi (PW7), and his report was that an external examination of the deceased revealed that he had 60% third degree burns on the trunk, whole left upper arm, the frontal aspect of the right limb, the frontal aspect of the right upper lime, the frontal part of both thighs, scrotal area, lower aspect of the face and neck region. The internal examination revealed that the trachea and lungs of the deceased were swollen and bluish in colour meaning there was lack of oxygen. His opinion was that the cause of death was respiratory failure with hypovolemic shock resulting from the loss of fluids in the body leading to collapse of the cardiovascular system and lack of air to the lungs arising from the extensive burns to the body.

6. The Appellant was consequently charged with the murder of the deceased on February 23, 2017, after unlawfully assaulting the deceased on 18th February 2017 at around 9.00 am at Njukini town in Taveta sub county within Taita Taveta County. The Appellant entered a plea of not guilty to the charge, and a trial was conducted by the High Court, which was partly heard by Kamau J. and completed by Farah Amin J. The prosecution called the seven witnesses who narrated the facts set out hereinabove, and on closing its case, the Appellant was put on her defence, whereupon she gave unsworn evidence and did not to call any witness. In her defence, the Appellant stated that on February 18, 2016 the deceased left her at the shop and went home to change his clothes, which is when she heard the deceased scream, and on running to him found him on fire, which she tried to put out by pouring water on him. She denied burning the deceased and said she loved him.

7. The Appellant was convicted of the charge of murder, and sentenced to imprisonment for a period of 15 years by the High Court (Farah Amin J.). in a judgment delivered on October 16, 2019. The learned Judge found that the deceased met his death as a result of injuries sustained after being set on fire and that the evidence by the prosecution was clear and cogent to the effect that Appellant was in the vicinity when the deceased was set on fire; she did not demonstrate any inclination to assist the deceased and she was heard threatening the deceased. It was her finding that though circumstantial in nature, the prosecution evidence taken together did provide a coherent version of events that the Appellant assaulted the deceased with a flammable liquid and caused the injuries leading to the death of the deceased, and had the intention to cause grievous harm and to kill the deceased by setting the deceased alight.

8. Being dissatisfied with the said conviction and sentence, the Appellant proffered this appeal by way of a Memorandum of Appeal dated February 12, 2020 and filed on February 13, 2020. The Appellant urges that the trial judge erred in law and fact by sentencing the Appellant to fifteen (15) years sentence which is harsh and punitive; by not considering the Appellant's mitigation and the circumstances surrounding the offence; by not considering and analysing the cause of death of the deceased; and by not realizing that the evidence adduced before the Court was not corroborated.

9. The appeal was canvassed during a virtual hearing held on June 28, 2022 in which the Appellant was present. Learned counsel, Mr. Kihara Mathenge, appeared for the Appellant, and highlighted his written submissions dated October 12, 2021, while learned prosecution counsel, Mr. Kirui holding brief for Mr. Allen Mulama appeared for the Respondent, and relied on Mr. Mulama's written submissions dated October 10, 2021. As this is a first appeal, the duties of this Court are set out in the case of *Okeno vs. Republic* [1972] EA 32 as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R*. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424."

10. The two issues arising from the grounds set out in the Appellant's Memorandum of Appeal are firstly, whether the Appellant's conviction was based on sufficient evidence that proved the ingredients of the offence of murder to the requisite standard, and secondly, if so, whether the sentence imposed on the Appellant was excessive. On the first issue, the Appellant's counsel submitted that there were contradictions in the evidence of PW1 to PW7 because on the one hand the cause of death is said to be severe burns whereas on the other hand it is said to be respiratory failure. It was therefore the argument of counsel that the cause of death has not been established. It was also argued by counsel that there was no evidence that the Appellant caused the burns and the death of the deceased, and there was no direct evidence that placed the Appellant at the scene of crime. Reliance was placed on the case of *Joseph Manoti Omwancha vs R* (2021) eKLR for the position that the discrepancies and inconsistencies in the circumstantial evidence did not warrant a conviction, and that the prosecution did not prove its case beyond reasonable doubt.

11. The prosecution counsel on his part submitted that the conviction by the High Court was safe as it was clear from the evidence of PW7 and post mortem report produced in the High Court that the deceased suffered extensive burns that led to respiratory failure as a result of lack of supply of oxygen to the lungs and PW4 produced photographs of the deceased while hospitalized that showed the extent of his injuries. Further, that while none of the prosecution witnesses saw the Appellant actually committing the offence, the circumstantial evidence coupled with the dying declaration of the deceased pointed towards the guilt of the deceased. In particular, that the Appellant was found standing several meters from where the deceased was burning and the scene of the offence was outside their rental premises, and it was the evidence of PW1 that when they arrived at the scene the Appellant was not making any effort to assist the deceased and he saw a stove near the deceased; PW5's assessment was that the Appellant had thrown the stove at the deceased and the stove had not fallen down while PW6 confirmed that he had spoken to the deceased while he was hospitalized and the deceased indicated that he had quarrelled with the Appellant who threw the stove at him, which amounted to a dying declaration under section 33 of the *Evidence Act*.

12. The key elements of the offence of murder as set out in section 203 of the *Penal Code* are the causing of death of another person by an unlawful act or omission, and with malice aforethought. The fact of the death of the deceased is not disputed, and both PW2 and PW5 were present when a post- mortem was conducted on the deceased. The Appellant has submitted that there was contradictory evidence on the cause of death, based on the evidence of PW2 that he was told by the doctor that the deceased died from inhaling smoke from the stove that damaged his lungs, and the evidence of PW5 that the deceased died from severe burns. Quite apart from that evidence of PW2 being hearsay evidence, it is notable that PW7, who gave evidence that he undertook a post mortem examination of the deceased, and produced the post-mortem report on the deceased, clearly clarified and identified the cause of death as respiratory failure and hypovolemic shock arising from the extensive burns sustained by the deceased. In our view, there was no contradiction on the cause of death from the evidence by the various witnesses as the primary and proximate cause of death was the serious burns suffered by the deceased, without which he would not have suffered the secondary respiratory failure and hypovolemic shock.

13. It is indeed the case as noted by the High Court, that the evidence of the Appellant's participation and contribution to the said cause of death was largely circumstantial. The threshold for basing a conviction on circumstantial evidence was stated in *R vs Kipkering Arap Koske* [1949] 16 EACA 135 and *Sawe vs Rep* [2003] KLR 364 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In *Abanga alias Onyango vs Republic* Cr. Appeal No. 32 of 1990 (UR) the Court of Appeal set out three tests to be applied to determine whether the circumstantial evidence relied on by the prosecution can lead to a conclusion that it is the accused who committed the offence under consideration. The said tests are:

    i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

    ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

    iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

14. The totality of the evidence adduced PW1, PW2, PW3, PW5 and PW6 in this regard was that the deceased was found burning; the Appellant was at the scene at the time observing the deceased burning; and the Appellant made remarks to the effect that she was the one who burnt the deceased,

and specifically admitted this fact to PW2, PW5 and PW6. The Supreme Court of Kenya in the case of *Republic vs Ahmad Abolfathi Mohammed & another* [2019] eKLR clearly and exhaustively explained out the distinction between an admission and confession, being that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.

15. The Supreme Court proceeded to hold as follows as regards admissibility of admissions:

> "(48) We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects' commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material (sic), ideally the Police are required to invoke the provisions of Section 25A of the *Evidence Act*. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A (1) of the *Evidence Act*, are admissible."

16. In the present appeal there was corroboration of the admission by the Appellant, not only by the evidence of various witnesses as to the admission, but also by the deceased's statements before he died to the effect that the Appellant had burnt him by throwing a burning stove at him, which were made to PW1, PW5 and PW6. The evidence of the statements made by the deceased were in our view admissible, as they did qualify as a dying declaration by the deceased, and were an exception to the rule against hearsay under section 33 of the *Evidence Act*. The conditions required to be fulfilled for a statement to be admissible as a dying declaration under the section is that the maker of the statement must be dead; the statement must relate to the circumstances of the death or transaction resulting in the death; and the cause of death must be in question in the proceedings; which conditions were all demonstrated to exist in the present appeal. Having been admitted as credible and reliable evidence, the said dying declaration was cogent direct evidence that corroborated the circumstantial evidence by the witnesses as to the Appellant's participation in the death of the deceased. The actus reus for the offence of murder was therefore proved beyond reasonable doubt.

17. The last question we need to address is whether the element of malice aforethought, which is the mens rea for murder, was proved beyond reasonable doubt. Under section 206 of the *Penal Code*, malice aforethought can be proved by evidence of various circumstances including the intention to cause death to another, the intention to cause grievous harm to another, knowledge that an act would result in death or grievous harm accompanied with indifference whether death occurs or not. In the present appeal, the evidence did demonstrate the element of an intention to harm the deceased and indifference on the part of the Appellant, particularly from the statement she made in the presence of PW1 "Don't say you are dying, I could have killed you completely". The High Court therefore properly found that there was requisite intention to cause harm, from her act of throwing a stove at the deceased, and her lamentations that she did not succeed in killing him

18. The Appellant has urged that the High Court failed to consider the surrounding circumstances of the offence. The presence or existence of extenuating circumstances at the time of commission of a crime are material to the proof of malice aforethought, as they can either absolve an accused person of the crime or reduce it to manslaughter, as they reduce the blameworthiness of an accused person. The Court of Appeal, in its decisions in *Safari Galgalo Komoro vs Republic* [2007] eKLR and *Obuon vs Republic* [2003] 1 EA 209 held that where there is evidence, whether from the side of the prosecution or the defence, of intoxication, provocation or self- defence, then it is the duty of a trial judge to direct himself or herself on that evidence and that failure to do so would normally result in a conviction for murder being set aside and substituted with one for manslaughter. To this extent, the High Court did err in failing to consider evidence of extenuating circumstances at the time of commission of the crime, on account of the Appellant not put forwarding any positive defence.

19. On whether there was cogent evidence of any extenuating circumstances, a number of the prosecution witnesses and the deceased in his dying declaration all stated that the offence arose in the course of a domestic dispute between the Appellant and deceased person. According to PW2, the Appellant told him they had a fight with the deceased on the day of the incident, and that she hit the deceased with a stove but did not know that he would be seriously injured. PW5 also testified as follows on the circumstances leading to the offence:

> " I interrogated the accused person when she told me that they argued about food and money she did not cook food for the deceased. The argument lasted till morning. When the deceased woke up, there was a physical confrontation according to the accused person the deceased hit her with blows and the stove she had fell down. The stove then burst into flames. Her information contradicted what I had been told because people told me that she poured water on the deceased before she threw the stove at him. The deceased had ased her to boil water for him for bathing. The people who I spoke to refused to record their statements .."

20. PW5 and PW6 also testified that the deceased told them that he had a domestic dispute with the Appellant before she threw the stove at him. Indeed the evidence of a dispute between the Appellant and deceased can also be deduced from the remarks heard by PW1 that were made by the Appellant immediately after the ofence that "Don't say you are dying, I could have killed you completely". This was a statement indicative of a desire to punish and clearly made in anger and jest, and also negated a desire on the part of the Appellant to kill the deceased.

21. This evidence in our view clearly indicates that the offence was committed at the spur of the moment in the grip of passion, pain and anger, and was not premeditated, and mitigated the malice aforethought for murder. It is thus our finding that the High Court erred in failing to consider this extenuating circumstances, and the conviction for murder was erroneous, an ought to have been substituted with the offence of manslaughter, which is the unlawful killing without malice aforethought, under section 202 and 205 of the *Penal Code*.

22. On the second issue of whether the sentence was excessive, we note that the Appellant's counsel submitted largely on the issue of the Appellant's conviction, which he urged should be set aside and the Appellant set at liberty. The said counsel did not make any submissions on the sentence, which were instead made by the prosecution counsel who urged us, while relying on the decision by the Supreme Court in *Francis Karioki Muruatetu & another vs R & 5 others*, Petition Nos 15 and 16 of 2015, to further review the sentence downwards. The reasons put forward by the prosecution counsel are that even though the Appellant did not raise the defence of provocation, from the evidence on record she appeared to have been a victim of gender based violence; and for the wellbeing and best interests of the two minor children of the deceased and Appellant.

23. We have considered the concession by the prosecution counsel on reduction of sentence, and note that the counsel did acknowledge that the High Court did exercise discretion in sentencing and considered the mitigating factors, including the best interests of the Appellant's minor children. The learned High Court Judge, delivered a sentencing ruling on January 30, 2020, in which she took into account the seriousness of the offence, the Appellant's mitigation that she did not intend to kill the deceased and plea for leniency so that she could be reunited with her children, and a pre-sentencing report prepared by the Probation Service that had recommended that the Appellant be placed on probation under supervision. The learned Judge thereupon found as follows:

> "13. In the circumstances the only sentence that is appropriate is a custodial sentence. Although this crime is grievous, in light of the needs of the children, this court does not think a capital sentence is appropriate. Hopefully, in the future the offender will be able to demonstrate that she's able to care for the children without putting them at risk, however in the mean time they must be given the chance to grow up without being placed in harm again.
>
> 14. Therefore, the custodial sentence that this court deems most appropriate is that the offender be sentenced to be imprisoned for a term of 15 years. If possible she should be incarcerated at a place which is close to where her children will be living to make it easier for them to visit her should they wish to do so."

24. We also note that the learned Judge curiously then proceeded to award parental responsibility of the Appellant's children to the paternal grandparents, pending any applications to the Children's Court.

25. The principle of the best interests of the child or a child's right to family life is a valid legal consideration when imposing sentence on a parent who is in conflict with the law. The Sentencing Guidelines recognise that the provisions of Article 53(2) of *the Constitution*, section 4(2) of the *Children Act*, Article 3 of the *Convention on the Rights of the Child*, and Rule 61 of the *United Nations Rules for the Treatment of Women Prisoners and Non- Custodial Measures for Women Offenders*, call upon courts to take into account the care-giving responsibilities of women when sentencing them, and that in determining the appropriate sentence for a female offender, the best interest of the children becomes an important consideration. Guidelines 20.39 and 20.40 provide that where a court is satisfied that an offender is pregnant or lactating, it should consider imposing a non- custodial sentence unless the seriousness of the offence and other factors demand a custodial sentence for justice to be served, and the caretaking responsibilities, background and family ties of female offenders should be taken into account during sentencing.

26. The provisions of Article 30(1) of the *African Charter on the Rights and Welfare of the Child* which address the rights of "Children of Imprisoned Mothers" are also instructive in this regard:

> "States Parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
>
> a. ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
>
> b. establish and promote measures alternative to institutional confinement for the treatment of such mothers;
>
> c. establish special alternative institutions for holding such mothers;
>
> d. ensure that a mother shall not be imprisoned with her child;

e. ensure that a death sentence shall not be imposed on such mothers;

f. the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation." .

27. A comparative analysis of various laws and judicial approaches on the consideration of the best interests of children during sentencing of their caregivers was undertaken by Hayli Millar and Yvon Dandurand in their article on "*The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities*" in Criminal Law Forum (2018), Volume 29 Number 2 at pages 227-277. The two authors observe as follows at page 267:

> "...there is an emerging international recognition that a dependent child has a right to have his or her rights and interests specifically and independently considered by a sentencing court when their parent, especially a sole or primary caregiver, is being sentenced to prison precisely because this decision is likely to adversely affect their immediate and long-term wellbeing. The interpretation represents a subtle jurisprudential shift' in criminal law from state and adult centric sentencing practices where the circumstances of the children were viewed only as an extension of their parents' personal circumstances. Certainly, taking a child's rights into account is a complex matter for criminal law because it requires sentencing courts to take third party and indirect and anticipatory victim harms into account. This is arguably why the various international bodies that have supported this notion have also been careful to stress that the impact of a sentence on the offender's dependent child is an important but not determinative factor to be considered..."

28. Likewise in the decision by the South African Constitutional Court in *S vs M* (CCT 53/06) [2007] ZACC 18, it was held as follows in allowing an appeal on sentence by a primary caregiver:

> "35. Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm"

29. The South African Court proposed guidelines in that case to be followed by a sentencing Court in this regard. The English Court of Appeal also held in *R vs Petherick* [2012] EWCA Crim 2214, at paragraph 24 thereof, that in a case where custody cannot proportionately be avoided, the effect on children or other family members might afford grounds for mitigating the length of sentence.

30. Coming back to the present appeal, the High Court in its sentencing ruling dated and delivered on January 30, 2020 observed as follows at paragraph 8:

> "In mitigation counsel appearing for the perpetrator asked the Court to be lenient and allow the perpetrator to be reunited with the children. The children officer in Maua was ordered to prepare a report on the best interests of the children. What was filed instead was a social inquiry report suggesting that the state should in some way finance the maternal grandmother having custody of the children. The children in question were also the children of the deceased. They have suffered at bereavement and by all accounts were witness to

the act and the suffering experienced by their father. That suffering was caused by the perpetrator."

31. The High Court further held as follows at paragraph 10 of the ruling:-

> " In addition to taking into account the seriousness of the offence, the Court must take into account the needs of the children. This is a case where the perpetrator has demonstrated herself to have no control over her temper irrespective of the consequences. Neither the probation officer not the author of the social inquiry report have given any thought whatsoever to the fact that the children were in the facility of the offence when it occurred. They would have stopped what happened. In addition, they were placed at great risk of themselves being burnt alive. The offender did not allow considerations of the safety of the children to deflect her from what she did. In the circumstances this court cannot discount the fact that there is a real possibility that the children will be at risk in hard careful stop what happens when they become abandoned like their father? She cannot be trusted."

32. Lastly at paragraph 15:

> " 15. The children have a right to know and form a relationship with both the maternal and paternal family. They have been prevented from doing so by the maternal family. This is in contrast to the paternal family who attempted to maintain a relationship with the offender throughout. The maternal family cannot provide for their needs without assistance. The paternal family would like to take care of them. The social inquiry report completely ignores the paternal family."

33. Upon perusal of the record, we note that the learned Judge, after convicting the Appellant, ordered that both a Children Officer's report and probation report be prepared. The Probation Service subsequently filed a probation report in the High Court on November 19, 2019. There is no record of a children's officer's report having been filed. We also note that the probation report did not make any recommendations that the state should finance the Appellant's minor children's maternal grandmother. The findings as regards the care of the minor children seemed of have been based on the probation report that the views of the deceased's family were that they be granted custody of the minor children, who were then in the custody of the maternal grandmother; and on the evidence by PW2, who was the minor children's paternal grandfather, that the maternal grandmother had refused to give them the deceased's children.

34. In our view, the High Court appears to have been disproportionately influenced by the Appellant's culpability, and failed as a result to undertake an independent examination of the impact on, and requirements of the Appellant's and deceased's minor children, in reaching the decision on the appropriate sentence. It is also notable that the learned Judge made various assumptions, findings and conclusions in this regard on the care and best interests of the Appellant's and deceased's two minor children, who were at the time aged three and seven years old, which were not supported by the evidence adduced during the trial or the probation report presented to the High Court. The High Court also failed to consider and the legal principles detailed in the foregoing on the sentencing of female offenders who are the sole and primary caregivers of minor children. Lastly, we have already found that the High Court failed to consider the extenuating and mitigating circumstances of the offence, which also be relevant in determining the appropriate sentence for the offence of manslaughter.

35. On the whole, we are of the view that the aggravating circumstances of the offence, in terms of the serious injuries and pain suffered by the deceased, did justify the imposing a custodial

sentence. However, we find that the sentence of fifteen (15) years imprisonment was excessive and not proportionate, after considering and balancing all the relevant factors that ought to have been considered by the High Court, and while also taking into account the deterrent, preventive, reformative and retributive objectives of punishment. We also note that that the proper forum to determine the issue of parental responsibility is the Children's Court, and this is an issue governed by specific laws and procedures, and which was not canvassed during the trial. What the High Court was required to do in the circumstances was to inquire into, and direct on the living and care arrangements for the minor children of the Appellant and deceased.

36. We accordingly allow this appeal to the extent that we set aside the conviction for murder under section 203 as read with section 204 of the Penal Code and in place thereof substitute a conviction for manslaughter under section 202 as read with section 205 of the *Penal Code*. We also set aside the sentence of imprisonment of fifteen (15) years, and substitute therefor a sentence of seven (7) years' imprisonment for the conviction for manslaughter, which term of imprisonment shall run from the date of the Appellant's conviction by the High Court.

37. We in addition, set aside the orders of the High Court awarding parental responsibility of the Appellant's and deceased's minor children to the paternal grandparents, and remit the issue of the living arrangements and care of the Appellant's minor children back to the High Court at Voi, pursuant to the provisions of section 361(2) of the *Criminal Procedure Code*. The High Court shall give the necessary and appropriate directions and orders as regards the minor children's living arrangements and care during the period of the Appellant's incarceration. The Deputy Registrar of this Court shall accordingly send a copy of this judgment forthwith to the High Court at Voi.

38. Lastly, this judgment is delivered in accordance with Rule 34(3) of the *Court of Appeal Rules* of 2022 as Gatembu JA refused to sign.

39. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR