



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KARANJA & KIAGE, J.J.A.)

CRIMINAL APPEAL NO. 76 OF 2015

BETWEEN

GERALD MWENDA KAILEMIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the High Court of Kenya at Meru, (R. P. V. Wendoh, J.) dated, signed and delivered on 25th September 2015

in

HCCRC NO. 79 OF 2008)

JUDGMENT OF THE COURT

1. The appellant was charged before the trial Court with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars were that the appellant, on 9th December 2008, at Muthara location, Kitharene Sub-location, in Tigania District, within Eastern Province murdered Josphat Mutuma (deceased).
2. In establishing their case, the prosecution called 9 witnesses. **PW1, Maureen Gatwiri Kobia**, was a neighbour to the deceased, who told the court that on the material day, at about 7.30 p.m. while at her home with her siblings, the deceased knocked at their door and requested for their father as he wanted him to accompany him to hospital to seek medical attention; he had been cut on his neck by the appellant, who used to work for her grandfather, **Josphat Kithia, PW2**. She looked at the deceased's neck using a torch and noticed the blood dripping down from his neck to his left hand. She informed him that her father was absent, and he ran towards PW2's house.
3. It was about 7.30 p.m. on the same night when the appellant arrived at PW2's house bleeding profusely. He informed him that the appellant had injured him and he performed first aid on him and assisted him to board a taxi, down the road from his house, to take him to Hospital. Later, he went to look for the appellant, who lived in a house on his farm, but realized that he had removed all his belongings from the said house. PW2 recalled that about 5 days before, the deceased had reported to him that he had an altercation with appellant but he did not know the reason why.
4. **PW3, Cecilia Karimi**, corroborated the evidence of PW1, PW2 and PW4 that the appellant cut the deceased on his neck and that later that night the deceased succumbed to his injuries.
5. **PW5, Paul Manyara**, the deceased's brother was called by the deceased on the material day at about 8.00 p.m. who informed him that he had been injured by the appellant and that he was at Tigania Mission Hospital. He was at the hospital when the deceased passed on hence he reported the incident at Tigani Police Station and the body was transferred to Meru General hospital.
6. **Doreen Nkirote, PW6**, who worked for the same employer as the deceased, stated that on the fateful day, she had seen the appellant armed with a torch and a panga which he pointed at the deceased threatening him that he would cut his neck or poison him. She enquired from the deceased the reason for the quarrel to no avail.
7. **PW7 Peter Mugambi**, corroborated PW6's evidence that the deceased and appellant knew each other very well and that on the material day they had quarrelled leading to the deceased's injuries and resultant death.

8. The Investigation Officer, **Barnabas Nyaga, PW9**, received a report of the murder on the material day from PW5, and on 11th December 2008 when the appellant went to the police station on self-surrender fearing that he would be lynched by the public. Upon investigations, he found that on the material day, the appellant and the deceased had had a dispute over a girl. Further, that despite the appellant's claim that he had fought with the deceased, he did not see any physical injury on him. The appellant was subsequently charged with the offence as particularised earlier.

9. In his defence, the appellant relied on his own sworn evidence. He testified that on the material day after going about his day's work on PW2's farm, he decided to go and have a drink at about 7.10 p.m. He later, while drunk, encountered the deceased who approached him and after a scuffle they fell to the ground. Seeing that the panga that the deceased had had fallen to the ground, he picked it up and threw it at him, hence cutting him on the neck. Consequentially, in an attempt to help him, he removed his shirt, tied the wound and took him to PW2's house to seek help; he also surrendered the subject panga to PW2.

10. Having heard both the prosecution and the defence case the trial Court (R.P. V. Wendoh, J.) determined that:

“In the instant case, there is no doubt that it is the accused who committed the act that caused deceased's death. From a close examination of the evidence of the prosecution and defence case, I am satisfied that the accused had the intention to kill or do grievous harm to the deceased arising from a disagreement over a woman and he attacked deceased aiming at the very delicate part of his body by cutting his neck severing the major vessels and fracturing the spinal cord. I find that the prosecution has proved beyond any doubt that the offence of murder was committed. I will find accused guilty as charged and convict him accordingly under Section 322 of CPC.”

The learned judge sentenced the appellant to death.

11. Aggrieved, the appellant preferred this appeal which, as aforementioned is now limited to sentence only. The grounds of appeal are that the learned Judge erred by failing to consider the applicable law, the circumstances of the case and the appellant's mitigation hence erroneously imposing a harsh and excessive sentence.

12. At the plenary hearing of the appeal, learned counsel Mr. Mutegi Mugambi appeared for the appellant while Mr. Ondimu, Prosecution Counsel appeared for the State.

13. Counsel for the appellant, relying on the amended grounds of appeal filed on 3rd May, 2021 and the appellant's home-made written submissions, urged that the learned Judge issued a harsh and excessive sentence while failing to take into account the appellant's personal dignity as enshrined under **Article 27** of the constitution. (See: **Yanyawale v. Republic (2018) eKLR**).

14. He maintained that the learned Judge ought to have considered the appellant's mitigation before meting out the sentence against him. Urging the Court to interfere with the sentence as meted out by the trial Court, counsel cited among others, the case of **Francis Karioko Muruatetu & Another v. Republic, Supreme Court Petition No. 15 of 2015**.

15. He also urged the Court to consider the time already served and reduce the sentence to a period not exceeding 10 years' imprisonment.

16. In response, the learned Prosecution Counsel submitted that in light of the recent developments of the law on mandatory sentences as set out in the **Karioko Muruatetu Case** (supra), which frowned upon the mandatory nature of the death sentence, did not oppose the appeal, save for stating that considering the circumstances of the case, the appellant was deserving of a sentence of twenty (20) years imprisonment from the time of first arraignment (27th January, 2009). He urged that this was appropriate considering the fact that the trial proceedings took an entire period of six (6) years.

17. Having considered the record and the parties' respective submissions, the sole issue for determination is whether this Court should interfere with the sentence as meted out by the trial Court. Undeniably, during the sentencing of the appellant, the trial Court expressed its confines as per the dictates of the law on the single available sentence upon conviction for the offence of murder, that is, death. Therefore, it goes without saying that the appellant's mitigation at that juncture was futile and accordingly, the trial Court imposed the said mandatory death sentence.

18. Indeed, the sentence imposed on the appellant was the legal sentence then, as provided by **section 204** of the Penal Code. However, in light of the **Francis Muruatetu case** (supra), in which the Supreme Court held that mandatory sentences deprived Courts of their unfettered jurisdiction to exercise discretion to individualize appropriate sentence on a case-to-case basis taking into account the relevant aspects of the character and record of each accused person, this Court is clothed with the duty to consider whether or not the appellant herein was deserving of a lesser sentence putting into consideration the appellant's mitigation and the circumstances of the case.

19. From a cursory perusal of the proceedings of the trial Court on record, it is evident that the trial Judge observed and acknowledged the appellant's mitigation that he was a first offender and that he was remorseful; this Court appreciates as much. It is also evident that the appellant has been in custody since his arrest. Further, the learned prosecution counsel has acknowledged that the trial proceedings took a period of 6 years which is an unjustifiably long period in all fairness. In addition, the learned prosecution counsel is not opposed to the appeal but proposes a sentence of 20 years' imprisonment.

20. We have reconsidered the circumstances surrounding the commission of the offence, the appellant's mitigation and the developing jurisprudence in this area. We also note that the deceased had only one cut wound which unfortunately was on his neck. We are minded to allow the appeal on sentence and set aside the death sentence imposed upon the appellant by the trial Court, which we hereby do and substitute therefor a sentence of twelve (12) years imprisonment from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR