Waita v Republic (Criminal Appeal 34 of 2016)
[2021] KECA 142 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 142 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 34 OF 2016

PO KIAGE, J MOHAMMED & W KARANJA, JJA

NOVEMBER 19, 2021

BETWEEN

DAVID MURIUKI WAITA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (A. Mshila, J.) dated 9th June, 2016 in HCCRA No. 204 of 2010)

JUDGMENT

1. The appellant, David Muriuki Waita, was arraigned before the Senior Resident Magistrate's Court at Karatina and charged with attempted murder contrary to section 220(a) of the *Penal Code*. The particulars of the offence were that on the 11th day of September 2008 at Muthua Estate Karatina in Nyeri North District within Central Province, he attempted unlawfully to cause the death of Rhoda Wairimu Muriuki by cutting her several times on the head and hands and locking her inside the house.

2. The brief facts of the case are that, on 11th September 2008, the complainant, PW1, was attacked by her husband, DW1, at their home in Muthua. DW1 cut PW1 on her head and severed both of her arms in the presence of their child of tender years. The attack led to the arms of PW1 being surgically amputated.

3. After the appellant was apprehended and charged, the prosecution called a total of 8 witnesses. PW4, a minor son to the complainant, corroborated the testimony of the complainant by stating that on the fateful day, the appellant, sent him to buy an airtime card for Ksh. 50, which upon being bought he refused to take and only asked for the balance of the money. PW4 disclosed that on his return from buying the airtime card he found his father closing the door to their house. He requested the appellant to open it but he declined. PW7, a clinical officer at Karatina District hospital testified that

on examination of the complainant, she had multiple injuries including a fractured skull with part of the brain visible, and that her upper limbs were amputated because of the injuries.

4. At the close of the prosecution's case, the trial court found that the appellant had a case to answer and was therefore put on his defence. The appellant gave a sworn statement and denied the charges. He explained that on the said date he had travelled to Nanyuki to his parents' home because he had some marital issues with his wife. The appellant called 3 witnesses in proof of his alibi. DW2, a cousin to the appellant testified that on the eventful day, while passing by the appellant's home, he heard noise coming from the home and went to see what was happening. He found the complainant bleeding but did not see the appellant and neither had he seen him for 3 days prior to that. DW3, a brother to the appellant stated that on the fateful day, he was with the appellant in Nanyuki when they heard news in the media that the appellant was being looked for by police for having cut his wife. Similarly, DW4 narrated that prior to the reported incident, he had been informed at the appellant's garage that the appellant had gone to Nanyuki for work.

5. The trial magistrate heard the testimonies, evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to life imprisonment.

6. Aggrieved by the judgment and sentence of the Magistrate's court, the appellant appealed to the High Court. Mshila, J. re-evaluated and re-analysed the evidence and found the appeal lacking in merit. The Learned Judge affirmed the conviction and sentence of the trial court.

7. Still dissatisfied, the appellant preferred the instant appeal against sentencing only, initially on 5 grounds, but later on 3rd May 2021 lodged an amended memorandum of appeal with 3 grounds, stating that he had abandoned the earlier grounds. The grounds are that the learned Judge erred in law by;

    a. Failing to appreciate the fact that the appellant was legally entitled to consideration of his mitigation contrary to section 216, 329 of the *Criminal Procedure Code* and Article 50(2)(p) of the *Constitution*.

    b. Importing a mandatory language in interpreting section 220(a).

    c. Imposing a life imprisonment which is manifestly harsh and excessive

8. At the hearing of the appeal, the appellant appeared in person while the respondent was represented by Mr Duncan Ondimu, the learned Senior Principal Prosecution Counsel. Both parties had filed submissions.

9. The appellant indicated that he had been in custody for 11 years and prayed for reduction of sentence so that he could go take care of his children and wife. On its part, the prosecution highlighted the gravity of the offence and the injuries caused, pointing out that the victim was the appellant's wife and the offence was committed in the presence of their children. Further, that the victim lost her limbs, lost consciousness and was hospitalised for 2½ months. The prosecution thus urged that in the circumstances, the maximum sentence of life imprisonment was most appropriate and the appellant deserved it.

10. In his written submissions, the appellant argues that if the courts below would have taken into account the issue of intoxication, his mitigation and possible provocation due to infidelity, then the same would have reduced the length of the sentence. In support of this proposition the appellant cites the cases of *Gideon Kenga Maita vs Republic Criminal Appeal No. 35 of 1997* And *Bernard Seneyo Kirichi vs Republic Criminal Appeal No. 2 of 2005*.

11. The appellant further submits that the wording of section 220(a) of the Penal Code does not make the sentence of life imprisonment mandatory but rather gives the trial court discretion to give any sentence up to a maximum of life sentence. According to the appellant, the life imprisonment sentence though lawful, was harsh and manifestly excessive. The appellant urges the Court to tamper with the maximum sentence following the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. The appellant implores the court to reduce the sentence on the basis that he has been rehabilitated and reformed while in prison. He relies on a recommendation letter from the Officer-in-charge at Nyeri Maximum Security Prison for this submission. The letter outlines the various trainings that the appellant has undertaken while in prison and the fact that he was promoted to a "trustee status" (special stage category).

12. In answer to the appellant's written submissions, the prosecution lodged written submissions on 6th May 2021, affirming the purpose of sentencing as being to prevent the person who has committed a crime from repeating the act or omission, and deter other members of society from committing similar crimes. For this proposition, the prosecution relied on the cases of *Kamaro Wanyingi vs Republic [2008] eKLR* and *Republic vs Thomas Gilbert Cholmondeley [2009] eKLR*.

13. The prosecution also cited the celebrated case of *S vs Makwanyane [1995] (3) SA 391* paragraph 46, where the South Africa Constitutional court held that at the sentencing stage of a criminal case, the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negate beyond reasonable doubt the presence of any mitigating factors relied on by the accused. According to the prosecution, aggravating factors to be considered in sentencing are as reckoned by the High Court of Botswana in the case of The *State Vs Mpho Mpelegang CTHLB-000008-07,* per Justice U. Dow who held that the court should consider; the seriousness of the offence, the offence's impact on the victim, the circumstances of the offender, the wider public interest, the age of the accused, the general intelligence of the accused, the class of persons the accused comes from, remorsefulness, the character of the accused, confession and/plea of guilty and the defencelessness of the victim.

14. On the issues of the nature of the offence, the defencelessness of the victim and the impact on the victim, the prosecution revisited the victim's evidence where she testified on the nature of injuries she suffered and the trial court's observation during her testimony, that she had no arms and she had a large scar on her head. To the prosecution, the victim underwent a traumatic experience and the scars on her body would be a permanent reminder of the gruesome attack by the appellant who was expected to offer protection.

15. The prosecution further reminded the Court that the offence committed was a serious one, done in the presence of young children by the husband to the victim. The prosecution asserted that the appellant was not remorseful during the entire trial and that in any case, the aggravating factors outweighed his mitigating circumstances. In the end, the prosecution affirmed that based on the evidence on record, it had discharged its burden of proof and invited the Court to dismiss the appeal on sentence.

16. We have considered the record of appeal as well as submissions made by the appellant and the respondent. It is worth noting that we rarely interfere with concurrent findings of fact. In *Samuel Warui Karimi -vs- Republic [2016] eKLR*, it wasstated;

> "This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R,* [1984] KLR 611."

17. Similarly, as expressly defined in section 361 of the Criminal Procedure Code, this Court's jurisdiction on second appeal is restricted to issues of law. The Supreme Court pronounced itself on what issues of law are in *Gatirau Peter Munya V Dickson Mwenda Kithinji & 3 Others [2014] eKLR*;

> "[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows: a. the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

18. With that in mind, this appeal hinges on 2 substantive questions; whether the courts below considered the mitigation of the appellant in sentencing him, and whether the sentence to life imprisonment was unlawful in view of the Supreme Court decision in Francis Karioko Muruatetu (supra).

19. From the record, it is evident that the trial court afforded the appellant an opportunity to mitigate, upon which the court stated;

> "I find that accused committed a very heinous act. He meant to kill the complainant herein and as such the court will not be merciful to him. Accused is to serve life imprisonment".

20. We agree with the summation of the trial court as was upheld by the High Court. The actions of the appellant were beastly to say the least. He viciously attacked his wife in the presence of his children, and left her for dead with grievous and permanent injuries, to wit, a fractured skull and no arms. It was an attack of great depravity within the intimate family space, negating its essence. We are indeed persuaded by the prosecution's submission that the aggravating factors of the offence far outweigh the appellant's mitigating circumstances. This then begs the question whether application of the Supreme Court's decision in *Francis Karioko Muruatetu* (*supra*) should persuade us to reduce the sentence. The answer is in the negative. The apex Court in that case *inter alia* held and guided that the mandatory nature of sentences deprives courts of their legitimate jurisdiction to exercise discretion in sentencing on an individualized case by case basis. In this case however, we are persuaded that the trial court and the High Court properly exercised their discretion in imposing the maximum sentence under section 220(a) of the Penal Code, which is life imprisonment. We have no reason to interfere with that determination.

21. The upshot is that we find no merit in this appeal. It is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR