



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR J.J.A)

CRIMINAL APPEAL NO. 12 OF 2018

BETWEEN

MDOE DEWA KOMBEAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from judgment of the High Court of Kenya at

Mombasa (Muya, J.) dated 30th October, 2015

in HCCRA No. 13 of 2013)

JUDGMENT OF THE COURT

The appellant, *Mdoe Dewa Kombe*, was charged in the High Court with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Cap 63 Laws of Kenya**. The particulars of the information were that on the 4th October 2011 at about 16.00 hours at Majugwani Village, Mwereni Location, Kwale County, within the Coast Region he murdered

Kwekwe Nyanje (the deceased).

The appellant pleaded not guilty to the charge, paving way for the trial, during which the prosecution called 6 witnesses.

The facts were that the deceased was the appellant's wife, and on the material day, a misunderstanding had arisen between them. This caused the deceased to return to her parents' home. The deceased's father *Nyanje Koti, PW1*, testified that the appellant had come to his home to resolve a misunderstanding that he had had with his wife, the deceased. When the deceased's father went to call the elders to settle the dispute, he was called by his wife and informed that the appellant had stabbed and killed the deceased. On his return, he found that the appellant had left the home, and his daughter lying in a pool of blood with a huge cut wound on her neck. The death was reported to the police and the appellant was arrested and charged with the offence.

The appellant admitted to having killed the deceased. He however stated that it was because he had found her having sexual intercourse with another man in a bush; that as he chased the man, his wife escaped to her parents' home, where he had found her.

Upon hearing the evidence, the trial court (*Muya, J.*) found that the appellant was provoked into committing the offence, and having found him guilty of the offence of manslaughter contrary to **section 202** of the Penal Code, on that basis, the court convicted and sentenced the appellant to 20 years' imprisonment.

The appellant was aggrieved with the conviction and sentence, and filed this appeal on grounds that;

1. ***“THAT the learned judge erred in law and fact by convicting and sentencing the appellant to 25 years' imprisonment by failing to see that nobody testified to have witnessed the appellant at the alleged scene of crime killing the said deceased.***
2. ***THAT the learned judge erred in law and fact by convicting and sentencing the appellant to 25 years' imprisonment without***

considering that PW1's evidence lacked corroboration.

3. THAT the learned judge erred in law and fact by convicting and sentencing the appellant to 25 years' imprisonment without considering that the case at hand was due to fabrications.

4. THAT the learned judge erred in law and fact by convicting and sentencing the appellant to 25 years' imprisonment without considering that the prosecution did not prove their case to the required standard of law.

5. THAT the learned judge erred in law and fact by convicting and sentencing the appellant to 25 years' imprisonment without considering the appellant's reasonable defence.

Submitting on behalf of the appellant, learned counsel **Mr. Obaga** informed the Court that he would abandon the appeal against conviction, and instead would canvass the appeal against the sentence. Counsel asserted that the sentence was harsh and excessive and that after he was convicted, the appellant had stated in mitigation that he was a first offender, was now a single parent, had shown remorse, and prayed for leniency.

On his part **Mr. Ketoo**, learned counsel for the State, did not oppose withdrawal of the grounds of appeal on conviction or the appeal against the sentence, on the basis of the Supreme Court in **Francis Karioko Muruatete & Another vs Republic SC Pet No 16 of 2015** which found that the mandatory death sentence prescribed for the offence of murder unconstitutional.

The appellant's appeal against conviction having been abandoned, this is an appeal against sentence. In sentencing the appellant, the trial court stated;

"The Accused has been charged with the offence of murder contrary to section 203 of the Penal Code but was convicted of the lesser charge of manslaughter contrary to section 202 of the Penal Code. The Deceased was the wife of the Accused. I have perused the probation report which is not favourable. He is sentenced to Twenty years' imprisonment."

We have considered the appeal against sentence, and the appellant's plea for leniency, the mitigation advanced before the High Court, the reasons given by the learned trial Judge for the sentence, and the law governing the offence. The High Court sentenced the appellant to 20 years imprisonment, and not 25 years as indicated in the appellants' grounds of appeal. By dint of **section 361(1)** of the **Criminal Procedure Code**, this Court has no jurisdiction to entertain appeals on severity of sentence.

Bearing this in mind, we are of the view that, the learned judge took into account the facts of the case, and more particularly the appellant's probation report, and exercising of his discretion, sentenced the appellant to 20 years' imprisonment. As such, we have no reason to interfere with the sentence imposed.

Accordingly, the appeal against sentence is dismissed.

It is so ordered.

DATED and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPTY REGISTRAR