



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 28 OF 2016

BETWEEN

HSJ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (R. Sitati, J.) delivered on 31st July 2015 in *H C Cr. Appeal No. 48 of 2012*)

JUDGMENT OF THE COURT

1. Domestic violence and murder most foul. The appellant and deceased were husband and wife. The key prosecution witness in this matter, (PW1 – SNH) was a child of the two.
2. The appellant was arraigned before the trial judge and charged with the offence of murder. The Information is that on the night of 2nd and 3rd day of December 2012 at an unknown time in Mumias District within Kakamega, he County murdered RMA.
3. The eye witness account to the murder was the testimony of PW1 (SNH). After *voire dire* examination, PW1 testified as follows:

I am SNH. I am in class two. I do not know my age. My mother (deceased) and I had gone to Shibale. Our father came and took us. Our father went out and took a stick. He then started assaulting our mother. He took a rungu and hit her. He then took a slasher, jembe (hoe) and a panga and injured her with a hoe. He then locked the door.

In the morning, his son by the name of I came and opened the door. I tried to wake up our mother but she could not talk. I came and looked at our mother and then called people. Our grandmother came from Bukura. She started crying and called the Police. Our mother is RMA. I is my uncle. Police took the body to the mortuary. Our father is HSJ. When my father assaulted my mother, it was in the house. It was dark but there was light. It was only me and my parents. I can see my father in court. Other people came home. I later recorded my statement.

4. **PW1, Dr. Mose Felister Muraa**, testified that he was a medical doctor at St. Mary's Hospital in Mumias had a post mortem report dated 6th December 2012 conducted on the deceased by Dr. Dan Oluoch, his colleague at St. Mary's Hospital. The post mortem report indicated that the deceased was a female aged 30 years old. There was hemorrhage on the entire body with bruises on the chest and head with fractured ribs. There was no obvious deformity. However, internally, there was fracture on the left 5th and 6th ribs and the right 3rd and 4th ribs with thermotherapy. The cardiovascular system was normal. There was skull hematoma on the head. The spinal column was normal. The cause of death was multiple injuries secondary to trauma.

5. In his defence, the appellant gave sworn testimony. He confirmed the deceased was his wife of 12 years and that they were living together and had one child (PW1). The appellant testified as follows:

....That on 1st December 2012, I was in the house. I was asleep. There was no light in the house. I had not locked the door. When my wife entered the house, she got hold of me. I got startled because I did not know who had got hold of me. As I asked who was holding me, I was lying on my back. She told me that she had called me without response from me. I know she had called me on 30th November 2012 in the night but I did not answer because I had taken "pombe." She told me she had called so that I could send her

some money.

As soon as I said “who was holding me”, I heard something fall. I got up and switched on my radio light and saw she had fallen on her back. I asked her whether she was hurt, but she told me she was not hurt. I discovered she was drunk. It was her habit to drink even before I married her..... Our child did not come back with the mother. She told me our daughter had been left with her grandmother.....

I got up and went to Yuaywa at 9.00 am. This was on 2nd December 2012. While I was at Yuaywa at about 10.00 am on

2nd December 2012, my uncle S telephoned me and asked me whether I knew that my wife had died. I told him that I had left my wife in good health. Immediately I took a motor bike and went home. On arrival at home I found some people in the home.....

The evidence given here that I fought with the deceased was not true. None of the witnesses was at our house on the material night. I had no intention to kill the deceased.

I do not know what caused my wife’s death and for that reason, I want to tell the court that I am not guilty of the allegations of murder.

6. Upon evaluating the evidence by PW1 and PW2 tendered before the court, the learned judge found the appellant guilty of murder. The appellant was convicted and sentenced to death. In convicting the appellant, the learned judge expressed as follows:

23. I find that the evidence of PW2 who was the only eye witness to the incident was consistent throughout her testimony. The incident happened in their home where she lived with the mother (deceased) and the father (accused). The deceased body was found covered with a blanket... The post mortem report produced by PW1 shows the deceased died of *multiple injuries on her head and chest secondary to trauma. This piece of evidence corroborates the testimony by PW2 to the effect that the accused hit the deceased several times using a stick, a rungu and finally a hoe which dealt the final blow.*

24. I have looked carefully at the evidence by the accused person DW1. The same is not adding up. His theory that something fell and hit the deceased from nowhere is hard to believe. He claims to have been alone with the deceased who accosted him apparently because he had not answered her calls. Questions abound as to how the deceased’s body was found with broken ribs leave alone the head injuries.....

27. From all the above evidence, I am satisfied that the prosecution in this case has proved the fact and the cause of death of the deceased person. I am satisfied that it is the accused person and no one else who inflicted the injuries that led to the death of the deceased. Although it was night, I have no reason to doubt the testimony of PW2 to the effect that there was light in the house. Both the deceased and the accused were her parents and therefore the question of mistaken identity does not arise. Although the only eye witness was PW2, I am satisfied that her testimony which withstood a rigorous cross-examination cannot be faulted.....

29. On malice aforethought...., PW2 named several weapons and stated that the accused beat the deceased on the neck with a jembe (hoe). I accept PW2’s testimony on how the deceased suffered the injuries which were noted by Dr. Dan Oluoch who carried out the post mortem examination on the body of the deceased.There is no doubt in my mind that the accused knew that his excessive beating of the deceased would probably cause death or grievous harm to the deceased. I therefore find that the prosecution had proved that the accused had a guilty mind to cause the death of the deceased.

7. Aggrieved by the death sentence meted upon him, the appellant has filed the instant appeal citing the following one ground in his memorandum of appeal.

i. That the honorable judge erred in law by failing to observe that the sentence of death violates the appellant’s right to life guaranteed under **Article 26 of the Constitution**.

8. At the hearing of this appeal, learned counsel Mr. Phillip Rodi appeared for the appellant. The State was represented by the Principal Prosecution Counsel Mr. L. K. Sirtuy.

APPELLANT’S SUBMISSIONS

9. Counsel for the appellant in his brief oral submission urged that the instant appeal was only against sentence. That the trial court passed a death sentence on the appellant. That in imposing the death sentence, the judge did not consider the mitigation by the appellant. That the mitigating factors relevant to the appellant includes his age, that he was a first offender and that he had a good character and social adaptation.

10. Counsel submitted that the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic, SC Petition Nos. 15 & 16 of 2015**, held that the mandatory nature of the death sentence was unconstitutional. Guided by this decision, the appellant urged us to set aside the death sentence meted upon the appellant.

RESPONDENT’S SUBMISSIONS

11. In his oral submission, counsel for the respondent did not oppose the appeal on sentence. However, counsel urged this Court to exercise its discretion in re-sentencing the appellant bearing in mind that this was a case of domestic violence that require deterrence. That from the

circumstances of the case, a long custodial term of imprisonment would be appropriate.

ANALYSIS and DETERMINATION

12. This is an appeal against sentence. The law on the power and jurisdiction of an appellate court to interfere with a sentence passed by a trial court was correctly expressed in the case of **Ogalo s/o Owuora 1954 24 EACA 70** to wit that an appellate court has power to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or that the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice.

13. Comparatively, the general principles that an appellate court adopts in an appeal relating to sentence was persuasively stated by **Nicholas J** in the South Africa case of **R -v- Rabie {1975} (4) SA 855 (A) at 857D-F** as follows: -

1. "In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-
 - a. should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court" and;
 - b. should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

14. Further, in the case of **Alister Anthony Pareira -v- State of Maharashtra, {2012}2 S.C.C 648 para 69**, the Indian Supreme Court held that: -

"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"

15. In Kenya, the Supreme Court in **Francis Karioko Muruatetu & another -v- Republic, SC Petition Nos. 15 & 16 of 2015** held that a mandatory death sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. This Court has adopted and applied the Supreme Court decision in **Christopher Ochieng -v- R, [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri -v- R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

16. In the instant matter, the trial judge meted out the death sentence upon the appellant without taking into account the mitigation on record. The sentencing of the appellant was before the Supreme Court decision in **Francis Karioko Muruatetu & another -v- Republic, (supra)**.

17. On our part, we note that there is mitigation record. Upon considering the appellant's mitigation as well as the circumstances under which the offence was committed and the need to condemn domestic violence; and guided by the dicta in the case **Francis Karioko Muruatetu & another -v-Republic, (supra)** we are inclined to interfere with the sentence. Accordingly, we hereby set aside the death sentence meted upon the appellant and substitute it with a sentence of imprisonment for a period of thirty (30) years with effect from 31st July 2015 when the trial judge passed the sentence.

18. This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal rules since Odek, J.A passed on before he could sign the Judgment.

Dated and delivered at Kisumu this 3rd day of April, 2020

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL