



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CRIMINAL APPEAL NO. 117 OF 2016

BETWEEN

JOHN MIJUKA OSURI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya

at Kisumu, (Chimitei, J.) dated 30th July, 2015

HCCRC NO. 4 OF 2012)

JUDGMENT OF THE COURT

At the hearing of this appeal, the appellant abandoned the appeal on conviction. Instead he opted to prosecute or pursue the appeal on sentence only.

The appellant was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on the 19th day of January, 2012 in Nyamira Sub-location of Siaya County within Nyanza Province, he murdered **Christine Muruka Osuri, "deceased"**.

In proving their case the prosecution called 5 witnesses. **PW1, Dr. Bob Otieno** produced the post mortem report on behalf of **Dr. Muturi** who had performed the post mortem examination on the deceased's body. He had concluded that the cause of death was multiple injuries to the head and chest caused by blunt trauma.

PW2, David Ambale Komenya a minor aged nine years on 19th January, 2012 in the evening was with the deceased who was his grandmother when the appellant, a step son, came in the house thrice and took firewood forcefully despite protests from the deceased. On the last occasion he took a panga and cut the deceased. The appellant went ahead to pour the vegetables that she was cooking. PW2 hid under the table until the appellant left whereupon he went with his brother **PW3, David Odhiambo** to seek assistance at the home of one, **Kwara**. Later the area chief came and the deceased was taken to Yala Level 4 hospital where she died while undergoing treatment.

PW3, a minor of twelve years was also at the scene of crime cooking vegetables with the deceased and PW2 when the appellant came looking for firewood. The deceased told him not to take the firewood but instead the appellant descended on her and cut her using a panga. Afterwards they sought the assistance from the village elder but as already stated, the deceased died while undergoing treatment.

PW4, Nashon Ouma Owino a neighbor of the deceased was notified of the assault on the deceased by PW2 and PW3. He went to the scene and found the deceased lying in a pool of blood. He called the area Assistant Chief who came with a taxi and rushed her to hospital. Unfortunately she died while undergoing treatment at Yala Level 4 hospital.

PW5, Beatrice Eunice Amolo the Assistant Chief of Nyamunya sub-location, received a report of the incident and took a taxi and went to the scene. She found the village elder together with the family members of the deceased. The deceased was bleeding from the head and hands. She took her to Yala level 4 hospital where she died.

PW6, Sgt. Joel Kiptoo as the investigating officer went to the scene with PC Mwangi and PC Mwaura after receiving the report of the incident. The appellant had already been arrested by the Assistant Chief and was being held at the station. He carried out investigation and charged the appellant.

When put on his defence the appellant gave sworn evidence and stated that on the material day he had gone to see his wife at Yala level 4 hospital where she was taking care of their sick child. When he came back in the evening he went to fetch water and firewood from his step mother's house at about 7.00pm. He stated that the deceased was drunk when he left her house with the firewood. He was later arrested by the Assistant Chief for assaulting her. He testified that one of the children later told him that the deceased had been assaulted and he called the Assistant Chief who took her to hospital. He denied the committing the offence.

Having heard both the prosecution and the defence case the trial court (**Chemitei, J.**) determined that *“By forcefully taking the deceased’s firewood, taking a panga and a stick to hit her the accused clearly had an intention of harming the deceased. Unfortunately his action led to the deceased’s death. Indeed, there was no reason for the accused to have attacked the deceased who was defenseless. The two boys aged 9 and 12 respectively were not a match to him and neither was the 70 years old grandmother. His defence holds no water.*

For the foregoing reason, I do find that the prosecution has established its case beyond any shadow of doubt and I proceed to convict the accused person accordingly.”

Upon conviction, the appellant was sentenced to death. Aggrieved by the conviction and sentence, the appellant preferred this appeal both on conviction and sentence which, as already stated is now limited to sentence only.

During the hearing of the appeal the appellant submitted through **Mr. Ariho**, learned counsel that this Court has jurisdiction to vary the sentence imposed upon the appellant based on Articles 165(3) (a) (b), 159(2) (a) (b) and 22(4) of the Constitution of Kenya as well as the Supreme Court decision in **Francis Karioko Muruatetu and Another v Republic [2017] eKLR**. In that decision, the Supreme Court made a finding that the mandatory death sentence in capital offences was unconstitutional. It went without saying therefore that mandatory sentences that have been passed before should comply with new changes in the law. The appellant had been in custody since 2012 when he was arrested and had so far served 7 years. The appellant had learnt his lesson and had reformed. He had undergone rehabilitation while in prison and he was a reformed person now. On the basis of the foregoing, counsel pleaded with us to reduce the sentence meted out on the appellant.

In response, **Mr. Thuo**, learned Prosecution Counsel opted to leave the issue of sentence to court. However, he reminded us to consider the age of the appellant. He pointed out that he is now aged 64 years and had been in jail for 7 years.

Having considered the record and the parties’ respective submissions, the core issue for determination is whether we should interfere with the sentence that was handed down on the appellant. We note that in sentencing the appellant, the trial court observed that there was only one sentence upon conviction for the offence of murder – death. It did not matter that the appellant had mitigated. The court therefore considered its hands tied. Accordingly, the trial court imposed the said mandatory death sentence. Of course that was the position in law before the **Muruatetu case** (supra), in which the Supreme Court held that mandatory sentences deprived courts of their legitimate jurisdiction to exercise discretion to individualize appropriate sentence to the relevant aspects of the character and record of each accused person.

We are satisfied that though the sentence imposed on the appellant was the legal sentence then, as provided by section 204 of the Penal Code, we doubt whether it was merited. It would appear that there was more than met the eye in the relationship between the appellant and the deceased and also in the commission of the offence. The appellant is aged 64 years and appears to have learnt his lesson, has reformed and is remorseful. We are therefore persuaded that the death sentence meted upon the appellant was not justified. We therefore set it aside and substitute therefor a sentence of 10 years imprisonment with effect from the date when the trial court passed the initial sentence.

This judgment has been 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