IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 89 OF 2017

BETWEEN

MATHEW KIPLALAM CHEPKIENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Eldoret, (Kimondo, J.) dated 14th June, 2016

in

HCCRC. NO. 10 OF 2016)

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JUDGMENT OF THE COURT

Background

1. This is an appeal against the judgment of the High Court (Kimondo, J.) whereby the High Court convicted the appellant on his own plea of guilty for the offence of murder and sentenced him to death.

2. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on 10th January, 2016 at Keitanyi village, Tiriondonin sub-location, Ossen location within Baringo County the appellant murdered Charles Chepchieng (the deceased).

3. Before the trial commenced, the appellant was assigned a state appointed counsel. The appellant initially pleaded not guilty to the offence of murder but on 14th June, 2016, he changed his plea to one of guilty.

4. In a nutshell the facts of the prosecution case were that the appellant and the deceased were brothers. On 10th January, 2016 the deceased heard screams from the appellant's house and rushed there to find out what the problem was. Upon arrival at the appellant's house, the deceased found that the appellant was beating his (the appellant's) child. The deceased tried to intervene but the appellant attacked him with a panga and cut him on the head and back. The deceased walked away, and the appellant picked a stone and hit the deceased on the chest. The deceased fell down and died. The appellant locked himself in his house from where he was arrested by the police. The police collected the panga and stone and investigations into the murder commenced. The deceased's body was taken to Kabarnet District mortuary where a post mortem examination was conducted. The post mortem report indicated that the cause of death of the appellant was blunt trauma to the chest.

5. At the trial, the appellant was represented by learned counsel, **Mr Misoi** who stated in mitigation that the deceased and the appellant were brothers; that the deceased went to the appellant's house and picked a quarrel leading to his death; that the appellant was remorseful and was a first offender and a father of four children. Counsel prayed for leniency.

6. In his judgment, the learned Judge stated in part as follows:

"A quarrel between two brothers led to the loss of an innocent life. I have considered that the accused used a panga and a stone to ward off the deceased. The force was lethal and led to the death of the deceased. Sentencing must take into account the moral blameworthiness of the accused. In the present case, the law provides for only one sentence. I sentence the accused to suffer death."

7. Aggrieved by that decision, the appellant filed this appeal raising grounds of appeal: that the plea agreement for the reduction of the sentence as provided by section 37 of the Criminal Procedure Code was not considered; that the appellant was not warned of the consequences of pleading guilty to a murder charge; that the prosecution and the appellant's counsel failed to follow the laid down procedure in a plea agreement; and that the appellant was denied an opportunity to mitigate his case.

Submissions

8. When the appeal came up for hearing, **Mr. Nabasenge** was present for the appellant while **Ms. Oduor**, the Principal Prosecution Counsel (PPC) was present for the State.

9. **Mr. Nabasenge**, on the appellant's instructions, withdrew the appeal against conviction and submitted that the appellant was appealing only against sentence. Counsel submitted that by the time the appellant was sentenced to suffer death, this Court in the case of **Godfrey Ngotho Mutiso vs Republic [2010] eKLR** had held that death sentence was not mandatory; that subsequently, the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, Petition No. 15 of 2015 (the Muruatetu case)** held that the mandatory death sentence was unconstitutional; that in the instant appeal, the trial court therefore erred in holding that the death sentence was mandatory. Counsel urged that the death sentence imposed on the appellant be quashed and set aside.

10. **Ms. Oduor**, counsel for the respondent submitted that the appellant pleaded guilty to the offence of murder which plea was unequivocal; that he understood the language used in the proceedings; that from the injuries sustained, the appellant had the intention to kill the deceased; and that the death sentence should be replaced with a sentence that this court finds appropriate.

11. In reply, learned counsel for the appellant submitted that the appellant did not anticipate to kill his brother, the deceased.

Determination

12. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty and limitation and obligation to ensure that the trial court properly discharged its mandate. This duty was well articulated by this Court in **Erick Otieno Arum v Republic [2006] eKLR** as follows:

"It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known Okeno v Republic (1972) EA 32 will suffice."

13. The main issue for determination is on the nature of the sentence to be meted on the appellant in light of the developments in the law regarding the mandatory death sentence for a conviction for the offence of murder. Section 204 of the Penal Code provides that **"Any person convicted for murder shall be sentenced to death."**

14. As regards sentence, the Supreme Court in the **Muruatetu case** (supra) held at para 69;

"Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

"…It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners…"

15. In **William Okungu Kittiny v Republic Criminal Appeal No. 56 of 2013**, this Court held that the decision of the Supreme Court in the **Muruatetu case** (supra) had an immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts. We note that this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the High Court could have lawfully passed.

16. The appellant has been in custody for about 3 years. This is a family tragedy which has no doubt caused psychological trauma to the appellant and the family. He has also suffered or is likely to suffer stigma for his unfortunate action. All these circumstances are relevant in assessing the appropriate sentence in the circumstances of this appeal.

17. For the foregoing reasons, the appeal against sentence is allowed. The sentence of death is set aside. Under these circumstances, the sentence of death imposed on the appellant was not appropriate. Moreover, the trial judge did not exercise his discretion in sentencing the appellant as he considered himself bound by the death penalty provided under **Section 204** of the **Penal Code.** In the circumstances, we allow the appeal against sentence, set aside the death penalty and substitute a sentence of ten (10) years imprisonment to take effect from14th

June, 2016, when the appellant was convicted of the offence of murder.

18. Orders accordingly.

Dated and delivered at Eldoret this 6th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.