IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, M'INOTI & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 322 Of 2018

BETWEEN

RUTH NASIMIYU BARASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Bungoma (Abida A. Aroni J.) delivered on 9th November 2018

in

H C Cr. Appeal No. 18 of 2014)

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JUDGMENT OF THE COURT

1. Ruth Nasimiyu Barasa, (the appellant), was charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars are that on 29th day of March, 2014 within Bungoma County, she murdered Evaline Nafuna Manyasi, (the deceased).

2. The regretful events leading to the death of the deceased were recounted through an eye witness testimony of PW1, JSJ, who testified as follows:

> *On 15th March 2014 at 1.00 pm, I was on my way to school when I heard someone screaming for help. My school is [Particulars Withheld] Polytechnic in Nimuvuli area. I heard someone screaming "jameni nisaidie."*
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> *I went to the place where the screams were coming from and I found Ruth Nasimiyu fighting with Evaline Nafula (deceased). The one who was screaming was Elimina Namarone who was inside the homestead where the pair were fighting. Elimina was trying to separate then in vain, that is why she screamed. On arrival, I saw Ruth and Evaline properly. Evaline had been floored onto the ground. Ruth sat on her and was chocking her neck while boxing her head. I separated them. Ruth is the accused in the dock. I did not know what they were fighting about. I tried to push her off and got back to Evaline and noticed she was bleeding from the nose and mouth. Evaline was saying "She has hurt me a lot." I then left to go to school.*

3. PW2, Nahashon Nyongesa Ndiemai, testified that on 15th March 2014 he was at home. At around 7.50 pm, the deceased came home with dirty clothes and a swollen jaw. He inquired of her what was wrong and she stated that she had been assaulted by the appellant. He asked her where she was injured. She said at the back of the head and chest. On 30th March 2014, he received a call from the deceased's son who told him that she had died. A post mortem report was done which showed the cause of death was head injury and the sternum was broken.

4. PW3, Ben Manyasi Munyokori, testified that the deceased was his wife. That he is a village elder. That on 15th March 2014 he was holding a village *baraza* at Khamasa Centre. That in the cause of the meeting, the deceased appeared. She reported that the appellant had assaulted her. Her clothes were torn and she had scratches on the neck and she was spitting blood. He told her to go for treatment at the hospital. She went for treatment at a hospital near her grandmother's home. On 29th March 2014, he received a call from grandmother's home that the deceased had died.

5. PW4, Dennis Nyongesa Barasa, a son of the deceased testified that on 29th March 2014 at 10.00 he visited the deceased at grandmother's

home. She was very sick. All she said is that she was assaulted by the appellant and she kept clutching her chest and back. She kept saying "this lady Ruth has killed me. I can't get well. I can't go to hospital." PW4 testified that he looked at his mother and before he could ask her anything, she breathed her last. He telephoned PW3 and told him that the deceased had died.

6. PW7, Dr. Haron Ombongi, a medical doctor, produced a post mortem report on the deceased. The report indicated that the deceased had bruises on the right arm extending to the right anterior chest. That internally, the deceased's skeleton system had a fracture of external bone – hematoma. She had multiple injuries secondary to assault. That the injuries were one week old.

7. The trial judge held that a *prima facie* case had been established by the prosecution and the appellant was put on her defence. She gave sworn testimony. She testified that on 15th March 2014, the deceased went to her home at the *shamba* whereupon the deceased started cultivating her land; that she asked her why she was planting sweet potatoes on her land; that upon being asked, the deceased started to attack her (appellant). The appellant testified and conceded that she fought with the deceased. She was injured and she left the scene and went to Sangalo Police Station to report the incident. She sought treatment and was given a P3 Form. That both of them were arrested and released so that they could sort out the matter at home. In cross examination, the appellant admitted fighting with the deceased and that PW1 came and separated them. She insisted it was the deceased who attacked her.

8. Upon evaluating the prosecution and defence evidence tendered in court, the trial judge convicted the appellant for the lesser offence of manslaughter and sentenced her to a term of 15 years' imprisonment. In reducing the charge from murder to manslaughter, the judge expressed herself as follows:

> *The next question is whether the accused acted with the intention of killing the deceased. The two women had an altercation over land and got into a fight as seen above. That may explain why the accused took a P3 Form. I do not read malice aforethought in her action. However, the action of banging the deceased's head was unnecessary and excessive without any justification. The accused severely hurt the deceased which led to her death. Her action is unacceptable and an offence. She has to bear the consequences of the same. Consequently, I find the accused guilty of a lesser charge and will convict her of the offence of manslaughter……*
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> *I have considered that the accused is a 1st offender. I have also considered her mitigation. It is interesting to note that the deceased equally left a family and made to die (sic) without any justification or cause. I note that the accused has twins aged 1 year. However, prison facilities allow mothers to be with their children. The offence committed was serious and the same must be severely punished. The accused is hereby sentenced to 15 years' imprisonment.*

9. Aggrieved by the conviction and sentence, the appellant has lodged the instant first appeal to this Court. The grounds in support of the appeal are stated as:

> (i) The judge erred in coming to the conclusion that the prosecution had proved the case against the appellant beyond reasonable doubt when the same was based on contradictory and inconclusive evidence.
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> (ii) The judge fell in error when she based the conviction of the appellant on the fact that it was the appellant who attacked the deceased whereas no single witness gave such evidence.
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> (iii) The judge erred in convicting the appellant on hearsay evidence.
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> (iv) The judge failed to properly analyze the evidence on record.
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> (v) The judge erred in passing a sentence that was harsh and manifestly excessive.
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> (vi) The judge erred in failing to consider the appellant's defence of self defence *(sic).*
>
> (vii) The judge was generally biased against the appellant.

10. At the hearing of the instant appeal, learned counsel Ms Annet Mumalasi appeared for the appellant. The Principal Prosecution Counsel Mr L. K. Sirtuy appeared for the respondent. The appellant filed written submissions in the appeal while the respondent made oral submissions.

APPELLANT'S SUBMISSIONS

11. At the hearing of the appeal, the appellant abandoned her appeal against conviction and opted to pursue the appeal against sentence. Counsel submitted that the 15-year jail term was harsh and excessive. That the appellant had two twin children who are in prison with her. The twin children were in court during the hearing. Counsel concluded that the appellant was remorseful and pleaded for leniency.

RESPONDENT'S SUBMISSION

12. Commenting on the conviction of the appellant, the respondent submitted that all the ingredients of the offence of manslaughter were proved to the requisite standard. On sentence, the prosecuting counsel submitted that the crime committed by the appellant was serious. That a life was lost. That a jail term of 15 years was appropriate. The prosecution urged this Court not to interfere with the sentence meted out to the appellant by the trial judge. Citing the Supreme Court decision in **Francis Karioko Muruatetu & another - v -Republic [2017] eKLR,** the respondent submitted that the issue of re-sentencing or variation of the 15-year jail term meted upon the appellant is for this Court to determine.

ANALYSIS and DETERMINATION

13. At the hearing of the instant appeal, the appellant abandoned her appeal against conviction and urged the appeal against sentence. Consequently, this is an appeal against sentence.

14. The appellant was charged with murder and convicted of the lesser offence of manslaughter. The trial judge sentenced her to a term of 15 years' imprisonment.

15. In this appeal, the appellant contends that the 15-year jail term is harsh and excessive given the circumstances of the case. That she did not intend to kill the deceased. That she is remorseful and asks for leniency. That she has two twin children with her in prison.

16. We have considered the evidence on record and re-evaluated the circumstances under which the offence was committed. In light of the circumstances, the trial judge correctly held that there was no malice aforethought on the part of the appellant that could sustain a conviction for murder. Taking into account the circumstances, the trial judge correctly convicted the appellant for the offence of manslaughter.

17. As regards the 15-year term of imprisonment meted out to the appellant, we remind ourselves that sentencing is at the discretion of the trial court. We further remind ourselves that this is a first appeal and we are at liberty to re-evaluate the facts and evidence on record. In the instant matter, the learned judge exercised her discretion and meted out a 15 year term of imprisonment.

18. In ***Bernard Kimani Gacheru – v- Republic, Cr App No. 188 of 2000*** this Court stated thus:

> *It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.* (Emphasis supplied: *See also* **Wanjema v. Republic [1971] E.A 493).**

19. Likewise, comparatively, in the Uganda case of **Kyalimpa Edward – v- Uganda, Criminal Appeal No.10 25 of 199**5, it was correctly stated:

> "*an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice:* ***Ogalo s/o Owoura vs. R. (1954) 21 EA.C.A.270 and R.V Mohamedali Jamal (1948) 15 E.A.C.A 126."***

20. We have considered the mitigation by the appellant that is on record. Of significance we note that the appellant has two young twin children staying with her in prison. The trial judge appreciated this fact and expressed the view that the prison facilities allow mothers to be with children.

21. Comparatively, in **R (on the application of P and Q) - v - Secretary of State for the Home Department [2001] EWCA Civ 1151,** Lord Phillips stated that, in sentencing a mother with dependent children, the rights of the child have to be weighed against the seriousness of the offence in a balancing exercise. In **R - v - McClue [2010] EWCA Crim 311,** the appellate court reduced the term of imprisonment of a mother from 18 months to 8 months in order for her to take care of her children. In the matter of **S – v- M [2007] ZACC 18,** the Constitutional Court of South African considered the duties of a sentencing Court when the person being sentenced is the primary caregiver of minor children, while keeping in mind the constitutional protection of the best interests of the child. The Court held that:

> "*[F]ocused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing Court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing Courts."*

22. In the instant matter, whereas it is true that a child can be with the mother in prison, when we consider the 15-year term of imprisonment, we observe that if the two twin children are to remain in prison for fifteen years with the appellant, their social upbringing will align to and be shaped by prison conditions. This potentially has detrimental effect on the welfare of two twin children. We find it is not in the best interest of the two children to be in prison for long with the appellant who is their mother. A balancing act must be done between punishing and sentencing the appellant for the offence committed and the best interest of the two children. For this reason, we find the learned judge erred and did not sufficiently consider as being a material factor the impact on the two children staying in prison for 15 years with the appellant. To this extent, the trial judge overlooked *a material factor namely the impact of prison life on the two children who are innocent. Given this fact, we find that the 15-year jail term was harsh and excessive.*

23. On our part, t*aking into account the best interest of the twin children who were one-year-old at the time of sentence; and considering that malice aforethought was not established on the part of the appellant; and appreciating that the appellant was convicted for manslaughter; we are inclined to interfere on sentence. We accordingly* set aside the 15-year term of imprisonment meted out to the appellant and substitute the same with imprisonment for a term of five (5) years with effect from 9th November 2018 when the trial court passed sentence on the appellant.

24. The upshot is that the conviction of the appellant is affirmed and upheld. We however set aside the 15 year term of imprisonment meted

out to the appellant and substitute it with imprisonment for five (5) years with effect from 9th November 2018.

Dated and delivered at Kisumu this 7th day of October, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR