IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 259 OF 2012

BETWEEN

ALI ABDALLA MWANZA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Mombasa (Odero, J.) dated 18th July, 2012

in

HC.CR.C.C.No. 52 of 2009)

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JUDGMENT OF THE COURT

[1] When this appeal came up for hearing before us on 7th June, 2018, **Mr. Wamotsa** learned counsel for the appellant, urged only one ground of appeal on sentence. It is a well-established principle of law that sentencing falls within the Judge's discretion and the appellate Court will normally not interfere unless the sentence appealed against is illegal or manifestly excessive. This is the holding in the case of ***Macharia vs. Republic [2003] EA 559*** the Court of Appeal held that,

> ***"an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellate court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial judge unless the judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive."***

[2] Bearing in mind the aforesaid, we think it is imperative to set out some background information this being a first appeal. During the evening hours of 13th December, 2009 at Kwahola Estate in Changamwe area within the County of Mombasa, Musyoki Kano (PW1) testified that he was on his way home, when along the way he saw a commotion caused by a crowd that looked agitated. When he moved closer to check, he found his younger brother Mutia Kano (deceased) being beaten. PW1 said that he saw Ali Abdalla Mwanza (appellant) hitting the deceased with an iron rod on the head while claiming that the deceased had stolen a motor-cycle. PW1 tried to intervene to save his brother, but the appellant caught hold of him and when he managed to free himself he ran to Changamwe Police Station to report the matter.

[3] Ambrose Juma Keya (PW2) a village elder went on to tell the trial court that he was alerted that a group of people were beating up a person who was suspected to have stolen a motor-cycle. He rushed to the scene and found a group of bodaboda cyclist beating the deceased. He saw the appellant who appeared as the ring leader hit the deceased on the head with an iron rod. He tried to intervene but the crowd was too hostile. PW2 saw the appellant place the deceased who was seriously injured on a motor-cycle and ride away. The deceased was then offloaded at Kwahola where the appellant and the other members of the crowd tried to set him ablaze using a tyre but the police arrived and intervened just at the nick of time.

[4] Corporal David Kingori (PW3) from Changamwe Police Station was the one who rescued the deceased from the inferno and rushed him to the Coast General Hospital but the deceased succumbed to the injuries while undergoing treatment. PW3 also managed to arrest the appellant at the scene and charged him with the offence of murder contrary to the provisions of **Section 203** as read with **Section 204** of the

Penal Code.

[5] At the trial before the High Court, the prosecution relied on the evidence of the aforementioned witnesses as well as Dr. Mandaly (PW4), a practicing pathologist who carried out a post mortem examination of the deceased body, he found that the deceased's body had a fracture of rood of left eye sock; fracture of the mid-occipital bond; swollen brain and bleeding and laceration of the brain had occurred. He formed the opinion that the deceased's death was caused by ultra-crucial haemorrhage due to skull fractures due to head injury. With this evidence, the Judge found the appellant had a case to answer and upon being put on his defence, he opted to make a sworn statement of defence and did not call any witness.

[6] The appellant denied having killed the deceased but admitted that he was at the scene where a crowd of people administered mob justice on the deceased who had been caught stealing a motor cycle. Upon analysing the entire evidence the learned was satisfied that the appellant was properly identified by PW1 and PW2 as the ring leader and the one who ferried the deceased in his motor cycle to burn him with a tyre. In the end, the Judge found the appellant guilty as charged and after conviction he was sentenced to 40 years imprisonment.

[7] In his homemade grounds of appeal, the appellant challenged the charge sheet which he contended was defective; he also took issue with the 40 years sentence; he faulted the trial court for failing to consider that malice aforethought, a necessary ingredient in criminal charges, was not established and finally his defence was not given due consideration.

[8] As indicated in the opening paragraph **Mr. Wamosta** learned counsel for the appellant, only pursued the ground of appeal on sentence. He submitted that while meting out the 40 year sentence, the Judge failed to take into consideration relevant factors such as the age of the appellant. According to counsel, the appellant was aged 36 years at the time of conviction and if he were to serve a term of 40 years that would mean he would leave prison after the age of 76 years which is above the life expectancy which is also stated even in the Bible to be 70 years. Another crucial step in sentencing such as the social report on the appellant was not considered. Due to the age of the appellant, counsel submitted that it was necessary for the trial court to consider the character and previous record of the appellant as well as the circumstances under which the offence was committed by an emotive crowd where the appellant participated in a mob beating of the deceased who was a suspected thief. In that set of circumstances the appellant did not plan to kill or anticipate the death of the deceased.

[9] On the part of the State, **Mr. Yamina** learned Principal Prosecuting Counsel opposed the appeal. He submitted that if there was to be any interference with the sentence imposed by the trial court, he urged that the same be enhanced to death being the one provided for the offence of murder. According to the state, the learned Judge duly considered the mitigation offered by the appellant but taking into account the degree of recklessness on his part when he inflicted fatal injuries on the deceased, the sentence of 40 years was commensurate with the offence. The appellant displayed total disregard to the sanctity of life when he also attempted to burn the deceased which were the aggravating circumstances in this matter where members of the public take the law into their own hands. Counsel for the prosecution urged us to dismiss the appeal.

[10] This being a first appellate Court, we are obliged to review the evidence in order to determine whether the conclusions reached upon by the trial court should stand. However, as it was stated by **Sir Kenneth OÇonnor, P** in the case of ***Peters vs. Sunday Post*, [1958] E.A. 424**:-

> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

We are nonetheless free to draw our own conclusion on the evidence without overlooking the conclusions of the trial court that had the advantage of seeing and observing the demeanor of the witnesses as they testified.

[11] As matters stand, there was no challenge regarding the prosecution's evidence that led to the conviction of the appellant. The conviction of the appellant was predicated on the evidence of PW1 and PW2 who were eye witnesses as they testified on how they witnessed the appellant who was well known to them hit the deceased with an iron rod on the head. The appellant also carried the deceased on a motor cycle to a place where he tried to set him ablaze when the deceased was rescued by PW3, the arresting officer albeit too late as by the time he was taken to hospital, he succumbed to the injuries. Counsel perhaps bearing in mind the aforesaid state of the evidence of identification by recognition by the prosecution's witnesses decided to concentrate on the issue of sentence which he submitted was manifestly excessive considering the appellant was 36 years of age at the time and life expectancy being 70 years, it would mean he was sentenced to a term that would go beyond life expectancy.

[12] Sentencing is purely a matter of fact and the determination of the appropriateness of the period set is a matter of the trial Judge's discretion which can only be interfered with as stated above. It is clear the trial Judge in passing the sentence took into consideration this Court's decision in the case of ***Godfrey Ngotho Mutiso vs. Republic* *Cr. Appeal No. 17 of 2008***, which was not long ago affirmed by the **Supreme Court of Kenya** in ***Francis Karioko Muruatetu & Another vs. Republic* – Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015** *(Muruatetu's case)*. The appellants were sentenced to death for the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. **Section 204** of the Penal Code provides:

> ***"Any person convicted for murder shall be sentenced to death."***

After their appeals were dismissed by the Court of Appeal, they appealed to the Supreme Court. The main issue canvassed in the appeal was whether or not the mandatory death penalty is unconstitutional. The Supreme Court said at paragraph 48:

> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to***

exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right"

At **paragraph 52**, the Supreme Court again said:-

"We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed."

In our view the *ratio decidendi* of the **Muruatetu's** case is summarized at **paragraph 69** where the Supreme Court stated:

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

[13] Following the above guidelines and considering the circumstances of the matter which is really the guiding principle in sentencing, we ask ourselves whether the sentence of 40 years is manifestly excessive bearing in mind the age of the appellant at the time of conviction. We also recognize that the length of the period of imprisonment imposed on the appellant had a bearing to the gravity of the offence where a life was lost due to the appellant's recklessness and failure to consider that even if the deceased was suspected of stealing, he had no reason to take the law into his own hands and commandeer others to take away a life in the most painful and undignified manner the way the deceased died.

[14] In considering whether the sentence of 40 years was manifestly excessive, we have taken note of the latest health profile for Kenya compiled by the World Health Organization (WHO) data for 2018, on life expectancy which is indicated as 64.4 for male and 68.9 for the females and total life expectancy average as 66.7. Of course if one went to the specifics of the causes of death in Kenya, a fair percentage would be due to murders and other homicides but that is perhaps not for us to determine in this appeal although it has a bearing in considering sentencing as a deterrent. It is also trite that every case of sentencing should strictly be considered on its own circumstances as no one individual should be sent to prison purely to send a message to other would be offenders.

[15] In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction.

Dated and delivered at Malindi this 27th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR