



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, KARANJA & G.B.M. KARIUKI, JJ.A

CRIMINAL APPEAL NO. 19 OF 2007

BETWEEN

A M M.....1ST APPELLANT

M K N.....2ND APPELLANT

F M N alias T.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Machakos (Sitati, J.) dated 30th March, 2007

in

H.C.C.R.A. NO. 37 OF 2006)

JUDGMENT OF THE COURT

M K N, F M N alias T and A M M N (the appellants), were arraigned before the High Court of Kenya at Machakos (Sitati, J) to answer one count of murder contrary to **Section 203as read with **Section 204 of the Penal Code**.**

The particulars of the charge were that they jointly murdered **E M** (deceased), on 22nd April, 2006 in Mwingi Township. Upon the charge being read over and explained to them on 27th November 2006, they pleaded not guilty and the matter was fixed for hearing.

When the matter came up for hearing on 27th February 2007, the State, through Mr. Wang’ond, Principal State Counsel, presented to court a new information sheet with a reduced charge of manslaughter contrary to **Section 202** as read with **Section 205 of the Penal Code**. Upon the fresh charge being read over to the appellants, they each pleaded guilty to the reduced charge. The facts as presented to the Court were that the three appellants, who are mother, son and daughter fought with the deceased on 21st April 2016 over some petty disagreement. The deceased sustained some injuries and was taken to the

police station where she was issued with a P3 form to attend treatment and advised to return to the Police station the following day. It is not clear how the three appellants and the deceased met early the following morning, but they started fighting all over again. This time, the first appellant was armed with a panga, and the third appellant with a hammer. They beat the deceased so badly, that they inflicted her with the fatal injuries that caused her death about one month later.

After these facts were read over to them, all the appellants admitted them as a true representation of what had transpired. The court consequently found them guilty on plea and convicted them. Learned counsel, Mr. Mbithi who appeared for the appellants made a long mitigation address on their behalf and entreated the court to be lenient in passing sentence.

The learned Judge called for pre-sentencing reports from the probation officer for consideration before sentence could be meted out. The pre-sentencing reports were unfavourable to the appellants, principally on the grounds *inter alia*, that the appellants were not remorseful, and did not seem to appreciate the gravity of the offence they had committed. The probation officers' reports indicated that the appellants' community was not ready to welcome the appellants back to their midst.

After balancing the address in mitigation, and the pre-sentencing report, and of course the law applicable, the learned Judge sentenced each appellant to twenty (20) years imprisonment.

Aggrieved by the sentence, the appellants moved to this Court on appeal against the sentence pursuant to **Section 379(3) Criminal Procedure Code**. They do not challenge the conviction. When urging her appeal, the 1st appellant pleaded for leniency saying that she had been jailed with her children leaving nobody behind in her home. The 2nd appellant urged the Court to release him as he had learnt his lesson. He told the Court that he had also reformed while in prison and acquired skills which he would put into use for the betterment of his family and the community at large. On her part, the 3rd appellant pleaded for leniency and said he had also reformed.

Mr. Omondi, learned Senior Assistant Director of Public Prosecutions, did not oppose the appeal. He was of the view that there were some mitigating circumstances which the court ought to have considered in passing the sentence. He observed that the appellants were members of the same family, and expressed the view that they have reformed and would be useful citizens if released.

We have considered the appeals before us, and the circumstances in which the offence was committed. We appreciate that the offence was indeed heinous and brutal. The appellants fought with the deceased on the first instance on 21st April, 2006. They then set upon the deceased early the following morning and viciously beat her up again, leaving her for dead as she lay on the ground. This was quite heartless on their part. These were the circumstances the learned Judge considered when sentencing the appellant. She also considered the probation officer's report which was not favourable to the appellants. Under those circumstances, the sentences imposed by the learned Judge would appear justifiable.

We observe from the record however, that the appellants were not given a chance to comment on the damning pre-sentencing reports. Had they been accorded the opportunity to comment on the same, and if necessary given a chance to cross examine the probation officer, possibly, the learned Judge would have meted out a more lenient sentence.

This Court has pronounced itself before on the need for any adverse comments made in a probation officer's report to be brought to the attention of the accused, and for him/her to be given an opportunity to comment on the same before such a report can be relied upon. See **Josephat Masaku Mutunga vs Republic, Criminal Appeal No. 100 of 2008 (UR)** and **Festus Ndalame Kilonzo, Criminal Appeal No. 228 of 2010 [2011] eKLR**.

In these cases, this Court interfered and reduced the sentences given by the superior court, on the ground that the appellants had not been given an opportunity to comment on the contents of the negative presentencing reports presented by the probation officer, before the same were relied on for sentencing purposes.

In the present appeals, as we have already observed, the circumstances of the offence called for a serious sentence, particularly when it was apparent to the court that the appellants were not remorseful or appreciative of the gravity of the offence they had committed. On the other hand however, on the basis of the appellants having been denied the opportunity to comment on the presentencing reports, we are inclined to interfere with the sentences herein.

We are also of the view that having served ten (10) years in prison already, the appellants have learnt their lesson. They have reformed and are ready to be rehabilitated back into the society.

In the circumstances, we allow the appeals with the result that we reduce the sentences for all appellants from the twenty (20) years imprisonment imposed by the learned Judge to fifteen (15) years imprisonment, which sentences will run from 26th

July, 2006.

Dated and delivered at Nairobi this 4th day of March, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR