



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO, & M'INOTI, J.J.A.)**

**CRIMINAL APPEAL NO. 1 OF 2016**

**BETWEEN**

**NELSON AMBANI MBAKAYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Mombasa*

*(Odero, J.) dated 26<sup>th</sup> July 2013*

*in*

*H.C.CR.C. No. 10 of 2012)*

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**JUDGMENT OF THE COURT**

The only issue in this first appeal is whether we should interfere with the sentence of 15 years imprisonment imposed upon the appellant, **Nelson Ambani Mbakaya**, by **Odero, J.** on 26<sup>th</sup> July 2013, after convicting him for the offence of manslaughter. The State concedes the appeal, submitting that from the circumstances under which the offence was committed and the appellant's mitigating statement, the sentence was manifestly excessive.

A brief background to the appeal is essential before we consider the merits of the appeal against sentence. By the time of her death, the appellant was married to the deceased, **Doreen Ayuma** for a period of about three years. They lived in a room behind a shop, which the appellant was running, at Kipevu area in Changamwe, Mombasa. Also living with them was the appellant's five-year-old daughter from a previous relationship.

The relationship between the couple became quite strained in the last 6 months of the deceased's life. The source of affliction was their inability to bear a child, which made the deceased very unhappy. The couple had been to see a doctor who was not able to solve their infertility problem and had referred them to yet another doctor. According to the appellant, the deceased was very frustrated and wanted to adopt a 3-month-old baby.

On 16<sup>th</sup> February 2012 at about 9.30 a.m. the appellant telephoned his elder brother, **Wycliffe Shohonzo Makaya (PW2)** and requested him to call the police and rush to the appellant's house. On getting there, PW2 knocked on the door but there was no response. He called the appellant on the phone but there was no answer. Alarmed, he pushed open the door and encountered a grisly sight. The appellant was lying shirtless on the bed, bleeding profusely from the chest. He was still alive, but unconscious. Next to him lay the deceased, partially on the bed and on the floor. She had what appeared to be stab wounds on her chest, stomach and hands. She was dead.

Several neighbours soon came to the scene, among them a village elder, **Cosmus Jackton Nzungi (PW1)** and later the investigating officer, **Acting Inspector Michael Wanjohi (PW6)** who confirmed the condition in which the appellant and the deceased were found. PW2 called the police who arrived and took the appellant to Coast Provincial General Hospital where he was admitted for a day and discharged. Subsequently the deceased's body was removed to the mortuary.

According to the evidence of **Dr. Francis Otieno (PW4)** who conducted an autopsy on the body of the deceased 6 days after her death, the cause of death was respiratory and hemorrhage shock caused by penetrating wounds into the lungs and viscera. He noted a 4 cm cut wound above the right breast, a 3 cm cut wound below the umbilicus, 5 cm cut wound between the 4<sup>th</sup> and 5<sup>th</sup> ribs, and cut wounds on the left shoulder and left thumb. Internally there were two penetrating wounds on the left lung tissue, a tear into the membrane covering the heart, bleeding in the heart cells and in the abdomen and tears in the spleen and abdomen section. The witness was of the opinion that the wounds were not self-inflicted.

By information dated 28<sup>th</sup> February 2012, the appellant was charged with the murder of the deceased at Kipevu in Mombasa on 16<sup>th</sup> February 2012, contrary to section 203 as read with 204 of the Penal Code. He pleaded not guilty and the prosecution adduced evidence from 6 witness. Put on his defence, the appellant gave an unsworn statement and did not call any witness.

The substance of his defence was that in the morning of the material day, the deceased served him tea in a flask, which he declined to take suspecting it was laced with poison because of the odour it was reeking. Moments before the two had quarreled, the bone of contention being their inability to bear a child. The deceased, who had in the meantime brought some mangoes and a kitchen knife, insisted that the appellant must drink the tea, before picking the knife and stabbing him on the left side of the stomach. He then called his brother and asked him to call the police and come over to his house. Immediately after he made the call, the deceased stabbed him on the left shoulder, pulled out the knife and stabbed him four times in total. Bleeding profusely, he soon passed out, until he came to in hospital. He denied having inflicted the wounds from which the deceased died.

By the judgment dated 22<sup>nd</sup> July 2013, the trial judge found, correctly in our view, that there was compelling and overwhelming circumstantial evidence that it was the appellant who caused the death of the deceased, in particular taking into account the fact that only the appellant and the deceased were in the house at the time of the death. However, the learned judge was not satisfied that the appellant had caused the death of the deceased with malice aforethought. In the pertinent part of the judgment, she expressed herself thus:

***“From the evidence it does not appear that the accused had a premeditated plan to kill his wife. What is more probable is that in stabbing the deceased the accused acted in the heat of the moment when tempers were raised and before passions had cooled down. The injuries on the deceased are evidence of a fight in which the deceased gave as good as she got. The assault by the accused was not unprovoked. In such a situation the element of malice aforethought cannot be said to have existed.”***

After hearing the appellant's mitigation statement on 26<sup>th</sup> July 2013, the learned judge noted that still, a human life had been lost because of the actions of the deceased, and sentenced him to 15 years imprisonment, thus provoking this appeal.

As we have already stated, in this appeal the appellant's conviction for manslaughter is not challenged. The only issue is severity of the sentence. The sole ground of appeal in the appellant's supplementary grounds of appeal states:

***“The learned trial judge erred in law and fact by meting out a sentence (that) is excessive and harsh given the circumstances of the case.”***

**Ms. Otieno**, his learned counsel, submitted that a sentence of 15 years in the circumstances was harsh and excessive, the trial court having found that the appellant had acted in the heat of the moment. Counsel further submitted that the court failed to take into account the period that the appellant had been in remand pending his trial and to consider the fate of the appellant's young child who was left without parental support. On the basis of the ruling of the High Court in ***Republic v. Thomas Gilbert Cholmondeley, HC.CR.C. No. 55 of 2006***, where the accused was sentenced to 8 months imprisonment for manslaughter, it was submitted that the appellant in this appeal was a first offender; that he had alerted his brother of the problems in his house and sought help; that he had even requested a report to be made to the police; that he had been incarcerated in remand since his arrest; and that the severity of the sentence should depend on the circumstance of each case. In this case, it was submitted, the circumstances favoured a less severe sentence.

**Mr. Yamina**, learned Principal Prosecution Counsel, for the respondent, conceded the appeal and agreed that in the circumstances of this case a sentence of 15 years was manifestly excessive. While appreciating the principle that ordinarily this Court will not interfere with exercise of discretion in sentencing by the High Court, counsel submitted that there were compelling mitigating circumstances in this appeal, which the trial court did not consider at all or adequately, which justified a more lenient sentence. In counsel's view, the trial court erred by emphasizing or being influenced by the fact that a human life was lost.

We have duly considered the record, the judgment of the trial court, the submissions by learned counsel and the law. Although it is the right of the respondent to decide whether to oppose or concede an appeal, that in itself is not binding upon this Court which is nevertheless obliged to consider and determine the appeal on its merit. (See ***Godfrey Ngotho Mutiso v Republic, Cr. App. No 17 of 2008*** and ***Norman Ambich Miero & Another v. Republic, Cr. App. No. 279 of 2005 (Nyeri)***).

Sentencing of an accused person after conviction involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this Court is normally slow to interfere with that exercise of discretion unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In ***Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 (Nakuru)*** this Court stated:

***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.***

See also ***Wanjema v. Republic [1971] E.A 493***.

In this appeal, the appellant was a first offender. There is uncontroverted evidence of a strained relationship between him and the deceased on account of their inability to have a child, which frustrated and agitated the deceased. There is also uncontroverted evidence that the appellant suffered serious stab wounds, which rendered him unconscious. From the circumstantial evidence accepted by the trial court,

the deceased must have inflicted those injuries on the appellant. The injuries sustained by both the appellant and the deceased were not premeditated; they were inflicted by a kitchen knife, which happened to be around, on a plate of mangoes. There was a five-year child who depended exclusively on the deceased and the appellant. The appellant was in remand for a period of slightly more than 1 year and 5 months.

The trial court did not advert to the above factors in sentencing the appellant. The only factor considered and emphasized by the court, which contrary to the assertion by the respondent, we find to have been relevant, is that a human life had been lost. We do not know whether, if the court had considered the other factors, it would have come to the same conclusion on sentence. The principle is that the trial court is under a duty to consider all matters in favour of and against the accused person. (See *Felix Nthiwa Munyao v. Republic, Cr. App. No. 187 of 2000*, *Gideon Kenga Maitha v. Republic, Cr. App. No. 35 of 1997* and *Kenneth Kimani Kamunyu v. Republic [2006] eKLR*).

Accordingly we are satisfied that the exercise of discretion by the trial court was vitiated by the failure to consider the facts and circumstances of the case in their entirety before settling on the sentence. In the premises we allow the appeal against sentence, set aside the sentence of 15 years imprisonment and substitute therefor sentence of imprisonment for 7 years from the date of sentence by the High Court. It is so ordered.

**Dated and delivered at Mombasa this 27<sup>th</sup> day of May, 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**