



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 15 of 2005

JULIUS KITHINJI M'KWARIA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the sentence of the High Court of Kenya at Meru

(Sitati, J) dated 17th October, 2005

in

H. C. CR. Case No. 34 of 2005)

JUDGMENT OF THE COURT

1. JULIUS KITHINJI M'KWARIA (appellant) was in the first instance arraigned before the High Court at Meru on the 9th June 2005; he was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63, laws of Kenya. Subsequently, the original charge of murder was substituted with one of manslaughter contrary to section 202 as read together with section 205 of the Penal Code. The particulars of the charge stated that:

“On the 6th day of March 2005 at Marimba sub-location in Meru Central District within Eastern Province, unlawfully killed NICHOLAS KIREMA”

2. After the charge was read to him, he pleaded guilty and admitted the particulars of the offence and facts on how the offence was committed as read out to him by Mr. Muteti the prosecuting counsel. The learned Judge convicted the appellant on his own plea of guilt, and after the mitigation he was sentenced to fifteen (15) years imprisonment. The appellant is aggrieved by the sentence and has now appealed before us. In the memorandum of appeal, he raised a single issue of the sentence being excessive to wit:

“That the sentence of 15 years imposed upon the appellant was manifestly excessive in the circumstances of the case.”

3. The facts which were presented to court and accepted by the appellant were as follows. On the 6th March 2005, the appellant and the deceased went on a drinking spree within Marimba sub-location, Meru district and returned home at around 8:00 p.m. appearing drunk. They were both employees of Hellen Gacheri. The two started quarrelling over a t-shirt which the appellant had allegedly given to the

deceased. The deceased surrendered the t-shirt to the appellant but the quarrel continued in the course of which the appellant stabbed the deceased once on the chest. The deceased died on the spot, and his body was taken to Meru District Hospital. A post mortem examination was carried out. In the doctor's opinion, the cause of death was penetrating chest injury which was consistent with the injury inflicted by the appellant.

4. Those facts are not contested but we have reiterated them as they inform the sentencing which is the only issue raised in this appeal. Mrs Ntarangwi, learned counsel for the appellant submitted that the sentence meted out by the trial court was excessive taking into account the circumstances of the offence; that the learned trial Judge failed to consider that both the appellant and deceased were friends and at the time of the incident; that they were both drunk; and lastly, that the appellant was remorseful, a first offender who admitted the offence at the first opportunity, thereby saving court's time.

5. On the part of the State; Mr. J. Kaigai, learned Assistant Deputy Prosecuting counsel, conceded the appeal. He was of the view that although the sentence of fifteen (15) years was not illegal it was excessive in the circumstances. Both the appellant and the Prosecution are asking this Court to interfere with the sentence by the trial court. By dint of section 379(3) of the Criminal Procedure Code, an appellate court has power to interfere with the sentence only if the sentence is illegal. See **SAMSON KIRUMBI M'IKAMATI -vs- R, (Nyeri) Criminal Appeal No. 71 of 2005** (unreported)

6. Was the sentence of fifteen years for the offence of manslaughter manifestly excessive so as to warrant interference by this Court? It is trite law that sentencing is a matter of the exercise of discretion by the trial court; on appeal, the appellate court will not easily interfere with the sentence, unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factors, or took into account, some irrelevant material, or acted on a wrong principle.

(See **OGOLA s/o OWOUR -vs- R (1954) 21 EACA 270** and **WANJEMA -vs- R. (1971) EA 493**.)

7. It is evident from the trial judge's record of proceedings that she considered the mitigation, and weighed it as against the seriousness of the offence as indicated in the following observations;-

“The Court has noted the circumstances under which this offence was committed. The court notes that despite the fact that the deceased had given up the t-shirt which the accused alleged belonged to him, the accused still went ahead and inflicted a fatal stab on the deceased. The response by the accused went beyond the gravity of the quarrel between him and the deceased. The court has also taken into account the mitigation made on behalf of the accused by his counsel. A life was innocently lost.”

8. In **SAMSON KIRUMBI M'IKAMATI -vs- R (Supra)**, this Court also pointed out that it is as important for the trial court to consider all mitigating factors in favour of the appellant, as it is to consider the effect of the crime on the victim including the family of the deceased. The appellant in his mitigation stated that the deceased was his friend and they were drunk at the material time. Based on the facts that were admitted by the appellant, we agree with the trial court that the appellant's error of judgement when he stabbed the deceased thereby inflicting on him a fatal injury went beyond the gravity of a small quarrel between two friends.

9. The prescribed penalty for the offence of manslaughter is life imprisonment; therefore in our view the sentence of fifteen years is a lawful sentence, the mitigation seems to have been given due consideration. We therefore find no valid reasons to interfering with the sentence.

10. For the foregoing reasons we reject this appeal and hold the sentence imposed by the learned Judge of the High Court was well merited and legal.

Dated and delivered at Nyeri this 6th day of February, 2013

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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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