



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, OUKO & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 365 OF 2011

BETWEEN

JOHN MUENDO MUSAU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Makhandia, J.) dated 18th November, 2011

in

H. C. Cr. C. No. 54 of 2010)

JUDGMENT OF THE COURT

(1) The appellant, ***John Muendo Musau***, was tried by the High Court at Machakos (Makhandia, J as he then was.) on information which charged him with murder contrary to ***section 203*** as read with ***section 204*** of the *Penal Code*. The particulars contained in the information were that on the 12th September, 2010 at Kavumbu village in Mwala District within Machakos County unlawfully killed Muilu Wambua.

(2) The appellant was arraigned in Court for plea on the 3rd February, 2011 and pleaded not guilty to the information. On the 2nd November, 2011 the State having perused the record was willing to accept a plea of manslaughter and the appellant accepted. The matter was adjourned to the following day on the 3rd November, 2011 for plea bargaining. On the 3rd November, 2011 before taking the plea, the learned Judge confirmed from the appellant that he understood Kamba language. The Court then proceeded to explain the substance and every element of the charge to the appellant who upon being called upon to plead replied:

“It is true that I killed Muilu Wambua”

The State Counsel then proceeded to read out the facts of the case in detail. Upon being asked whether the facts were correct, the appellant confirmed that indeed the facts were correct. The learned trial Judge then proceeded to enter a plea of “guilty” and convicted the appellant on his

own plea.

(3) The appellant was then called to mitigate and learned counsel appearing from him had this to say:-

“The accused is remorseful. He is a family man married to one wife. He prays for leniency. I urge the Court to impose such sentence as it deems fit in the circumstances of the case. I pray for non-custodial sentence.”

The learned trial Judge then made his sentencing notes and handed down 7 years imprisonment hence, the appeal.

(4) We have set out the procedure hereinabove in detail because it has been challenged before this Court. Learned counsel, Mr. Francis Masika, represented the appellant before this Court. He raised two grounds of appeal which challenged the un-equivocality of the plea and that the sentence imposed was manifestly excessive. The said grounds were as hereunder:

(i) The learned trial Judge of the Superior Court erred in law when he entered a plea of guilty that was unequivocal.

(ii) The learned trial Judge of the Superior Court erred in law by imposing a manifestly excessive sentence.

In his submission in Court, learned counsel maintained that the plea was not unequivocal as the appellant’s response upon the charge being read; ***“It is true that I killed Mailu Wambua”*** did not convey the element of *mens rea*.

(5) On this argument, we wish to state that we have outlined the procedure followed before the trial court at the time of taking the plea. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case of **Adan vs Republic [1973] EA 445** where the Court held:-

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”

We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence. The procedure as laid out in **Adan vs Republic** (*supra*) is also provided for under **section 207** of the Criminal Procedure Code.

(6) We have found it necessary to restate this procedure in order juxtapose it to the procedure

used by the trial court when the appellant's plea was taken. The charge in this case was read over to the appellant and the substance of the same explained to him in a language he confirmed he understood. His reply to the charge was "**it is true I killed Muilu Wambua**". The law enjoins the learned trial Judge to record the plea in the words of the accused. Accordingly, if his answer to the charge was "**it is true I killed Muilu Wambua**" that is what the learned Judge must record. In this case, the facts were then read out in detail and upon being asked if he admitted them, the appellant confirmed that the facts were indeed correct. "**Yes, the facts are correct**" was his reply. The learned Judge then proceeded to convict the appellant. That procedure up to that point could not be faulted.

(7) Indeed, even in his mitigation he admitted his action but was "*remorseful*". His mitigation did not therefore negate the offence. The trial court rightly convicted the appellant. On our part, we agree with and uphold that finding. The appellant had the opportunity to change his plea before he was sentenced. He did not do so though remorseful for his action. In summary, therefore, we find that the plea was unequivocal and the conviction of the appellant was solidly predicated on the law. Grounds 1 of the appeal must therefore fail.

(8) In her submissions, Ms. Mary Oundo, learned Principal Counsel for the State, contended that the appeal cannot lie unless the sentence was illegal. She cited the provisions of **section 348** of the Criminal Procedure Code. Ms. Oundo further submitted that the appellant's plea was unequivocal. In ground 2 of the appellant's memorandum of appeal, he challenges the sentence imposed on the grounds that the sentence of 7 years imprisonment was manifestly excessive in the circumstances. Learned Principal Prosecution Counsel, submitted further that the sentence was lawful since the maximum provided for the offence under the law is life imprisonment.

(9) We understand Ms. Oundo to be arguing that the appellant having pleaded guilty and been convicted on such plea is debarred from filing an appeal against the conviction. **Section 348** of the Criminal Procedure Code allows appeal from such a conviction but only as to the extent or legality of the sentence in the following terms:-

"348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute. The case law was reviewed by the predecessor of this Court in ***Adan (supra)***. In ***Ndede vs Republic [1991] KLR 567*** this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused person to court from the date of arrest. In the appeal before us, we reiterate our satisfaction that the plea of guilty was unequivocal.

(10) On the sentence, **section 26 (2)** of the Penal Code provides that where the prescribed sentence is imprisonment for life or any other period, the trial court has the discretion to pass a sentence of imprisonment for a shorter period. Situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by this Court. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. Those circumstances were well illustrated in the case of ***Nelson vs Republic [1970] E.A. 599***, following ***Ogalo Son of Owuora vs Republic (1954) 21 EACA 270*** as follows:

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex (1950), 18 EACA*

147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.”

(11) We have taken into account the circumstances in which the offence was committed. The appellant together with his relatives were in a bar drinking when a fight broke out. In the course of the fight the appellant picked up an object and threw it and it landed on the head deceased's head. Clearly, the appellant did not intend to hit the deceased who died at the scene as a result of the injuries sustained. The appellant in mitigation showed remorse.

(12) Viewed in light of these facts and the mitigating circumstances, we hold that the learned judge made comprehensive notes before sentence. He took into account everything that was urged before him and therefore we are satisfied that the learned judge exercised his discretion properly and fairly in assessing the sentence. He did not, in our view, act upon some wrong principle or overlook some material factor.

The sentence imposed was well deserved in the circumstances of the case. It was neither excessive nor illegal. We have found absolutely no reason to interfere with it and for those reasons, we order this appeal to be and is hereby dismissed in its entirety.

It is so ordered.

Dated and delivered at Nairobi this 20th day of September, 2013.

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR