REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 72 of 2005

FRANCIS NKUNJA THARAMBA ……...……APPELLANT

AND

REPUBLIC ……RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (sitati, J.) dated 3rd February, 2005

in

H.C.CR.C. NO. 78 OF 2004)

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JUDGMENT OF THE COURT

This is a first appeal. It is against sentence only. On 9th July, 2003, the appellant and ***Bernard Mwingirwa M'Mutunga*** (deceased) were drinking changaa at a drinking den at Kianjai market in Meru North District. As they continued drinking, the deceased desired more changaa and demanded it from the appellant. The appellant declined the demand and a fight ensued between the two. In the course of the fight, the appellant stabbed the deceased once on the chest. The deceased died on the spot. Members of the public responded to the commotion, chased the appellant, arrested him and handed him over to the police who re-arrested him. Meanwhile, the deceased's body was removed to Meru District Hospital for postmortem which was done on 15th July, 2004. It revealed that the deceased's death was due to acute blood loss secondary to severed aorta. The appellant was then charged with the offence of manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the Penal Code. This was in an Information dated 6th September, 2004. The particulars of the charge were that:

"On the 9th day of July 2004 at Kianjai Location in Meru North District within Eastern Province, unlawfully killed Bernard Mwingirwa M'Mutunga."

On the charge being read to the appellant in Kimeru, which he understands well, he admitted it and the learned Judge of the High Court (R.N. Sitati) after hearing the facts convicted him on his own plea. We observe at this juncture, that the charge of manslaughter came as a result of the appellant offering a plea on it as a lesser charge, as the original charge was murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code, but upon the appellant offering a plea to a lesser charge of manslaughter the State accepted the same and hence the charge stated herein above.

After the facts as stated above were narrated to the appellant by the trial court and after the conviction was entered, the learned counsel for the appellant, submitted on fairly lengthy mitigating facts. These

were that the deceased was the one who caused the incident that culminated in the offence that was before the court; that the injury inflicted was only through one stab wound; that the appellant was at that time (2004) 34 years old, married with a child 1½ years old; that he would forever be haunted by the fact that he killed a person for no good reason and that he was a farmer and was also working as a Store Keeper within Kianjai market. Upon hearing those mitigating factors, the record shows that the learned Judge called for a Probation Officer's report. That report was availed by the Probation Officer on 31st January, 2005. The report is lengthy but we think the learned Judge, in her notes on sentence summarises it fairly accurately. She stated as follows as concerns the Probation Officer's report:

"I asked for a probation officer's report which was handed in on 31.01.2005. From the report, it is indicated that the accused who is aged 36 years is of bad character and has previous criminal antecedents. He was a suspect in a robbery with violence charge and is suspected to be among the group of thugs who terrorise innocent people around Kianjai market.

After considering all the above factors, and the fact that the accused responded with unreasonable force to demands by the deceased to him to buy the deceased some changaa probation is disrecommended."

The learned Judge then sentenced the appellant to serve fifteen (15) years imprisonment.

The appellant is dissatisfied with that sentence and hence this appeal which is in effect based on two grounds only and which are spelt out in grounds two and three and are that: -

"2. Your Lordship, the sentence of 15 years is manifestly harsh and excessive according to the circumstances surrounding the entire case.

3. Your Lordship I am a first offender and the court could have given me probation sentence."

At the hearing of the appeal, the appellant conducted his appeal in person. All he told us was:

"I only appeal against sentence. I want the sentence to be reduced. I was 36 years at the time of conviction but now I am 45 years."

Mr. Kaigai, the learned Acting Deputy Prosecutions Counsel opposed the appeal submitting that the learned Judge considered all the relevant materials that were before her and arrived at the right sentence on the matter as the appellant was not a first offender but had previous convictions for the offence of assault and the probation report did not favour a lighter sentence.

We have anxiously considered the grounds of appeal, the record, the probation officer's report which is annexed to the record, the submissions by the appellant and by Mr. Kaigai and the law.

Whereas we feel that allegations in the probation officer's report needed to be tested before the court could rely on them, particularly as the appellant was not given opportunity to respond to the allegations that were made against him, some of which were clearly based on hearsay and suspicions, nonetheless, sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.

In the appeal before us, the maximum sentence that was called for is life imprisonment. In short the

sentence of fifteen (15) years was legal. Life was lost upon a frivolous ground and while the appellant was involved in an illegal activity namely consuming changaa apparently made for commercial purposes. Added to that, the appellant was not, contrary to what he alleges in the grounds of appeal, a first offender. He had been convicted of the offence of assault, and put on probation. This was from his own testimony to the Probation Officer. The offence of assault is in the same criminal cluster as murder for whether assault, grievous harm or murder, they are all offences threatening life of a person. Thus he had committed such an offence and so he was not a first offender. Finally, in commiting the offence for which he was awarded the subject sentence, he used a lethal weapon namely a knife.

Considering all the above, we find it difficult to fault the learned Judge who, in our view, considered all the aspects that were before her and having done so, came to a proper and inevitable conclusion.

The sum total of it all this is that the sentence awarded is in our view proper in the circumstances and we find no good reason for interfering with it. It will stand.

The appeal is dismissed.

Dated and delivered at Nyeri this 11th day of December,2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR