



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, ONYANGO OTIENO & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 228 OF 2010

BETWEEN

FESTUS NDALAME KILONZO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J.) dated 10th September, 2008

in

H.C.CR.A. NO. 56 OF 2008)

JUDGMENT OF THE COURT

The appellant *Festus Ndalame Kilonzo* was originally charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars as stated in the information filed on 8th July 2008 were that on the 23rd day of March 2008 at Ndooni area Kola in Machakos District within the Eastern Province he murdered Rael Munini Kilonzo. He appeared in the superior court at Machakos on 9th July 2008 but no plea was taken till 22nd July 2008 when that charge was read out to him and he pleaded not guilty to it. The learned Judge entered a plea of “*not guilty*” and fixed the matter for mention on 30th July 2008. On that date the State filed an Information dated the same day in which the appellant was charged with a lesser offence of manslaughter contrary to **section 202** as read with 2005 of the Penal Code. The particulars of that charge were almost the same except that this time he was charged with unlawfully killing Rael Munini Kilonzo. His response to that charge, when read to him, was that the allegations were true whereupon, the learned Judge (Lenaola J) entered a plea of guilty.

The facts giving rise to that charge of manslaughter were that the deceased was the mother of the appellant. His father had apparently died sometime back. One Benson Mutunga was appellant’s younger brother. On 23rd March 2008, the appellant went home late. He was drunk. He met the deceased and his younger brother Mutunga who were taking supper. The deceased asked the appellant the source of the money the appellant used to buy new clothes. The appellant was not amused and a quarrel ensued. The appellant took a panga and chased away Mutunga who sought help. The appellant then cut his mother

with a panga killing her instantly. He then dumped the body at a boma and left for unknown destination. The incident was reported to police station the same day. On 26th March 2008, post-mortem was conducted on the body of the deceased at Machakos General Hospital. The cause of death was severe head injury caused by a deep cut on the skull. The prosecution preferred the lesser charge of manslaughter on grounds that the appellant was drunk at the time of the incident and was provoked.

The appellant admitted the facts as narrated to the Court by the state counsel. The learned Judge thereafter convicted the appellant on his own plea of guilty. In mitigation, the appellant told the Court through his counsel that he was aged 24 years; had just completed school and was remorseful. The prosecution had no previous records of the appellant. Upon consideration of those mitigating factors, the learned Judge called for Probation Officer's report to be filed and fixed the case for mention on 10th September 2008. On that day the Probation Officer's report was availed. The probation officer's report stated inter alia:-

“His being in the open community is a security threat both to himself and his siblings. Consequently, I find his case unsuitable for open community rehabilitation and do therefore request the court to deal with his case in any other manner it deems fit.”

There is no record that this report was availed to the appellant nor that even if it was availed to him, he was given opportunity to challenge its contents most of which were serious allegations against him and his past. Notwithstanding that glaring omission, the learned Judge considered the report and after doing so stated:-

“I have seen the Probation Officer's report and it is clear that the accused person is a menace to society. His own siblings are terrified of him and he is a man who cannot be released to society at all. I have also noted that he had previously attempted to poison his mother in 2006 and eventually killed her in uncontrolled rage. He now deserves no mercy and I will sentence him to life imprisonment.”

That is the decision which has prompted this appeal which is only against sentence. The appellant filed what he termed plea for leniency- perhaps this is what he treated as memorandum of appeal. We too treat it as such in the absence of a proper memorandum of appeal. It raises four grounds all of which are in effect pleas for reduction of the sentence on grounds that his health has deteriorated and he is now suffering stomach ulcers and hypertension. He also filed a document headed “mitigation” which raises six mitigating factors. Before us he conducted his appeal in person and told us he only seeks reduction of sentence. Mr. Monda, the learned Senior State Counsel conceded the appeal on grounds that the learned Judge, in relying on the Probation Officer's report and sentencing the appellant to life imprisonment failed to afford the appellant opportunity to challenge the same report before he could consider the entire antecedents of the appellant having had the appellant's input as well.

We have considered the submissions before us, the record and the law. We do with respect agree with Mr. Monda, that in basing the sentence on the Probation Officer's report without giving the appellant opportunity to challenge the report, the learned Judge erred in law and the sentence awarded may not have reflected the entire aspects of the case that was before him.

For example, the report talked about the appellant having previously attempted to poison his mother. This was a serious allegation that required the appellant's comment before any action could be based on it. This Court has in the past made its views known on how the courts should handle situations such as now before us where probation officers report is not in favour of a person convicted and who is waiting for his sentence. In the case of ***Josephat Masaku Mutunga vs. Republic Criminal Appeal No. 100 of 2008 (Ur)*** this Court stated inter alia:-

“It is significant to observe that there is nothing in the record to show the manner in which the report was presented to the Court but it is evident that its contents were not disclosed to the appellant but we do appreciate that there is nothing in the procedure which requires that the report be so disclosed. However, it is clear to us that the appellant was never given an opportunity to cross-examine the probation officer on the report, though it was heavily tilted against him to the extent of recommending that he be kept away from the local community including his own children.

We are of the view that, in the circumstances, the report was prejudicial to the appellant's interest in obtaining a fair sentence since the court reposed blind faith in the report by relying on it exclusively for the purpose of determining the sentence to mete out to the appellant. To this extent, the court did in our view fail to take into consideration that the report was untested or that there was a possibility of it containing serious factual errors hence the need for the court to be on guard when relying on it. We think it would be good practice in future for probation reports to be availed to accused persons or their advocates well in advance of sentencing where practicable. That, in our view, would assist in enhancing the quality of justice in sentencing."

That is the law. We think that if the learned Judge had given the appellant an opportunity to rebut the allegations in the Probation Officer's report, he would not have imposed a life sentence upon the appellant. Possibly, he would have settled for a lesser sentence. The appellant has served about 2 ½ years of the life sentence. We do not find it proper to refer the matter back to the trial court.

In the circumstances of this case and of the appellant, we think a sentence of 20 years imprisonment would be appropriate. The appeal on sentence is allowed. The sentence of life imprisonment is set aside and in its place, the appellant shall serve 20 (twenty) years imprisonment with effect from 10th September 2008. Orders accordingly.

Dated and delivered at Nairobi this 8th day of April, 2011.

P. N. WAKI

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR