



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, ONYANGO OTIENO & NYAMU, J.J.A.)
CRIMINAL APPEAL NO. 66 OF 2008

BETWEEN

NICHOLAS MULI NGWILI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Lenaola, J.) dated 7th May, 2008

in

H.C.CR.C. NO. 58 OF 2007)

JUDGMENT OF THE COURT

This is a first and last appeal. It is against sentence only. In an Information filed in the superior court at Machakos on 5th November 2007, the appellant *Nicholas Muli Ngwili* was arraigned before that court with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of which were that on the night of 13th and 14th day of August 2007, at Muvuti Location, Kivandini Sub-location, Kyangundi village in Machakos District, within Eastern Province, he murdered Josephine Martha Kituku. He was produced in court on that day and on several days thereafter but for one reason or another, plea was not taken. On 2nd April 2008, the appellant, through his counsel at that time, indicated to the court that he wanted to offer a plea of manslaughter. On 4th April, 2008, another Information was filed, this time the appellant was charged in that information with the offence of manslaughter, contrary to **section 202** as read with **section 205** of the Penal Code in that on the same date, within the same place, he unlawfully killed Josephine Martha Kituku. When the charge was read to him, he accepted that it was true whereupon a plea of guilty was entered against him. The facts which were read, and explained to the appellant and which he accepted to be true, were that the deceased Josephine Martha Kituku was his aunt. On the night of 12th August 2007 he visited her at Kyangundi village. On 13th August 2007, he made as if he was going away to Makueni, but he returned to that home and slept in the house. At night two women namely Kathoni Mutua and Judith Mueni, granddaughter and daughter respectively of the deceased, heard some commotion as the appellant and the deceased were engaged in an argument. Judith went to find out what was happening. She found the appellant dressed in his grandfather's clothes. The deceased was nowhere to be seen. Later the appellant took off and Judith,

apparently suspecting something bad, told her uncle Dickson Mutua what they heard and what she saw. Mutua went into the house and found the deceased dead. The incident was reported to Machakos Police Station and the appellant was arrested two months later when he surrendered himself to the police. When post-mortem was done on the deceased by Dr. Olunga, the cause of death was found to be cardio-pulmonary arrest due to head injuries. She had also been strangled. The appellant, as we have stated, accepted the above facts as true and the learned Judge of the superior court (Lenaola J.) convicted him on his own plea. In mitigation, the accused stated through his counsel that he was 22 years old, was remorseful and undertook never to indulge in any such habits in future. The prosecution asked that he be treated as first offender.

The learned Judge, upon considering all the above, called for probation officer's report to be filed before sentence. This was done and the probation officer, in a lengthy report dated 6th May, 2008 made a finding that the appellant's case was unsuitable for rehabilitation in the open community. The probation officer requested the court to deal with the appellant's case in any other way it deemed fit. We must add here, that indeed several allegations were made in the report that taken on their face value, were serious allegations against the appellant which on consideration vindicated the probation officers views, but we emphasise that this was only on their face value and untested as the record shows the appellant was not availed the opportunity to test the allegations.

On consideration of that report, the learned Judge in a ruling on sentence stated:-

“The Probation Officer’s Report does not favour the accused person. He has other convictions and is not remorseful at all. The circumstances of this case would not allow me to release him to society at this stage. He will serve 30 years in prison.”

This is what has prompted this appeal, which as we have stated is on sentence only. The appellant, filed six grounds of appeal and appeared before us in person. The summary of his grounds of appeal is that he was provoked by the deceased into committing the offence through her words about the death of his parents, together with threats against him by his aunt to eliminate him. The rest of the grounds were no more than a plea for mercy and a promise that he would reform. Before us, he stated that he had been fully rehabilitated and would be a useful citizen if released. Mr. Monda, the learned Senior State Counsel did not oppose the appeal on the main ground that the appellant was not given opportunity to challenge the allegations made against him in the probation report, yet the court relied on that report to sentence him to 30 years imprisonment which appears excessive in the circumstances of the case.

We have considered the appeal. The appellant was sentenced to 30 years imprisonment mainly because of the contents of the Probation Officer's report which made certain allegations against him which he needed to challenge if he was minded to do so. Allegations such as that he was indeed not a first offender but had four previous convictions at the age of 22, whereas the prosecution had stated before court that the prosecution was prepared to have him treated as a first offender, were allegations that needed the appellant's comment. We add here that even in ordinary criminal offences such as theft, when previous convictions are alleged against a person facing sentence, such a person is always asked to accept or deny such allegations before he is sentenced. In the Probation Officer's report, it was not made clear whether such previous convictions were relevant or not. In the case of Josephat Masaku Mutunga vs. Republic Criminal Appeal No. 100 of 2008, this Court stated:-

“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.”

We fully endorse these principles. The effect is that the sentence awarded without those procedural requirements cannot be lawful. The appellant has served approximately three years of the sentence. It would not be just and fair to send him back to the superior court for that exercise.

Doing the best we can in the circumstances of the case, we think if the learned Judge had given the appellant the opportunity to challenge the allegations in the Probation Officer’s report, he would have settled for a lighter sentence

The appeal which was only against sentence is allowed. The sentence of 30 years imprisonment is set aside and in its place, the appellant is sentenced to serve seventeen (17) years imprisonment with effect from 7th May 2008. Orders accordingly.

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

P. N. WAKI

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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