REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: BOSIRE, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 297 OF 2010

BETWEEN

FRANCIS MBURUGU MUCHENA ……..…….APPELLANT

AND

REPUBLIC ……..…….RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Meru (Emukule, J.) dated 29th July, 2010

in

H.C.CR.A. NO. 28 OF 2008)

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JUDGMENT OF THE COURT

At the conclusion of his trial for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code respectively, ***Francis Mburugu Muchena***, the appellant was sentenced to a term of 20 years imprisonment. Before sentence he is recorded to have stated in mitigation that he was a first offender, had a wife and a small child who were dependent on him, and that he was praying for leniency.

In sentencing him G. Oyugi, a Senior Resident Magistrate remarked that the appellant's action was uncalled for as it led to the unfortunate death of ***Peter Gitoni***, the deceased. He noted that the offence carried an imprisonment term of life.

On first appeal Mr. Oluoch who appeared for the State had this to say on sentence:

"20 years. The appellant was claiming he was not charged with the offence of murder. This is the appellant who provoked the situation. In terms of s.354 (3) (ii) of CPC we are requesting that the sentence be enhanced to life imprisonment."

In skeleton arguments filed by the State remarks on sentence were as follows:

"Section 354 of the Criminal Procedure Code Cap 75, Laws of Kenya also to apply (that is – State proposes enhancement of sentence)"

The skeleton arguments are shown to have been drawn by the Honourable Attorney General and intended to be served upon the firm of advocates known as Maitai Rimita & Company Advocates. On the date the

appellant's appeal was heard, the coram shows that one Mr. Rimita was holding a watching brief and one Anampiu was appearing for the appellant.

Apart from his complaint on severity of sentence the appellant had raised several other grounds to challenge his conviction. His appeal against conviction was dismissed. In his concluding remarks at the end of his judgment M.J. Anyara Emukule J, who heard the appellant's first appeal stated thus:

"In this case, the court properly convicted the Appellant, and on the evidence, the sentence as observed above was lenient. In exercise of the discretion conferred upon this court by Section 354 (3) (a) (ii) of the Criminal Procedure Code, alter the sentence of twenty years to one of life imprisonment."

In this second and probably last appeal the appellant has raised only one ground, namely severity of sentence. His complaint is that the sentence of life imprisonment meted out to him by the High Court is excessive in the circumstances.

By dint of the provisions of ***section 361 (1)*** of the Criminal Procedure Code, this Court has jurisdiction to hear appeals only on issues of law. However, it lacks the jurisdiction to entertain an appeal on a question of fact which includes severity of sentence, which under the law is regarded as a question of fact except where the sentence has been enhanced by the High Court or the subordinate court had no power to pass the sentence. In the appeal before us, the sentence which was imposed on the appellant is, *prima facie*, lawful. The trial magistrate had jurisdiction and the power to impose a life sentence. He however, imposed an imprisonment term of 20 years. That sentence could be altered upwards or downwards by the High Court, as did happen, but the High Court could only properly enhance a lawful sentence only upon following a particular procedure.

In the case of **Francis Odingi v Republic**, **Criminal Appeal No. 28 of 2006**, this Court differently constituted, stated, in pertinent part, as follows:

"The sentence provided for the offence is 14 (fourteen) years, but the learned magistrate sentenced the appellant to 6 (six) years imprisonment. He was aware and recorded that the appellant was a first offender and other mitigating circumstances and this is why he handed down 6 (six) years imprisonment. This was a discretionary function and it is our view that since the Attorney General had not applied for enhancement of the sentence there were no compelling reasons for the learned Judge to enhance it as he did."

And in **Josea Kibet Koech v Republic** **Criminal Appeal No. 126 of 2009**. This Court again rendered itself thus.

"The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submission that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction. In the circumstances, this appeal is allowed to the extent that the sentence of 20 years imprisonment imposed by the High Court is set aside and in its place reinstate the sentence of seven (7) years imprisonment to commence from the date the appellant was sentenced by the Senior Resident Magistrate i.e 25th June, 2007."

It is clear from authorities that a notice of enhancement of sentence was essential before the High Court could properly consider enhancing a sentence. But what form should the notice take? This Court in the two cases we have cited above has not dealt with that issue. As stated earlier, in the matter before us there was some indication that a state counsel informally applied for enhancement of sentence on the date the appellant's appeal came for hearing. The application cannot by any standard be regarded as the notice of intention to apply for enhancement of sentence. Likewise the remark in the skeleton arguments cannot be said to be the required notice of intention to apply for enhancement of sentence. Even if it were to be considered to be such notice, it is clear that the appellant was not, *prima facie*, served with it, in view of the fact that the person noted on whom the notice was to be served was counsel holding a watching brief for the family of the deceased. A notice must be specific and take the form of a formal notice. It must be a notice served ahead of the hearing of an appellant's appeal to enable him to prepare to meet the intended

application for enhancement of sentence. It is in the nature of an appeal by the Honourable the Attorney General (see ***section 379 (5A)*** **CPC**; **Republic through Attorney General v Batista Ligoni Beni Criminal Appeal No. 65 of 2004**; **Republic v Anthony Kiarie Njoroge & 4 others**, **Criminal Appeal No. 236 of 2005**).

Notwithstanding absence of a special notice of intention to apply for enhancement of sentence, were there special circumstances which would have given rise to the need of enhancing sentence? The charge against the appellant was manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. That is the charge the police decided to prefer against the appellant.

The background facts to the offence are brief and straightforward. The appellant unzipped his trouser and urinated in front of the deceased and two other people next to where the three were seated outside a canteen. The deceased was incensed by this and slapped the appellant who then cut the deceased on his neck with a panga he was hiding on his person. The appellant escaped, but later reported the matter at Miathene Police Post. The deceased died.

In his judgment Emukule J expressed the view that the appellant's conduct bordered on murder and in his view a murder charge should have been preferred against the appellant. For that reason, he said, a sentence of 20 years imprisonment was inappropriate and called for interference. The learned Judge did not make any reference to the submission by the State Counsel regarding enhancement of sentence, or the need for a notice being served upon the appellant warning him of the intention to seek enhancement of sentence.

Looking at the provisions of ***sections 202*** and ***205*** of the Penal Code as read with the schedule of the Criminal Procedure Code which sets out courts power to try the offence of manslaughter, it is clear that the trial court had power to handle the offence of manslaughter and the discretion to pass any sentence up to a maximum of life imprisonment. He exercised that discretion and awarded the appellant 20 years imprisonment for the offence. The sentence is lawful and it cannot be said that the trial magistrate erred in principle when he settled for 20 years imprisonment. In the circumstances although under ***section 354 (3) (a) (ii)*** of the Criminal Procedure Code, the High Court had power to interfere, it could only do so where special circumstances are shown to exist or where it is clear there was an error in principle in arriving at the sentence. None were pointed out, nor do we find any to justify interference as happened here.

In the result we agree with both Mr. Mwanzia for the appellant and Mr. Kaigai, Principal State Counsel, that the High Court lacked jurisdiction to interfere in absence of special circumstances to necessitate enhancement of sentence. Having come to that conclusion, we are of the view that Emukule J erred in law to interfere. Accordingly, we set aside the sentence of life imprisonment he imposed and reinstate the 20 years imprisonment meted out to the appellant by the trial magistrate. It is so ordered.

Dated and delivered at Nyeri this 28th day of October, 2011.

S.E.O. BOSIRE
…….…….
JUDGE OF APPEAL

P.N. WAKI
…….……..
JUDGE OF APPEAL

ALNASHIR VISRAM
……...
JUDGE OF APPEAL

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

DEPUTY REGISTRAR