



IN THE COURT OF APPEAL
AT NAIROBI
CRIMINAL APPEAL NO. 100 OF 2008

BETWEEN

JOSEPHAT MASA KU MUTUNGA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Lenaola, J) dated 17th April, 2008

in

H.C.CR.C.NO.36 OF 2007)

JUDGMENT OF THE COURT

In an information on murder filed in the superior court at Machakos on 2nd August, 2007, the appellant, **Josphat Masaku Mutunga** was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code.

However, before he could plead to the charge of murder on 4th March, 2008, the Attorney General filed an information on manslaughter in substitution of the earlier charge. The information stated:-

“On the night of 4th and 5th of July 2007 at Mbilini Village in Machakos District within the Eastern Province unlawfully killed Florence Mbithe Masaku.”

The plea was taken on 4th March, 2003 and the appellant pleaded guilty to the charge of manslaughter contrary to **sections 202** as read with **section 205** of the Penal Code.

Following the plea, *Mr Omirera*, learned State Counsel in an outline of facts stated that the deceased was the accused’s wife; that their marriage was not happy and was strained on account of the deceased starting a carpentry workshop in Machakos town without the appellant’s knowledge that the appellant felt neglected by the deceased and on 27th June, 2006 while at Katoloni market the appellant met with four men who warned him that they were “Mungiki” adherents who had been sent to kill him by his wife and who warned him never to step into the Katoloni market again; that on 5th July, 2007, the fateful day, the

appellant went on a drinking spree and in the process drunk “*kalubu*” a traditional liquor and when his wife came home at 8 p.m. the appellant felt provoked and he decided to wait until the children and deceased had gone to sleep at which point he picked a hookjembe and viciously beat up and seriously injured the deceased allegedly because she had mistreated him for a long time. The deceased died that night and the appellant reported to the police what he had done.

A postmortem was conducted at the Machakos General Hospital and the report indicated that the cause of death was head injury due to trauma. The appellant accepted the aforesaid facts as correct and on 4th March 2008 he was convicted of the offence of manslaughter. On the same day, his advocate Mr Wambua gave a mitigation address to the court the gist of which was that the appellant was remorseful and had six children who were being taken care of by the grandmother. On his part, Mr Omirera, the learned State Counsel urged the court to treat the appellant as a first offender. However, the learned Judge, Sitati, J. ordered that a probation officer’s report for the appellant be filed and indicated that she would sentence the appellant on 17th April 2008. On that date, Lenaola, J. was the presiding judge and as previously ordered, he found the probation report on the file. In the report compiled by a probation officer, Sarah M. John on 10th April, 2008, the officer covered the family background of the appellant, his personal history, marital status, past behavior, community attitude, the appellant’s attitude, circumstances of the offence and recommendation of the probation officer. All in all, the report was negative and the major recommendation was that the community members were against his release and his children needed time to heal from the trauma and as a result, the officer recommended institutional rehabilitation for the appellant. After perusing the report, the learned Judge, Lenaola, J., sentenced the appellant as follows:-

“The accused person’s report is unfavourable. The community he comes from distrusts him. He has admitted the offence and has been found guilty of manslaughter. He deserves a severe sentence and I hereby order that he should serve 30 years imprisonment.”

Aggrieved by the sentence against him, the appellant filed a homemade petition of appeal which at the hearing we treated as a memorandum of appeal in which he listed the following grounds:-

- 1. That I pleaded guilty to the lesser charge of manslaughter.*
- 2. That the learned judge gravely erred in facts and law by metting (sic) such a harsh and excessive sentence to the (sic) I, appellant without due considerations to the circumstances relating to the deceased’s death.*
- 3. That the learned judge erred in both law and facts in failing to put human consideration as to what would become of my family in sentencing me to serve thirty years in prison.*
- 4. That the probation report given by the probation officer was not so conclusive to have me serve thirty years.*
- 5. That I am a first offender therefore such an excessive sentence did not deserve the occasion.*
- 6. That the learned judge did not state in his assessment of sentence that he put to I (sic) the accused’s antecedents and mitigation in adequate considerations.*
- 7. That the sentence that was imposed upon me of thirty (30) years imprisonment for manslaughter contrary to section 202 as read with section 205 of the Penal Code is manifestly harsh and very excessive.*

The substance of the memorandum of appeal and the appellant’s submissions before us is that, the appeal before us is against sentence only. Briefly stated the appellant challenges the sentence and says the sentence of 30 years was manifestly harsh and unjust having regard to all the circumstances of the case.

This being the first and final appeal, the appellant has the right to challenge the severity of the sentence. The State, through Mr Omurera, the learned State Counsel, submitted that the sentence was

lawful since the maximum provided for the offence under the law is life imprisonment. He was of the view, nevertheless that a sentence of 30 years for a first offender whose medical history was not very positive was on the higher side and that he would be content if the Court were to exercise its discretion concerning the period of the sentence.

On our part, we have considered the issue fully. Under *section 26(2)* of the Penal Code 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.

In 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 the predecessors to this Court and the Court itself. Thus, the general rule is that, an appellate court would only interfere 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 v REPUBLIC* [1970] E.A. 599 following *OGALO SON OF OWUORA v R* (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 criteria, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v SHERSHEWSITY (1912) C.CA 28 T.LR 364.”

We take the view that, in the appeal before us, the sentence meted out to the appellant was not informed by the mitigation recorded from the appellant’s counsel and in particular, the fact that he was a first offender. The trial court has in fact not made any reference to the mitigating circumstances narrated by the appellant’s counsel. On the contrary, the sentence of 30 years was heavily informed by the contents of the probation officer’s report which as stated elsewhere in this judgment, was negatively tilted against the appellant. 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 titled 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 available 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.

The other important missing link is that, unless there are special circumstances, uniformity of sentencing is a current criminal justice principle which is being pursued in many jurisdictions including this jurisdiction. Thus, the offence of manslaughter has generally attracted sentences within the range

of 15 to 20 years. Viewed from this standpoint, it is clear to us that in the circumstances, the sentence of 30 years was manifestly excessive and on this ground we feel constrained to interfere with the sentence. However, justice is never one sided. It is evident to us that the deceased was the appellant’s wife who needlessly met a cruel death through the hands of the appellant and the injuries as described in the postmortem report reflect unusual cruelty from a husband to his deceased wife. In the result, taking all matters into consideration including the interest of the victim and the children, we think that the cause of

justice would be better vindicated by reducing the sentence to 15 years imprisonment.

The upshot is that, the appeal is hereby allowed, the sentence of 30 years is quashed and the sentence of 15 years substituted to run from 30th July 2007, the day the appellant was first convicted.

It is so ordered.

DATED and delivered at Nairobi this 16th Day of July, 2010.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR