REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 166 of 2008

CECILIA MWELU KYALO ………………………...……....APPELLANT

AND

REPUBLIC ………………….……………………………RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Mr. Justice Lenaola) dated 1st August, 2008

in

H.C.CR.C. NO. 38 OF 2008)

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JUDGMENT OF THE COURT

When this appeal came up for hearing before us on 13th July 2009 Mr. Kenyariri, who held brief for Mr. Bosire, the learned counsel for the appellant applied for adjournment. That application was rejected and thereafter Mr. Kenyariri addressed us only on the second and third grounds of appeal in the memorandum of appeal filed on 8th July 2009. Those grounds challenged the sentence imposed on the appellant who had pleaded guilty to a lesser charge of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code and was found guilty of that charge, convicted and sentenced to serve a prison term of 30 years by the learned Judge of the superior court (Lenaola J.). In reply Mr. Kaigai, the learned Principal State Counsel also addressed us only on the sentence. The Court was not addressed on the first ground of appeal which claimed that the learned trial Judge erred in law and in fact as "*the plea of guilty was not (sic) equivocal.*" We thus treat the appeal as an appeal against the sentence only. In any case, that first ground on its own wording does not, in our view challenge the conviction of the appellant on the plea as it does not state that the plea was equivocal in any way, and in our own assessment, it was not.

The facts that were accepted by the appellant at her trial were that the she was married to Remmy Kyalo Kinguti (deceased). She married the deceased when she was two months pregnant. The mother of the deceased was not happy with the appellant on that score. After her first child, she had a child with the deceased and by the time of the incident, she was again expecting another child of the deceased. On 11th February, 2008, the deceased's mother quarreled with the deceased, telling the deceased that he was not man enough for allowing his wife to have extra-marital affairs. The deceased was not amused. He went on a drinking spree. He returned at 1.00 a.m. armed with an axe and set upon the appellant while seeking

to kill the alleged illegitimate children. The appellant snatched the axe from the deceased and used it to cut the deceased on the face. The deceased bled profusely. The appellant covered his face and attempted to take him to the hospital, but about 150 metres away from the house, he fell into a trench and died. She did not immediately disclose what happened and refused to tell anybody about the incident. Members of the public, noting the absence of the deceased, started searching for him or his body. Two days later, on 14th February, 2008, the body of the deceased was recovered from the trench. Although a post mortem was conducted on 27th February 2008, the cause of death could not be established as the body had decomposed. The appellant was arrested after investigations and was arraigned together with three others, in an information dated 30th June 2008 and filed on the same date, with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. They all appeared in court on that date but no plea was taken. On 1st July 2008, the state applied to enter *nolle prosequi*. The defence did not object and that application was granted. The appellant, who thereafter, was the only accused facing the offence of murder, offered to plead guilty to the lesser offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. That was accepted and she was charged with the offence of manslaughter, the particulars of which stated:-

"***On the 11th day of February 2008 at around 10.30 p.m. at Kaliani Village Makueni District within the Eastern Province unlawfully killed Remmy Kyalo Kinguti."***

She pleaded guilty to that charge. The record shows that after she stated in her plea "*it is true"*, the court entered a plea of guilty and the learned State Counsel proceeded to read the facts. In response to the facts which were as we have stated above, the appellant stated that the facts were correct. Thereafter she was convicted on her own plea.

The record shows further that in mitigation the appellant through her counsel asked the court to treat her as a first offender, sought leniency, and non-custodial sentence. She was remorseful and she tried to take the deceased to hospital but he died before he reached there. She was 24 years old and had children one of whom was being expected. Lastly she stated that she only acted in protecting her children. The court then called for a probation report. That was produced later on 1st August 2008. After considering the report as well as the record, the learned Judge sentenced the appellant to serve 30 years in prison. In doing so the learned Judge stated as follows:-

"***I have seen the Probation Officers' report and it does not favour the accused person. She has no remorse and the community is hostile. Further, there was clear evidence in the conspiracy to kill the deceased.***

In the circumstances, the accused is sentenced to serve 30 years in prison."

That is the decision that prompted this appeal. As we have stated, Mr. Kenyariri addressed us on sentence only. His submission was short. He urged us to use our discretion on the matter as the sentence of 30 years imprisonment was unreasonable as the appellant had children who needed her for their care. Mr. Kaigai, conceded that the sentence of 30 years was harsh and excessive in the circumstances of the case. He referred us to this Court's decision in the case of ***Felix Nthiwa Munyao vs Republic*** **–** Criminal Appeal No. 187 of 2000 and asked us to intervene on sentence.

We have considered the record, the probation officer's report, the submissions of the two learned counsel and the law. Under ***section 205***, of the Penal Code, the maximum sentence provided is life imprisonment. The appellant was a first offender. The circumstances of the case as are stated in the record are that the deceased made to attack the appellant and her children with an axe and the appellant, having dispossessed the deceased of the axe, used it to cut the deceased on the face. Having done that, she attempted to take the bleeding deceased to hospital, but the deceased fell into a trench nearby and died. She then decided not to tell anybody of the incident and was apparently uncooperative for the next two days until the body was recovered in the trench by members of the public. She was 24 years at the time the offence was committed. These were the circumstances, the learned Judge of the superior court was enjoined to consider together with the fact that she had young children to take care of. In the case of

Gideon Kenga Maita vs. Republic, Criminal Appeal No. 35 of 1997 (unreported), this Court stated:-

"*…….**..We are not saying that a court has no power to impose a sentence of life, a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was committed; the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature."***

In this appeal, the learned Judge, was told by the State Counsel that the appellant was a first offender; had children and that there was no cause of death revealed by post mortem and other matters. He apparently considered these and called for probation report, but once that report was produced in court, the learned Judge did not, in what he called "*ruling on sentence"*, consider the appellant's antecedents. He considered only matters in the probation report that were against the appellant. In our view that was not proper. It must be considered that the probation report, though important as it leads the court into making its mind as to whether to put a person convicted on probation, is nonetheless composed of allegations some of which had not been tested through cross-examination in court and are matters that the person convicted has not had an opportunity to comment on and as such should not form the only basis for sentencing. Once the court finds that it is not favourable and that a convict cannot be put on probation on the basis of it, the court must proceed on the original mitigating factors and consider an appropriate custodial sentence of course taking into account the contents of the probation report. In considering a proper sentence, this Court in a judgment delivered in the case of ***Felix Nthiwa Munyao vs. Republic*** Criminal Appeal Number 187 of 2000 to which we were referred by Mr. Kaigai stated as follows:-

"***These were matters on one side of the scale aggravating the crime committed by the appellant. But a Court is also under a duty to take into account the matters in favour of an accused person. In this case the appellant was admittedly, a first offender. The learned Judge does not mention this factor at all in his elaborate notes on sentence. This was, however, a factor which the learned Judge was bound to take into account in favour of the appellant …………….***

We think he was bound by law to consider the two factors which were in favour of the appellant and weigh them against those which supported severe penalty."

We agree that in law, sentence is essentially a discretionary matter for the trial court but again in law, in exercising that discretion a trial judge has a duty to take into account all the relevant factors and leave out all irrelevant ones. An appellate Court would only be entitled to interfere with that exercise of discretion where it is shown that the court whose exercise of the discretion is impugned, has either not taken into account a relevant factor or has taken into account an irrelevant factor, or that short of those two, the exercise of the discretion is plainly wrong – see ***Felix Nthiwa Munyao vs. Republic*** (supra), or that the sentence itself is, in all the circumstances of the case manifestly harsh and excessive.

We have stated above that the learned Judge did not consider in his notes on sentence the factor that the appellant was a first offender. He did not consider the facts of her children and the circumstances of the offence. He considered that there was clear evidence of her conspiracy to kill the deceased. That was not stated in the facts that were narrated to the court by the state. As we have stated, if it was in the probation report, the appellant had no opportunity to give her version concerning that allegation. It was not in our view a matter that should have been considered. In short, this is a case where our intervention is called for. We agree with the two learned counsel that the sentence awarded as a result of non consideration of factors in favour of the appellant and consideration of factors against the appellant, was manifestly harsh and excessive. We have considered all relevant factors both in favour and for the appellant and our view is that the sentence of 30 years imprisonment was not merited. We allow the appeal against sentence. We set aside the sentence of 30 years imprisonment and substitute it with a sentence of 14 (fourteen) years imprisonment with effect from 1st August, 2008.

Dated and delivered at Nairobi this 17th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR