REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 236 of 2005

REPUBLIC ……...…….. APPLICANT

AND

ANTHONY KIARIE NJOROGE & 4 OTHERS ……. RESPONDENTS

In the matter of an intended Review Application under section 379 (5A) of the Criminal Procedure Code Cap 75 Laws of Kenya

C.CR.C. No. 67 of 2003)

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ORDER OF THE COURT ON REVISION

The matter before us is rather unusual. It is a certificate lodged by the Attorney General under *section 379 (5A)* of the Criminal Procedure Code seeking revision of a sentence meted out against the respondents for the offence of manslaughter contrary to section 202 as read with *section 205* of the Penal Code. There is also a notice of motion filed on behalf of the respondents seeking to strike out the certificate filed by the Attorney General on the grounds that it was filed out of time and that it was incompetent in law. Both applications were heard concurrently.

Section 379 (5A) which is invoked by the Attorney General provides as follows:-

"*Where the Attorney General certifies that a sentence passed by the High Court in the exercise of its original jurisdiction should be reviewed by the Court of Appeal, the Court of Appeal may, after giving the accused person or his advocate an opportunity of being heard make such order by way of enhancement of sentence or maintaining the sentence passed as is consistent with the ends of justice.*"

Before we consider the application of the section and whether we should exercise our discretion as sought, it is appropriate that we relate, very briefly, since this is not an appeal against the decision of the superior court, the circumstances leading to the filing of the certificate.

The five respondents, together with one Samuel Gichiri Ngethe were arraigned before the superior court on an information filed by the Attorney General on 12th January, 2003 for murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of the offence were that the six persons on the 27th day of April, 2002 at Riandegwa village in Maragua District of the Central Province, jointly with others not before the court, murdered Patrick Mbugua Ndungu (the deceased). The trial

commenced before the superior court (Rawal, J) with the aid of assessors on 20th January, 2004, and the prosecution called 10 witnesses to prove the offence. They established that all the six accused persons and the deceased were from the same village. On 27th April 2002 at about 2.00 p.m. they all attended a fundraising (harambee) function in respect of an electricity project at Riandegwa village which was attended by many other villagers. The villagers dispersed after the harambeee to their homes and some to the nearby Kabati trading centre for drinks in various bars. The deceased was called by the five respondents here who were with Samuel Gichiri Ngethe (Gichiri) and they drank in the same group upto about midnight when they left to go home. On the way home, Gichiri complained that he was being attacked by the deceased. The five respondents went to his assistance and they all set upon the deceased and beat him up thoroughly. They then frog- marched him in a helpless state to Kabati police station and made a report that the deceased had attacked Gichiri. The deceased however said it was the six persons who beat him up for nothing. The officer who recorded the report in the occurrence book refused to re-arrest the deceased in the state he was and instead gave him and Gichiri notes for medical attention. The assault incident was witnessed by Joel Kamuya Macharia (PW4) and he was believed by the court when he testified that all six persons were assaulting the deceased and refused to hear Macharia's pleas to stop it. The deceased did not reach his home until the evening of the following day at 8.30 p.m. He had serious injuries and as a result was rushed to Thika General Hospital where he was admitted. While at the hospital he gave the names of all six accused persons who had beaten him.

He remained in Thika hospital until 30th April, 2002 when he was transferred to Kenyatta National Hospital where he succumbed to his injuries and died on 6th May, 2002. Thereafter Gichiri and the five respondents here were arrested and prosecuted for murder as stated earlier.

After considering the evidence on record, Rawal, J concluded as follows:-

"***Thus, I shall find that all the accused persons did beat the deceased seriously which resulted in his death. However, the prosecution has failed to prove that they had malice aforethought to kill the deceased. I take note of the fact that they all had too much to drink and a fight broke out on the way. This supports the fact that the 1st Accused was also injured. The other accused persons then joined the fray and beat the deceased which resulted in his death.***

The end result of all these is that I find all the accused persons guilty of manslaughter and convict them of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code."

It is what followed that conviction which prompted the Attorney General to take the action we are now considering. For the learned Judge had this to say:-

"***I have considered scanty and generalized facts on mitigation put forth by the learned Defence Counsel and I give emphatic attention to the fact that all the Accused persons have no previous criminal antecedents. I also take into account the evidence laid before the court.***

Balancing the above matters, I order that all the Accused persons shall serve imprisonment for three years which shall be deemed to have commenced from the date of offence i.e. 27th April, 2002."

The sentence was imposed on **10th June, 2004**.

We referred to Samuel Gichiri Ngethe as the first accused in that trial. He was not satisfied with the conviction and sentence meted out by the superior court and so exercised his right of appeal to this Court. The respondents here did not appeal and it appears they did not serve any portion of the sentence the superior courts order entailed. The appeal filed by Gichiri was Criminal Appeal No. 212 of 2004. Before it was heard, Gichiri and his counsel were warned that if the appeal was dismissed, the court was bound to revisit the sentence which was patently illegal. He chose to proceed with the appeal, the warning notwithstanding and in the end it was dismissed on 6th May, 2005. In interfering with the sentence, this Court stated:-

"***The learned trial Judge sentenced the appellant and his co-accused to three years imprisonment but she went on to order that the sentence would be deemed to have commenced from the date of the offence i.e. 27th April, 2002. That sentence was pronounced on 10th June, 2004, which meant the appellant never served any sentence as he walked to freedom. It is significant to note that the deceased died on 6th May, 2002 which means the sentence for manslaughter commenced even before the deceased had died! This must be corrected as requested by the learned State Counsel. It must be pointed out that while a court may take into account the period that an accused person has spent in custody while assessing sentence, it would be illegal to order an accused person to start serving a sentence before conviction. In the instant case the appellant was ordered to serve the sentence even before the trial commenced."***

Gichiri was ordered to serve the sentence of three years imprisonment from the date he was sent to prison consequent upon the judgment.

The certificate filed in this Court on 12th October, 2005 appears to have been a knee-jerk reaction or belated response to that decision. That is why the respondents accused the Attorney General of inordinate delay and abuse of court process.

The respondents filed separate affidavits in support of their notice of motion and stated in identical paragraphs as follows:-

"***7. THAT I am advised by my advocate in the record which advise I verily believe to be true that the said certificate was filed out of the mandatory one month period after conviction and I urge this Honourable court to strike it out.***

8. That I have further been advised by my advocate which advise I verily believe to be true that since there is an earlier appeal pending involving the same sentence the present application is an abuse of the process of the court.

9. That I have been advised by my advocate in the record which advise I verily believe to be true that the purported certificate was signed by the Director of Public prosecutions who has no authority to sign since such power is only vested on the Attorney General and not any other officer in his office and as such the said certificate is incompetent.

10. That no explanation has been offered in filing the application after all this inordinate delay as the applicant has not caused it "

Each of them also deponed that they had, since 10th June, 2004 (when the superior court judgment was delivered and sentence passed) embarked on gainful employment which would be adversely affected if the sentences imposed on them were enhanced.

At the hearing of the application, learned counsel for the respondents, Mr. Gacheru, abandoned the grounds that the certificate was incompetent since it was signed by the Director of Public Prosecutions. He conceded that there was a Legal Notice. No. 331 of 1996 issued on 19th December, 1996 which delegated the powers vested in the Attorney General under ***sections 81*** and ***82*** and Part VII of the Criminal Procedure Code. Mr. Gacheru also conceded that there was no right of appeal granted to the Attorney General and therefore any purported application by the Attorney General for leave to appeal out of time was of no consequence. As for the objection that the certificate ought to have been filed within one month of the decision of the superior court, Mr. Gacheru must have invoked ***section 379 (5)*** of the Criminal Procedure Code which relates to a person acquitted in the trial. The matter before us however is based on ***section 379 (5A***), an amendment introduced in 1990 by Act No. 7/90. That section which we reproduced earlier, makes no provision for limitation of time and it is therefore up to the court to consider in all the circumstances what is reasonable. The notice of motion filed by the respondents is thus for dismissal and we so order.

Which brings us to the certificate filed by the Attorney General. Learned Senior State Counsel, Mr. Kaigai, pleaded with us to correct an illegality in the sentence to accord not only with the law and justice, but also in line with this Court's earlier decision in Cr. A. No. 212/04, **Samuel Gichiri Ngethe V. R** which was decided on the same facts and law. We have already referred to the decision and the reason given by the Court in interfering with the sentence. Indeed Mr. Kaigai sought an order for further enhancement of the sentence considering the brutality accompanying the deceased's death. This course of action was adopted in **Republic vs. Batista Ligoni Beni**, Cr. A. No. 65/04 which Mr. Kaigai relied on. In that case the accused person faced a charge of murder before Rawal, J but was convicted on the lesser offence of manslaughter and sentenced to serve 5 years imprisonment. Upon a certificate being filed under ***section 379 (5A),*** the sentence was enhanced to 15 years. The Court stated in part:-

"**Section 379 (5A) Criminal Procedure Code was recently introduced in the law. We could find no decided cases on it. It was introduced to create an opening for the Attorney General to challenge a sentence passed by the High Court in exercise of its original jurisdiction if he thinks that taking into consideration all the circumstances of the case, the sentence is inconsistent with the ends of justice . The section confers review powers on this Court and a simple procedure has been provided for approaching this Court. In exercising its power under that section this Court must look at sentencing principles.**

Sentencing is a matter for the discretion of the trial Judge. The discretion must however, be exercised judicially. The trial Judge must be guided by evidence and sound legal principles. He must take into account all relevant factors and exclude all extraneous or irrelevant factors."

The Court then went ahead to consider the circumstances of the case afresh since the trial court's notes on sentencing were sketchy. The court found that a panga was used in severally and viciously slashing the deceased to death. The force used by the accused was excessive and not commensurate with what the deceased did to provoke him. The intention, the court found, was to cause grievous harm and the circumstances therefore amounted to murder or bordered on murder.

As for the apparent delay in filing the certificate, Mr. Kaigai submitted that the filing period was reasonable and the only reason why it was not determined earlier was because the respondents were evading service. He referred us to an order of this Court made on 31st January, 2007 on application by the Attorney General, directing that the Director of CID should effect service on each of the five respondents. Even then, it was difficult to serve until a further order was made on 7th March 2007 that warrants of arrest be issued in respect of the respondents and that the Deputy Registrar should consider releasing them on bond to await the hearing. The respondents however surrendered themselves before the Deputy Registrar before the warrants were secured and they were admitted to bail to await the hearing. Their bonds have since been extended awaiting judgment.

For his part, Mr. Gacheru pleaded with us not to prejudice the respondents' newly found careers. He relied for that submission on the decision of this Court in **Mutuku vs. R [1981] KLR 532** where the Court held that there was inordinate delay (of 2 years) before the Attorney General requested the High Court to enhance a sentence imposed on the appellant for an offence of theft. The appellant was a court clerk when the offence was committed and so he lost the job but found another one as a salesman two months before the enhancement of his sentence was sought. He had not left his local residence all that time and had not evaded service of any document. In those circumstances the court held that enhancement after a lapse of two years, a lapse of time which the appellant was in no way responsible, and at a time when the appellant had just embarked on a new career, was wrong in principle.

We have considered the matter fully. As stated by this Court in the **Batista Beni Case (supra**), the purpose of enacting ***section 379 (5A)*** was to confer revisionary or review powers to this Court in an appropriate case and in exercise of that power the Court would consider sentencing principles. In doing so it must bear in mind that sentencing is a matter of discretion although the court must be guided by evidence and sound legal principles. In this particular case we are not examining fresh facts and circumstances as we are reminded that this Court has already reassessed the facts and the law on appeal arising from the same trial – the **Gichiri Case (supra).** As is evident in that case, this Court (differently

constituted) found that the trial court erred in principle in meting out the sentence and so made the necessary corrections for the sentence to accord with the law. We make no apologies for adopting the reasoning in that case and finding, as we now do, that the sentence of the five respondents here ought to be interfered with. The only issue is whether it should be enhanced upwards as sought by the Attorney General or not at all, for different reasons, as sought by the respondents' counsel.

We have examined the circumstances surrounding the **Batista Beni Case** which justified enhancement of the sentence and the circumstances of this case and we think, with respect, that they are different. As correctly stated by the trial Judge in this case, there was really no intention to kill the deceased and the unfortunate fight which took place between villagers who had spent time together drinking for long hours, was just that, unfortunate. It was nevertheless unjustifiable and the respondents must bear the consequences of their acts. In our view, there was no error in principle in meting out a three year sentence of imprisonment on each respondent. The three year sentence ought to have run from the date of conviction but the respondents did not serve any prison term. That error was corrected by this Court in the **Gichiri Case (supra)** and we must similarly correct it in this case. The commencement of their prison terms should start soon after this judgment. The issue however, remains: should we, as this Court did in the **Mutua Case (supra)**, reject enhancement of the sentence on account of the delay in filing the certificate and the fact that the respondents have embarked on new careers since they were set free in the superior court?

The point of departure with the **Mutua Case** is that we did not enhance the sentence in this matter but corrected an error of law and principle. As stated above, we find no compelling reason to enhance the sentence. The other point of departure is that the time lapse in this matter is explicable and we accept the explanation made by the Attorney General. It was not unreasonable in all the circumstances.

The upshot is that the following persons, who were convicted on 10th June 2004 for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code in High Court Criminal Case No. 67 of 2003, shall serve the sentence of three years imposed in that Case with effect from the date of this judgment:-

1. Anthony Kiarie Njoroge

2. David Njoroge Kamande

3. Kennedy Kamau Ndungu

4. John Mwangi Murigi

5. Anthony Mutune Kamande

The bonds granted to each of the five accused persons shall be cancelled forthwith. Those are our orders.

Dated and delivered at Nairobi this 12th day of October, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.