IN THE COURT OF APPEAL

AT NAKURU
CORAM: CHUNGA, C.J, SHAH & BOSIRE, JJ.A.
CRIMINAL APPEAL NO. 188 OF 2000

BETWEEN

BERNARD KIMANI GACHERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence of the High Court

of Kenya at Nakuru (Rimita J) dated 17th November, 2000

in

H.C.CR.C NO. 78 OF 1999)

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JUDGMENT OF THE COURT

BERNARD KIMANI GACHERU (appellant), was, initially charged before the High Court Nakuru on one count of murder contrary to section 203 as read with ***section 204 of the Penal Code Chapter 63 Laws of Kenya*** . The particulars of the charge alleged that:-

> *"On the night of 16th and 17th May, 1999 at Mwisho wa Lami Shopping Centre Bahati Location, Nakuru District within the Rift Valley Province murdered MARGARET WAMBUI KARANJA."*

When the appellant first appeared before the High Court on 28th of February, 2001 and the murder charge was read out to him, he is recorded to have responded thus: - "It is true."

It does appear however that, being a capital charge with a mandatory death sentence, the learned trial judge disregarded the appellant's intention to admit the charge and proceeded to record a plea of "not guilty" . The case was then set down for hearing on a subsequent date.

On 31st May, 2000, hearing did, indeed, open before the Judge sitting with three assessors. The prosecution called four witnesses after which the appellant, through his advocate, indicated that he was offering a plea of guilty to manslaughter. The State accepted this offer and the murder charge was, accordingly, reduced by the Judge to one of manslaughter contrary to section 202 as read with ***section 205 of the Penal Code Cap 63 Laws of Kenya .***

The reduced manslaughter charge was then read out to the appellant and his response was:-

"I admit the charge. It is tru e."

The Judge entered plea of guilty and the prosecution proceeded to outline the facts which were admitted as true by the appellant. The Judge then formally convicted the appellant on his own plea of guilty to the manslaughter charge.

Following the conviction, the appellant's advocate addressed the Judge on mitigation whereupon, the Judge sentenced the appellant to nine years imprisonment on 17th November, 2000.

Against the conviction and sentence, the appellant filed his appeal to this Court. The fifth ground of appeal was to the effect that his plea of guilty to manslaughter before the High Court was equivocal. Accordingly, he asked this Court, in his Memorandum of appeal, to quash the conviction, set aside the sentence and order his immediate release from prison.

When the appeal came before us for hearing on 18th February, 2002, the appellant appeared in person while Mr. Onderi appeared for the Republic/Respondent. The appellant expressly stated that he did not wish to pursue his fifth ground of appeal which was attacking the conviction. He stated that he wished to pursue the appeal on sentence only.

Accordingly, we heard this appeal on that basis.

In his submissions before us, the appellant emphasised his family circumstances. He pointed out that his parents were dead and his wife had no gainful employment, except that she worked on their small family shamba. He had two children of school going age, but who, for the last three years, have not gone to school for lack of school fees and general maintenance. He urged that he committed the offence unintentionally under the influence of drinks and he was remorseful for that. He asked this Court for mercy and, prayed for the reduction of his sentence which, he said, was manifestly excessive in the circumstances of the offence.

For the Republic/Respondent Mr. Onderi supported the sentence. He submitted that the learned trial Judge exercised his discretion properly and fairly in assessing the sentence against the appellant. He pointed out that the learned Judge did not act on any wrong principle, did not take into account any wrong matter, and the sentence was not manifestly excessive. He also emphasised that the appellant had a duty of protection of life and property but instead, as the facts showed, he destroyed somebody's life. The appellant used a firearm which he should have used to protect life and property. Sentence was in the discretion of the trial court and, unless that court has acted wrongly, irregularly, or on wrong principles, the appellate court ought not to interfere with the sentence.

The facts upon which the appellant pleaded guilty and was convicted, were short and can be summarised as follows. He was a police officer of the rank of a Sergeant, in-charge of police armory at his police station. On the fateful night, he took a gun from the armory without signing for it and went to the nearby trading centre for drinks. At 11.00 p.m., after drinking at some other bars, he went to the bar where the deceased was working as an attendant. He knocked on the door and the deceased, who was in the bar with her boyfriend opened the door. The appellant asked the deceased to sell to him beer which the deceased declined to do, saying that it was after the permitted time for doing so. On hearing this, the appellant declared that the deceased and her boyfriend were under arrest. The deceased, in compliance with the appellant's order, locked the door and, together with her boyfriend, they left with the appellant, presumably, being sent to the police station under arrest. On the way, the deceased demanded to know the reasons for their arrest. Without any response, the appellant drew his gun (a pistol) and shot the deceased once on the chest. The deceased collapsed and died. The deceased's boyfriend ran away and the appellant himself went to the police station and secretly returned the pistol to the armory. The incident was reported to the local police station, the scene of the shooting visited, and the deceased's body recovered and escorted to the district mortuary. Postmortem was carried out and the doctor found injuries and cause of death consistent with gun shot wound.

We have considered the record before us carefully. We have taken into account the facts upon which the appellant pleaded guilty and was convicted of the lesser charge of manslaughter. We have also considered the mitigating factors which were put before the trial judge by his advocate. We have also considered what the appellant himself urged before us on appeal. Finally, we have considered the submissions made by the State Counsel Mr. Onderi before us in supporting the sentence.

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

The position was stated succinctly by the Court of Appeal for East Africa in the case of ***OGOLA s/o OWOURA VS REGINUM (1954) 21 270*** as follows:-

> *"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground tha t 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 R., (1950) 18 E.A.C.A 147:*
>
> *"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."*
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> *To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher shewky, (1912) C.C.A. 28 T.L.R. 364."*

Ogola s/o Owoura's case has been accepted and followed by this Court and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.

For example, in the High Court case of ***WANJEMA VS R*****. 1971 E.A 493** , more particularly, on page 494 letters (D) to (E) this is what that court said:-

> *"A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerne d, a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand.*
>
> *An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. No account was taken as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449 (This admits of no doubt because the magistrate awarded the maximum sentence to this first offender; which of itself is unusual.) Matter extraneous to the trial was acted upon for the magistrate bore in mind that he had "issued a warning only last week that dangerous drivers will be dealt with severely by the court."*

In the appeal before us, the learned trial Judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly he did not act on any wrong principle. The very same matters that the appellant urged before us were urged before the learned trial Judge and he took all of them into account.

We fully agree with the learned trial Judge that the appellant, as a police officer, abused his position and used the firearm against an innocent member of the public. There was absolutely no justification or reason for the appellant to purport to place the deceased and her boyfriend under arrest, let alone to open fire and shoot the deceased as she followed the appellant's command to be escorted to the police station, or merely because she asked for reasons for their arrest. The sentence was entirely in the discretion of the learned trial Judge and we are satisfied that he exercised that discretion properly and on the facts before him. The sentence he gave was well deserved and was not manifestly excessive. We have found absolutely no reason to interfere with it and for these reasons, we order this appeal to be and is hereby dismissed in its entirety. Orders accordingly.

Dated and delivered at Nakuru this 20th day of February, 2002.

B. CHUNGA

CHIEF JUSTICE

A. B. SHAH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR