Case Number:	Criminal Appeal 193 of 2016
Date Delivered:	19 Mar 2021
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Sankale ole Kantai, Fatuma sichale, Patrick Omwenga Kiage
Citation:	Caroly Owino Oluoch v Republic [2021] eKLR
Advocates:	Mr Nabulindo h/b for Mr Ingosi for the Appellant Mr Kakoi, Principal Prosecution Counsel for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	HCCR No. 49 of 2015
Case Outcome:	Appeal allowed
History County:	Siaya
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KIAGE, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 193 OF 2016

BETWEEN

CAROLY OWINO OLUOCH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Siaya (Makau, J.) dated 6th October, 2016

in

HCCR No. 49 of 2015)

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JUDGMENT OF THE COURT

Making a potent, if counterintuitive plea to Shylock who, demanding, his pound of flesh, the quintessential, if morbid, exemplar of just desserts, righteously spurns it (*"I demand the law"!*) beautiful Portia, in Shakespeare's The Merchant of Venice appeals to our better selves thus;

"The quality of mercy is not strained.

It droppeth as the gentle rain from heaven

Upon the place beneath. It is twice blest:

It blesseth him that gives and him that takes.

….

It is enthroned in the hearts of kings; It is an attribute to God himself,

And earthly power doth then show likest God's

When mercy seasons justice. Therefore, Jew,

Though justice be thy plea, consider this:

That in the course of justice none of us

Should see salvation. We do pray for mercy,

And that same prayer doth teach us all to render

The deeds of mercy."

(Act IV scene 1)

That quality of mercy should also reside and flow forth in appropriate cases, such as is before us, in the hearts of Judges, upon who falls the fearful duty of enforcing the law and administering justice. They should do so with a balanced emphatic view to the foibles and flaws of the human condition.

This is an unfortunate tale of two young men who fought while under the influence of alcohol, leading to the death of one and the incarceration of the other. The duo, the appellant, Caroly Owino Oluoch and Charles Okumu Odero (the deceased) were among the young men hired as grave diggers at the funeral of one Tobia Mugere. As is the custom in much of Western Kenya, the grave diggers usually attend to this vital responsibility in the dead of night while consuming alcohol.

As they were digging the grave, the deceased approached the appellant and questioned him on his behaviour of shouting while drinking. An argument soon ensued and the appellant picked a spade and hit the deceased twice on the head. The deceased, who had no apparent signs of serious injury, was later escorted to his home. He was taken to Ambira Sub-District Hospital the next morning, where he was later referred to Jaramogi Oginga Odinga Hospital on 27th April 2017. While undergoing treatment, he succumbed to his injuries on 6th May 2015.

Upon that turn of events, the appellant surrendered himself to Ugunja Police Station where he was arrested and charged with the offence of Murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**. He denied the charges before Maina, J on 3rd June 2015. The prosecution later reduced the charge to Manslaughter contrary to **Section 202** as read together with **Section 205** of the same Code. The appellant pleaded guilty to this lesser charge on 25th July 2015, and was thus convicted of the offence.

In the Judgement delivered on 6th October 2016, Makau, J noted that; the deceased was the aggressor in the fight that led to his death; the probation report which indicated that the appellant's family had taken measures to care for the family of the deceased; the remorsefulness of the appellant who had turned himself in; and that the appellant had been in custody for one and half years prior to the sentencing. The learned Judge then sentenced the appellant to 10 years imprisonment.

Aggrieved by that sentence, the appellant preferred the instant appeal, raising 3 grounds, which are that the judge erred in law and fact by;

a) Failing to put into consideration various mitigating factors thus meting out an excessive sentence.

b) Failing to address his mind to emerging jurisprudence on sentencing for the offence of manslaughter.

c) Exercising his discretion wrongly for an excessive sentence in the circumstances of the case.

At the hearing of the appeal, learned counsel **Mr Nabulindo** held brief for **Mr Ingosi** who is on record for the appellant while the State was represented by **Mr Kakoi**, the learned Principal Prosecution Counsel.

Relying on the submissions filed, the appellant's Advocate contended that the Judge ignored various mitigating factors which would have led him to give the appellant a lesser sentence. These included the fact that the act happened amidst of a lot of drinking meaning there was no *mens rea*; the deceased was the aggressor; the appellant was a first offender; and his family subsequently undertook to cater for the deceased's family. In sum, the learned Judge misdirected himself in respect of the mitigating factors and arrived at a manifestly excessive sentence.

Mr Kakoi admitted that, under the circumstances, the sentence meted on the appellant was on the higher side. He thus would have no objection were we to reduce the sentence.

We have considered the record of appeal as well as submissions made by Counsel. We appreciate our role as a first appellate Court as was stated in **REUBEN OMBURA MUMA & ANOTHER - V - REPUBLIC [2018] eKLR**;

"This being a first appeal, our mandate as an appellate Court is to analyze and re-evaluate the evidence, being mindful of the fact that, the trial court had the advantage of seeing and assessing the demeanor of the witnesses."

The sole issue for our consideration is the sentence which is within our remit in a first appeal. Sentencing is an integral component of a fair trial as enshrined in **Article 25 (c)** of the **Constitution**. The Supreme Court in the off-cited **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC [2017] eKLR** made the following guiding pronouncements on sentencing;

"[41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.

….

"[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence….

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability…."

In order to achieve just results in sentencing, it is crucial that the Court considers, *inter alia*; the age of the offender, whether the accused was a first offender, whether the offender pleaded guilty, character and record of the offender, remorsefulness of the

offender and the possibility of reform and social re-adaptation of the offender. See **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC (Supra)**.

From the record, it is disturbingly clear that the learned Judge failed to take into account and give due credit to the mitigation by the appellant's Counsel and the probation report from the Probation Services. The facts of the case show that both parties were drunk and that the deceased was the aggressor, the same is corroborated by the probation report which gave a detailed account of the events which led to the unfortunate attack. The report described the appellant as a hardworking and honest individual who was considered to be the best mason in the community.

Moreover, the majority of the members of community interviewed spoke well of him. They were aware that the attack was in self-defence and therefore had no objection to his serving a non-custodial sentence. The widow of the victim had since forgiven the appellant and was not opposed to him being released. What is more in a rare gesture of responsibility and cordiality, the appellant's family had also assisted the deceased's widow financially to open a business and had purchased education policies for her children to enable them to continue with their education.

From the foregoing, coupled with the fact that the appellant was a first offender, swiftly and voluntarily surrendered himself to the police and pleaded guilty to the offence, we find that the 10 year sentence was excessive and highly disproportionate to his crime and the circumstances of the case. The appellant was not deserving of a custodial sentence, and one so long at that, especially after serving one and half years in remand. Not every offender is deserving of jail, and courts need to send to jail only those deserving of it. To make this a present reality, we as Judges ought to soften the harshness of the law, in deserving cases, by infusing it with liberal doses of mercy. Thus will justice flow like a river, a terror to the worst of men, and a refuge to those who, though erring seek its protection.

The immediate 'society' within which the appellant lived his local community, was of the general opinion that he did not deserve a custodial sentence and the learned Judge ought to have seen that the appellant was no threat to it. All things considered the appellant was given an excessive sentence, a fact which **Mr. Kakoi**, properly concedes. The sentence was heavy on vengeance or retribution with scant consideration for the rehabilitative or restorative aims, which may in fact be redemptive, of punishment.

Ultimately and inevitably, we find that this appeal has merit. We set aside the 10 year sentence, reducing it to time already served. We order that he be set at liberty forthwith, unless he be otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of March, 2021.

P. O. KIAGE

……...……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR