Kisanya v Director of Public Prosecution (Criminal Appeal E082 of 2022)
[2024] KEHC 16403 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E082 OF 2022

S MBUNGI, J

DECEMBER 23, 2024

BETWEEN

VICTOR MMOCHI KISANYA ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Being an appeal from the conviction and sentence delivered on 17th November 2022 by Honorable A. Alego SPM at Kakamega in Criminal Case No. E1343 of 2022)

JUDGMENT

Introduction

1. The appellant was charged with the offence of threatening to kill contrary to section 223(1) of the penal code. The particulars of the offence was that on the 30th October, 2022 the appellant at Kasarai village, Iranda sub-location Iguhu location in Kakamega south sub-county within Kakamega County without lawful excuse uttered words "Nitakukatakata nikuwe vile baba alikufa" threatening to kill Margaret MmochI who to his knowledge is his mother.

2. The facts of the case were read out to the accused as follows:

> The complainant was in her house preparing to go to church when her son came and informed her that the accused was chasing her son. The complainant found the accused who told her that she loved Alex more than him (the accused) and threatened that he would kill her and all children.

3. The appellant pleaded guilty to the charge and after mitigation, the trial court sentenced him to a 10-year custodial sentence.

4. The Appellant being dissatisfied by the sentence filed this petition of Appeal in this court on the 25.11.2022 on the following grounds: -

    i. That the learned trial magistrate grossly erred in law and facts by handing me a harsh and excessive sentence without considering his mitigation.

    ii. That the learned trial magistrate failed to consider that he was a first offender remorseful and as such fit for a non-custodial and /or a more lenient punishment.

    iii. That the learned trial magistrate erred in law and facts in his plea of guilty was a sincere act of remorse deserving a less severe sentence.

    iv. That the learned trial magistrate, erred in law and facts by failing to observe that the intended effect of the sentence of [10] years can be achieved with a less severe punishment.

    v. That the learned trial magistrate misdirected himself in law and /or misinterpreted the word "is liable to" to mean mandatory sentence of ten years [10] imprisonment.

    vi. That more grounds to be adduced during after receipt and perusal of trial court proceedings and judgement.

5. The appellant prayed that the appeal be allowed, the sentence of 10 years set aside and a more lenient sentence ordered.

6. The merits of this appeal were canvassed by way of written submissions.

Appellant's Case

7. The appellant submitted that the trial court failed to consider the mitigating grounds factors and the motive of the same. He further submitted that his plea of guilt was a sincere act of remorse and averred that he is totally rehabilitated and reformed, having successfully undertaken various studies since his incarceration.

Respondent's Case

8. The respondent submitted that the sentence meted by the trial court was manifestly harsh and excessive and they were unopposed to this court granting a lesser sentence or fine.

Analysis and Determination.

9. I have looked at the memorandum of appeal, submissions by both parties and the proceedings from the trial court.

10. The Supreme Court in Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 of 2015, as a guide in sentencing held that:

> " ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
>
> a. age of the offender
>
> b. being a first offender;
>
> c. whether the offender pleaded guilty;
>
> d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant."

11. In Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, the High Court held that the objectives of sentencing include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."

12. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

> " Sentences are imposed to meet the following objectives:
>
> 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
>
> 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
>
> 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
>
> 5. Community protection: To protect the community by incapacitating the offender.
>
> 6. Denunciation: To communicate the community's condemnation of the criminal conduct."

13. Section 223 of the Criminal Procedure Code states as follows:

> " Threats to kill
>
> 1. Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years."

14. Sentencing is the discretion of the trial court. For an appellate court to interfere with a sentence meted by a trial court, it must be shown that a trial court overlooked or took into account wrong material or acted on a wrong principle.

15. The principles guiding interference with sentence imposed by the trial Court were properly set out in S vs. Malgas 2001 (1) SACR 469(SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

16. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

17. The then Court of Appeal for Eastern Africa in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270 stated as follows on this issue:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

18. Odunga J (as he then was stated as follows in Antony Musembi Mutisya v Republic [2019] eKLR, which decision I have cited herein in extensor as it is in part material with this case:

> " To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
>
> > "sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306).

19. In Benard Kimani Vs Republic (2002) EKLR the Court of Appeal stated that:

> " It is now settled law, following several authorities by this Court and 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..."

20. I have looked at the trial court proceedings; the magistrate never gave reasons as to why she imposed the maximum10-year custodial sentence.

21. In Charo Ngumbao Gugudu vs. Republic [2011] eKLR, the Court of Appeal held that:

> " It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged."

22. From the notes on mitigation, it is not said whether the appellant was a first-time or a repeat offender. However, the prosecution in its submissions agrees with the appellant's submission that he is a first-time offender.

23. A pre-sentence report was sought; it is not said whether it was availed. Also in this appeal, a similar report was sought. At the time of writing this judgment, the pre-sentence report has not been filed despite the court adjourning the date for judgment for close to two months to await the pre-sentence report. So the court cannot have a feel of the ground as it exists now.

24. Perhaps if the fact that the appellant is a first-time offender was brought to the attention of the trial magistrate, the trial magistrate might have arrived into a different finding.

25. A maximum sentence if meted against an accused person, in absence of evidence that he is a repeat offender, or the worst offender it is automatically /manifestly excessive.

26. In this appeal, the appellant pleaded guilty and sought for leniency him being a first-offender and the complainant being his mother, the court should have imposed a sentence which would have aimed at promoting reconciliation. I note the appellant has served over two years' imprisonment. I will set aside the sentence of 10 years imposed by the trial court and substitute it with a sentence that the appellant to be deemed to have been sentenced to serve imprisonment for the period already served.

27. Since the court does not have the benefit of how the ground is, and especially the views of the victim, to cushion the victim, I order that the appellant shall be released to the in-charge Probation and After Care services Kakamega County who shall give counselling to the appellant and promote reconciliation between the appellant and his mother.

28. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Appellant – present online

Court prosecutor – Ms. Osoro present online

Court Assistant – Elizabeth Angong'a