



**Kemboi v Republic (Criminal Appeal E118 of 2019)  
[2023] KEHC 2225 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2225 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E118 OF 2019  
SM MOHOCHI, J  
FEBRUARY 28, 2023**

**BETWEEN**

**PHILEMON KIBET KEMBOI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the sentence in CMCC CR No. 419 of 2015 - Iten, Republic v Philemon Kibet Kemboi, delivered by Hon. H.M. NYABERI, S.P.M. delivered on 23.08.2017.)*

**JUDGMENT**

**Introduction**

1. The Appellant appeals in mitigation against the consecutive sentence of three (3) years imprisonment in two (2) counts for the offence of causing grievous harm contrary to section 234 of the [penal code](#) and the consecutive sentence of two (2) years for the offence of causing actual bodily harm contrary to section 251 of the [penal code](#) based on the following seven (7) grounds: -
  - i. That upon conviction and sentence by the Trial Court and upon serving my awarded sentence this far it has become imperative and necessary to make further mitigation to this Honorable Superior Court of record so that an order to issue for the appropriate remedy relief be granted for my release released from prison.
  - ii. That I have now served substantial portion of the sentence and accordingly the intended punishment by the honorable Court has achieved its intended objective
  - iii. The while prison I received Jesus Christ as my personal Savior and I am now a team leader preaching to other inmates the need to respect the laws of the land by first fearing the almighty God and currently attached to the industry section of the prison and have learnt how to make



beautiful furniture and the same skills will be replicated back home was discharged by this honorable Court find this mitigation being allowed.

- iv. That I do further urge this Honorable Court to order for two sentences to run concurrently from the date of conviction and sentence being 23rd August 2019 as show of remorseful on my part.
  - v. That I am married with three children and whose care maintenance is of paramount consideration as to parental responsibility. Their mother left the matrimonial home upon my conviction and sentence and is married to a different man.
  - vi. That I will always be loyal to the laws of the Land their fidelity to the constitution and ready to abide by any order that shall be decreed issued by this honorable Court to secure my freedom from prison ostensibly for the innocent young children who need my Close attention to be modelled into mature citizens .
2. The particulars of the four (4) count was: -
- i. That on the 16th day of April 2015 at 1030Hrs at Kapkoi Village Kabulwo Sub-location, Keu Location in Elgeyo-Marakwet County, willfully and unlawfully did grievous harm to Joseph Cheruiyot.
  - ii. That on the 16th day of April 2015 at 1100hrs at Kapkoi Village Kabulwo Sub-location, Keu Location in Elgeyo-Marakwet County, willfully and unlawfully did grievous harm to Monica Chelimo.
  - iii. That on the 16th day of April 2015 at 1240hrs at Kapkoi Village Kabulwo Sub-location, Keu location in Elgeyo-Marakwet County, unlawfully assaulted Paul Kiplagat yet or their bio questioning him actual bodily harm.
  - iv. That on the 16th day of April 2015 at 1445Hrs at Kapkoi Village Kabulwo Sub-location, Keu location in Elgeyo-Marakwet County, assaulted number 37303 Corporal James Wanjigi with intent to resist arrest for the offence of Grievous harm
3. When the Appellant was arraigned before the Trial Court, he pleaded not guilty to all the four (4) charges facing him. After a full trial from the 8<sup>th</sup> April 2015 to the 23<sup>rd</sup> August 2017, the Appellant was convicted on all counts and was accordingly sentenced to imprisonment running consecutively.
4. The Appellant being aggrieved of the consecutive term of his sentence, has appealed to this Court in mitigation, having successfully sought leave to file his appeal out of time and filed his Petition of Appeal dated 17<sup>th</sup> July 2017.
5. The Appellant presented undated written submissions filed on 12<sup>th</sup> January 2023 urging this Court to allow his appeals arguing regurgitating his grounds of appeal, relying on the case of *R v Thomas Gilbert Cholmondley* (2009) eKLR, that offenders are victims of social, political, economic and psychological forces in society and as such sentencing should have the goal of salvaging and rehabilitating offenders and therefore treated with compassion and understanding and that the legal goal of his imprisonment has been achieved.



6. The Appellant further sought to fortify his argument and relied on the case of *S v Muchunu & Anor* (AR24/11) (2012) ZAKZPHC 6, and *S v Scott-Crossley* (2008) (1) SACR 223 SCA Para 35 holding that;

“plainly any sentence imposed must have a deterrence and retributive purpose but of course must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishment, they are not the only ones”

seeking leniency of the Court alleging he is a sacrificial lamb and that he be considered a rehabilitated person.

7. He Submitted that his fair trial rights as contained in Article 50 (2) (p) were contravened and he felt discriminated contrary to Article 27 (1), (2) and (4) and further invoked Article 20(4) of the constitution, citing the case of *Peter K. Waweru v Republic* (2006) eKLR that he was discriminated when the Trial Court imposed on him consecutive sentences.

8. He urged the invocation of this Court’s jurisdiction as a Constitutional Court under Article 165 as a means of addressing his predicament. And finally invited the Court to adopt the judicial sentencing guidelines in allowing his appeal.

9. The Appeal was opposed by the Republic in the undated written submissions filed on the 17<sup>th</sup> January 2023 arguing that the sentence imposed was just and fair with no need for the Court’s interference.

10. That the Trial Court in pronouncing the sentence was guided by the gravity of the offence the harm that the victims suffered and that the maximum sentence provided for under Section 234 of the Penal Code for the offence of causing grievous harm is up to life imprisonment and that the Court was lenient in imposing an imprisonment of three (3) years on each count.

11. The Respondent invited the Court to consider from the record of appeal the degree of harm occasioned upon the victims in contrast to the sentence imposed.

12. That Counts 3 and 4 attract a maximum sentence of up to five (5) years and the Trial Court was lenient in imposing two (2) years imprisonment on each count.

13. The Respondent thus urged the Court to disallow and dismiss the Appeal while confirming the sentence.

### **Analysis and Determination**

14. This is a first appeal. The duty of the first Appellate Court in criminal cases was restated in the case of *Charles Mwita v Republic*, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

“In *Okeno v R* [1972] EA 32 at page 36 the predecessor of this Court stated: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA}336) and to the appellate court’s own decision on the evidence”.

15. Being a first Appeal Court I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwalla v R* [1957] EA 570) it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court’s findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the



magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] EA 424.

16. The Court has re-valuated the entire body of evidence as it is enjoined to do and as it was established in the case of *Gabriel Njoroge v Republic* [1988-85]1 KAR 1134, that: -

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] EA 336, *Ruwala v. R* [1957] EA 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirection and non-directions on material points are matters of law.”

17. The fresh and exhaustive examination of this Appeal has given rise to the following issues for determination: -

- i. Whether the misdirected itself and acted upon a wrong principle or overlooked some material facts in sentencing?
- ii. Whether the trial court considered irrelevant factor(s) or applied a wrong principle in sentencing? or
- iii. Whether the sentence is excessive?

18. This Court has agonized while evaluating the Trial Court record, recalling the seriousness of the charges facing the Appellant, the peculiar circumstances of the commissioning of the offences, the trial evidence, the conduct of the Appellant during trial, the Trial Court's judgement, the Appellant's mitigation before sentencing in answer to the three (3) issues on Appeal.

19. The Prosecution called Six (6) witnesses who narrated graphically how on the material day the Appellant ran amok sequentially and over some hours attacking PW1, PW2, PW3 with a “machette”, a stone, a stick in various different locations within the village including by the road PW1, at the home of PW2 and PW3 in the presence of their children and PW4 at the Kabulwo Trading Center while responding to the complainants (PW1-PW3) and effecting an arrest upon the Appellant.

20. It was further noted of the prolonged duration of the murderous rage by the Appellant with PW1 testifying how the Appellant told him “he would kill him” while PW2 and PW3 being subjected to a senseless and unprovoked attack and in evidence stating that they never knew why the Appellant attacked them and in fact the attack was without any speech by the Appellant.

21. The medical evidence produced revealed the degree of injuries occasioned upon PW1 was ‘grievous harm’ and PW2 was ‘maim’ while PW3 and PW4 the injuries were classified as ‘harm’.

22. The Appellant was found with a case to answer and elected to give unsworn evidence where he denied the charges claiming he was arrested for no reason from his house on the 6<sup>th</sup> of April 2015 and that on the material day on the 16<sup>th</sup> of April he was in remand. He closed his case applying to submit after which he took flight failed to appear in Court subsequently on the 14<sup>th</sup> September 2015 for submission, constraining the Court to order for his arrest while forfeiting his cash bail.



23. The Appellant absconded and remained at large from the 3<sup>rd</sup> September 2015 to the 20<sup>th</sup> August 2017 almost two (years) a period which state resources were expended towards enforcing his warrants of arrest.
24. Two days after his arrest on warrant on the 22<sup>nd</sup> August 2017 judgment was delivered and sentence imposed upon the Appellant. The Trial Court offered the reason for the consecutive sentences as being the Appellants conduct in trial in absconding in breach of his bail terms. The Court nonetheless considered the Appellant as a first offender while sentencing him.

“The *Judiciary Sentencing Police Guidelines*, No.T.13 provides as follows: -“Where the offence emanate from a single transaction, the concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.”

25. Section 14(1) of the *Criminal Procedure Code* provides: -

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”

26. In this case the offences charged were committed in multiple and sequential transaction(s) against multiple victims at different locations and times I find in the circumstances of this case the trial court properly imposed consecutive sentences.
27. This Court finds that the sentence as imposed considered the gravity of the offence, conduct of the Appellant his mitigation and the Appellant’s assertions of discrimination and constitutional transgressions are without any basis and the Trial Court exercised sound discretion that cannot be disturbed by this Court.
28. The Appellant sought review of his sentence which the Court finds to be without basis, the sentence as imposed was lawful, and was not excessive under the circumstances and the Trial Court did not consider any irrelevant factor(s) or applied a wrong principle in imposing the sentence to warrant interference by this Court.
29. Consequently, and for reasons enumerated above, this Court finds the Appeal in mitigation of sentence to lack merit and accordingly and dismiss the same.
30. The Sentence of the Appellant by the trial court is thus confirmed.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 28<sup>TH</sup> FEBRUARY 2023**

**MOHOCHI S.M**

**JUDGE**

**28.2.2023**

In the presence of: -



Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

