



REPUBLIC OF KENYA



KENYA LAW
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**Kipkosgei v Republic (Criminal Appeal 11 of 2020)
[2023] KEHC 1379 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 11 OF 2020
RN NYAKUNDI, J
FEBRUARY 23, 2023**

BETWEEN

ELIUD KIPKOSGEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Conviction and Sentence of Hon. J.A
Orwa in Kapsabet CMCC 1848 of 2018 delivered on 21st January 2020)*

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mugun for the State

1. The Appellant was charged with the offence of robbery with violence contrary to section 295(1) read together with section 296(2) of the Penal Code. The particulars of the charge being that on the 10th day of May, 2018 at Kaiboi village in Kaiboi sublocation in Nandi County, they jointly robbed Calistas Kibet of his mobile phone and used actual violence after time of such robbery. He also faced an alternative charge of handling stolen property contrary to section 322 of the Penal Code.
2. The trial court upon hearing the case to its logical conclusion found the appellant guilty and sentenced him to 10 years imprisonment. Being dissatisfied with the decision of the court the appellant lodged the present appeal against the conviction.

Appellant's Case

3. The appellant submitted that he conceded to the conviction and was seeking a variation of his sentence. He stated that he is remorseful and has learned his lesson. He cited sections 364 and 365 of the Criminal Procedure Code and articles 165 and 159 of the Constitution in urging the court to set aside his sentence.



He stated that he has undergone training in theology and has been sufficiently rehabilitated. He prayed that the court be guided by the case of Francis Karioko Muruatetu and allow his appeal.

Respondent's Case

4. There were no submissions on record for the respondent.

Analysis & Determination

5. This being an appeal against sentence only, I will not delve into the merits of the conviction. Robbery with violence carries a mandatory sentence of death. However, emerging jurisprudence has now led to the disposition that courts can exercise their discretion in determining sentences by considering the circumstances and the mitigating factors.
6. The Court of Appeal in Criminal Appeal no 84 of 2015 – *Joshua Gichuki Mwangi vs Republic* (unreported) held that;

We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution.

7. In Mombasa High Court Constitutional Petition No 97 of 2021 – *Edwin Wachira and 9 others vs Republic* Hon Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.

8. In *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J held as follows;

My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences



to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the Constitution. In other words, since the provisions of the Sexual Offences Act came into force earlier than the Constitution, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the Constitution as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.

9. Guided by the above decisions, this court is obliged to consider the mitigation of the appellant and the aggravating circumstances of the case. I have considered the same and the appeal and it is my considered view that the sentence is excessive. I am therefore persuaded to interfere with the same.
10. From the record of the court the appellant was in remand from the date he was arraigned in court and has been in custody from May 14, 2018 when he was arrested. I therefore set aside the sentence of the trial court and order that the appellant be set free forthwith on account of time served inconsonant with Section 333(2) of the Criminal Procedure Code.
11. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23RD DAY OF FEBRUARY 2023.

R. NYAKUNDI

JUDGE

