Lonogwa v Republic (Criminal Appeal 19 of 2020)
[2023] KEHC 2812 (KLR) (Crim) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 19 OF 2020

PM MULWA, J

MARCH 31, 2023

BETWEEN

JOSIAH ALIGULA LONOGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against both conviction and sentence in Kibera Criminal Case No. 4743 of 2016 – Hon. E. Juma, SPM))

JUDGMENT

ARGUMENTS

1. The appellant, Josiah Aligula Lonogwa was charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the offence were that on the November 18, 2016 along Kipande road near National Museum robbed Faith Makena Kaungu of her handbag containing cash Kshs 15,000, a mobile phone make ITEL 1556 worth 10500, National Identity card, school leaving certificate, ATM cards for Equity, Standard Chartered and Cooperative bank all valued at Kshs 25,000 and immediately before such robbery used actual violence to the said Faith Makena Kaungu.

2. The appellant denied the charge and the case proceeded for full trial with the prosecution calling 5 witnesses in support of their case while the appellant in his defence gave sworn statement without calling any witness. By the judgment delivered on February 28, 2018 the trial magistrate found the appellant guilty of the offence charged, convicted him and sentenced him to serve 30 years' imprisonment.

3. Being aggrieved by both the conviction and sentence meted out against him by the trial court, he filed the instant appeal on grounds that: -

    i. That the learned trial magistrate erred in law and fact in his failure to observe that the elements that constitute robbery with violence were not conclusively proved as required by the law;

    ii. That the learned trial magistrate erred in law and fact in his failure to account that the purported identification did not meet the required expectation;

    iii. That the learned trial magistrate erred in law and fact in his failure to comply with section 124 of the *Evidence Act*;

    iv. That the learned trial magistrate erred in law and fact when he solely relied on the prosecution evidence that did not meet the required threshold i.e proof beyond reasonable doubts;

    v. That the learned trial magistrate erred in law and fact when he refuted his defence without giving clear points of determination;

    vi. That since he cannot recall all that transpired during the trial he will adduce such other grounds at the hearing of the appeal.

4. The state opposed the appeal on both conviction and sentence and the matter proceeded for hearing on October 5, 2022. The court granted the appellant leave to amend his grounds filed on October 5, 2022 together with his written submissions.

5. In his submission, the appellant submitted that his appeal is on sentence only. To this end he submitted that he has reformed by utilizing his time in prison well and has learnt new skills. Further, he is remorseful and he has been rehabilitated.

6. The prosecution counsel submitted that urged this court to uphold the sentence since it was proper.

7. The appellant having withdrawn his appeal on conviction and proceeded with appeal on sentence, the question is whether I should uphold the sentence or, as urged by the appellant, reduce it.

8. 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.'

9. Further 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 v R (1989 KLR 306)'

10. In the instant case the Appellant was sentenced to 30 years' imprisonment. In my considered opinion, the sentence meted out on the Appellant cannot be said to be harsh or excessive being that the offence carries a mandatory sentence of death.

11. While the nature of the robbery and the level of violence unleashed on the complainant does not rise to the level of the heinous crime, it is sufficiently serious to warrant long term imprisonment. In the circumstances, I will not disturb the sentence of 30 years imposed by the trial court.

12.

Final Orders:

The appeal is without merit and is dismissed.

JUDGMENT delivered virtually, dated and signed at **Milimani**

This **31st** day of **March,** 2023

.....

P.M. MULWA

JUDGE

In the presence of:

Ms. Karwitha – Court Assistant

Ms. Akunja: For State

Appellant: Present