



REPUBLIC OF KENYA



KENYA LAW
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**Baitome v Republic (Criminal Appeal E086 of 2022)
[2023] KEHC 17786 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E086 OF 2022**

LW GITARI, J

APRIL 27, 2023

BETWEEN

EZEKIEL KARITHI BAITOME APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant Ezekiel Karithi Baitome was charged in the Principal Magistrate's Court at Tigania Criminal Case No. 238 of 2020 with the offence of Grievous Harm, contrary to Section 234 of the *Penal Code*. He pleaded not guilty and a full trial was conducted. The learned trial magistrate found the appellant guilty, convicted him and sentenced him to serve thirty (30) years imprisonment.
2. The appellant was dissatisfied with both the conviction and sentence and filed a Petition of Appeal dated 9/6/2022 which had raised six grounds. However, the appellant filed amended supplementary grounds of Appeal together with his written submissions.

He relies on the following grounds:

1. That the appellant humbly begs the court to allow him to further mitigate and review his sentence downwards as the sentence of thirty years imprisonment is harsh and excessive to him as he is 43 years old with school going children who might be affected adversely by this prolonged stay in prison.
2. That the learned trial magistrate erred in matters of law by failing to order in his judgment that the appellants 30 years imprisonment sentence be commenced on the date of 18/11/2020 when his bond was canceled by the court in order to include the time spent in custody while undergoing trial in compliance with Section 333 (2) of the *Criminal Procedure Code*.



3. The appeal was opposed by the state. The court directed that the appeal be canvassed by way of written submissions.
4. The brief facts of the case are that the appellant is alleged to have caused grievous harm to Moris Baitome M'abuaine by cutting him on the left side of the head and on the right hand using a machete thereby causing deformity on the right hand distal 3rd and 4th and 5th fingers. The complainant Moris Baitome M'abuaine is the father to the appellant. On 2/7/2020 the complainant was milking his cow at his home when the appellant emerged from his home while armed with a machete and charged to where his father was. The appellant started chasing the complainant who in return fled to the home of Kimathi (Pw4) in this case. The complainant stopped and fell down where upon the appellant got a chance and cut him on the right hand and on the head. On hearing the commotion her daughter-in-law Betty Wambui (PW2) started screaming. Onesmus Kimathi (PW4) rescued the complainant and took him to Meru Hospital where he was admitted for eleven (11) days. Later the complainant reported the matter to the police and he was issued with a P3 Form.
5. The appellant was arrested the same day and charged with this offence. The P3 Form was later filled by Doctor Kinoti who examined the complainant and was produced by Doctor Mutuma Kirimi (PW3) who is a medical doctor working at Meru Medical Teaching and Referral Hospital. The complainant according to the doctor had sustained a cut wound on the posterior occipital part of the head measuring 14 centimetres, a fracture of the skull that was seen on CT Scan. He had a fracture of metacapals on his right hand and there were fractures on the 3rd, 4th and 5th with plaster cast. A sharp object was used to inflict the injuries. The degree of injuries was assessed to be grievous harm.
6. The appellant denied that he is the one who cut the deceased. He alleged that it is his mother who wanted to cut him but when he evaded the blow the complainant was cut. I have considered the facts of the case and the submissions. The appeal by the appellant is on the sentence only. The issue for determination is whether this court should interfere with the sentence imposed on the appellant by the trial magistrate.
7. The appellant was charged with the offence of grievous harm under Section 234 of the Penal Code. The Section provides:-“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”.
8. The law on appeal of sentence is well settled. Firstly, sentencing is the discretion of the trial magistrate and an appellate court will normally not interfere with the exercise of that discretion unless it is shown that the trial court took into account some irrelevant matters or applied a wrong principle or the sentence was harsh and excessive.
9. Those principles were stated by the Court of Appeal in the case of *Shadrack Kipchoge Kigo v Republic* Court of appeal Eldoret Criminal Appeal No. 253 of 2003 where the court stated: “Sentencing is essentially an exercise of discretion by the trial court and to this court to interfere it must be shown that in passing the sentence the court took into account an irrelevant factor or that wrong principles were applied or those of the sentence was harsh and excessive that an error of principle must be interfered” similarly the Court of Appeal in *Wanyama v Republic* 1991 EA 493. The court held that “the Appellate Court will not interfere with the discretion in sentencing unless it is proved that the trial court took into consideration immaterial facts overlooked some material facts or that there was an error in principle”.
10. In his submissions the appellant states that he is a father of school going children who solely depend on him for their education and the sentence imposed on him as likely to affect their future adversely. He further submits that since this is a matter that involves members of the same family and chances



of reconciliation are high. He urges the court to consider these mitigations and review the sentence downwards as it is harsh and excessive.

11. On the other hand the respondent has urged the court to find that the appellant has not proved that the sentence was illegal or that the court acted *ultra-vires*.
12. The trial magistrate at page 7 of the record from Line 7 stated as follows:-

“I have considered the mitigation of the offender and the victim impact statements filed by the learned prosecution counsel. Clearly the injuries that the complainant suffered show that the offender intended to cause “severe”(sic) Harm to him. They are injuries that could have even caused his death were it not for quick action of his brother and the doctors. I find that the offender is not suitable for a non-custodial sentence and considering the nature of injuries as (sic) severe punishment is necessary. The offender is sentenced to serve 30 years imprisonment”
13. It is trite that the trial court must take into account all the relevant factors. The Court of Appeal in the Case of *Bernard Kimani Gicheru v Republic* [2002] eKLR stated that “It is now well settled law following several authorities by this court that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence is a matter that rests in the discretion of the trial court. Similarly sentence must depend on facts of each case.
14. On appeal the appellate court will not easily interfere with the 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. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.
15. The predecessor of the Court of Appeal in the case of *Ogolla S/o Ovodor v Republic* [1954] EACA 20 held as follows:-

“The court does not alter a sentence unless the trial judge acted on some wrong principles or overlooked some material factors”
16. These authorities set out the circumstances under which an appellate court interferes with the sentence.
17. The appellant was charged with grievous harm which attracts a maximum sentence of life imprisonment upon conviction. Section 234 of the *Penal Code* [*supra*] states that the “Offender is liable” to imprisonment for life emphasis added, it means that the court can exercise discretion and pass any sentence based on the circumstances and facts of the case upto a maximum of life imprisonment”.
18. In this case, the trial magistrate imposed a sentence of thirty (30) years imprisonment after properly addressing her mind to the circumstances and the facts of the case. The court did consider the mitigation by the appellant but eventually found that the appellant would have killed the victim if it were not for the quick intervention by his brother and the doctors. The victim impact statement stated that the appellant would kill the victim and burial preparations would take place. The appellant dismissed the entire incident as a passing cloud. This in itself shows that he was not remorseful and was not genuinely sorry for what he did to his own father. The injuries inflicted were severe life threatening and left the victim maimed for life.



19. I find that the learned trial magistrate, was right to hold that a deterrent sentence was called for. I find that the trial magistrate exercised her discretion judiciously in the circumstances. I therefore find no reason to interfere with the sentence. The appeal on the sentence must therefore fail.
20. On the failure by the trial court to comply with Section 333(2) of the Criminal Procedure Code, I have perused the record and noted that the appellant was arrested on 6/7/2020. Although he was granted bail he did not post the bail. On 3/9/2020 he was released on cash bail after the bail terms were reviewed. He absconded and warrant of arrest was issued. He was arrested and the bail was cancelled. He remained in prison custody thereafter up to the date the judgment. The sentence was passed on 25/3/2022. The learned trial magistrate did not take into account the period the appellant spent in custody awaiting trial. Section 333(2) of the Criminal Procedure Code provides:-

“..

- (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

21. This provision is couched in mandatory terms. The time court must therefore show on the record that it took into account the period spent in prison awaiting trial. What this means is that the sentence imposed must be reduced by the time spent in custody awaiting trial. This the trial court did not do. This court should therefore order that the period spent in custody be taken into account to reduce the sentence.
22. From the record the appellant was remanded in custody from 6/1/2020 upto 3/9/2020 when he deposited a cash bail. This accounts for two months and ten days. He absconded and upon arrest his bail was cancelled. He was remanded in custody from 18/11/2020 upto to 25/3/2022. This accounts for one year, three months and five days. The total period spent in custody is one year four months and fifteen days. The sentence ought to have taken this period into account.

In Conclusion

23. For the reasons stated above, I find that the appeal is without merits.

I order as follows:-

1. This appeal is dismissed.
2. The sentence imposed on the appellant shall be reduced by one year, five months and fifteen days to account for the period the appellant spent in custody awaiting trial.
3. The Deputy Registrar to serve the Order on the officer in-charge of the prison where the appellant is serving sentence for compliance.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF APRIL, 2023.

In the presence of:-

Prosecution Counsel: Ms. Kitoto

The appellant in person



HON. LADY JUSTICE L. GITARI
HIGH COURT – JUDGE

