



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lobusi v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 18000 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E025 OF 2022**

RB NGETICH, J

MAY 31, 2023

BETWEEN

SAMSON LIPUNA LOBUSI APPELLANT

AND

REPUBLIC RESPONDENT

((An appeal against the sentence from the Judgment and/or Decree of Honourable J. Tamar (PM) dated at Eldama Ravine Principal Magistrate's Court Criminal Case No. 844 of 2017 on 15th October, 2018).))

JUDGMENT

1. The Appellant Samson Kipuna Lobusi was charged with the offence of attempted murder contrary to section 220(a) of the *Penal Code*. The particulars of the charge being that on the 14th Day of November, 2017 at about 1700hrs at Sinende village in Mogotio Sub-County within Baringo County the accused unlawfully attempted to cause the death of Everlyne Tuitoek by inflicting multiple deep cut wounds on Everlyne Tuitoek using a *panga*.
2. The Appellant denied the charge and the case proceeded for full trial with the prosecution calling 5 witnesses in support of their case. The accused gave unsworn statement in his defence. By the judgment delivered on October 15, 2018, the lower Court found that the prosecution proved the charge against appellant/accused beyond reasonable doubt; he was convicted and sentenced him to serve 20 years imprisonment.
3. The Appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal by Petition of Appeal dated March 1, 2022 challenging conviction and sentence on the following grounds:
 - i. That the learned trial magistrate erred in law and fact by convicting the Appellant but failed to note that the ingredients of the offence was not conclusively proven.



- ii. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to find that his defense was cogent and believable.
- iii. That the learned trial magistrate erred in law and fact by convicting the Appellant yet failed to find that the prosecution did not discharge the burden of proof.
- iv. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the evidence of identification by recognition of the Appellant was not positively proved.
- v. That further grounds to be adduced at the hearing of this Appeal.

Appellant's Submissions

4. When the matter came up for hearing on the May 2, 2023, the Appellant informed the court that he agrees with the conviction; he stated that he was jailed for 20 years for the offence of attempted murder and he has been in prison for 6 ½ years; he sought forgiveness and urged this court to reduce the sentence.

Respondents Written Submissions

5. In response Ms Ratemo counsel for the state argued that the offence the Appellant was charged with is serious; that she has looked at the injuries sustained by the victim which were multiple skull fracture, left tibia and fibula fracture, deep cut in the neck and her right hand; and submitted that the complainant could have lost her life and based on the circumstances, the trial court applied the right principles in sentencing the Appellant to serve 20 years imprisonment since the trial court had the discretion during sentencing and had the benefit of listening to the witnesses.
6. She further submitted that the sentence imposed was proportional and the intention was to give a deterrent sentence. She urged this court not to show leniency and prayed that the trial court conviction and sentence be upheld.

Analysis and Determination

7. In view of the fact that the appellant abandoned appeal on conviction, what is left for determination by this court is whether this court should interfere with the sentence imposed by the trial court. This court can only interfere with the sentence imposed by trial court if the trial court applied wrong principles and whether the sentence is harsh and excessive in sentencing the Appellant to serve 20 years imprisonment.
8. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Mbogo & Another vs Shah* (1968) 1 EA 93 thus: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”



9. In the case of *Ogolla s/o Owuor vs Republic*, [1954] EACA 270, the Court of Appeal stated as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
10. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. In the case of *Shadrack Kipkoech Kogo - vs - R Eldoret Criminal Appeal No 253 of 2003* the Court of Appeal stated as follows: -

“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).”
11. Further in the case of *Bernard Kimani Gacheru vs Republic* [2002] eKLR the court of appeal restated as follows: -

“It is now settled law, following several authorities by this Court and by 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 considered 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, anyone of the matters already states is shown to exist.”
12. I have considered circumstances surrounding the offence herein. The offence herein is categorized as gender based. I note that the appellant has served six and half years (6 1/2).
13. In sentencing the Appellant, the trial magistrate stated as follows:-

“I have considered the offence, the circumstances under which it was committed and the facts of the complainant’s injuries. I hereby sentence the accused to serve 20 years imprisonment.....”
14. It is clear therefore that the trial court considered the fact that the Appellant was a first offender, he also considered the circumstances of both the victim and the appellant and noted that the offence required a stiff punishment. In this regard, I am satisfied that due consideration was made in safeguarding the interests of the victim, the Appellant and the community at large. In this appeal, the Appellant submitted that he was remorseful and prayed for forgiveness and leniency.
15. I note that the offence of attempted murder Contrary to Section 220 of the *Penal Code* is a felony and attracts a maximum sentence of life imprisonment. The appellant was sentenced to serve 20 years imprisonment. I have perused sentence imposed in similar offences or in the offence of murder and I am inclined to review sentence imposed to 15 years. I further order that sentence served in custody awaiting trial be reduced from the sentence herein.
16. Final Orders: -



1. Appeal on conviction is marked as abandoned.
2. Sentence reviewed by reducing to 15 years imprisonment.
3. Period served in remand to be reduced from sentence.
4. Right of Appeal 14 days.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 31ST DAY OF MAY 2023.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi/Mr. Milliong'ar - Court Assistants.

Ms Ratemo for state.

Appellant - Present

