Chepkwony v Republic (Criminal Appeal E053 of 2022)
[2023] KEHC 20428 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20428 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E053 OF 2022

RL KORIR, J

JUNE 29, 2023

BETWEEN

WESLEY CHEPKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E492 of 2022 by Hon. L. Kiniale in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was convicted by Hon. L. Kiniale, Principal Magistrate for the offence of arson contrary to Section 332(a) of the *Penal Code*. The particulars of the Charge were that on May 21, 2022 at around 2200 hrs at Sugutek village, Singowet Location within Bomet County, the Appellant wilfully and unlawfully set fire to a dwelling house valued at Kshs 150,000/= belonging to Agnes Kosgei.

2. The Appellant pleaded not guilty to the charge before the trial court. He changed his plea to guilty and when he disputed the facts read to him, a plea of not guilty was entered. Thereafter, a full hearing was conducted. The prosecution called four (4) witnesses in support of its case.

3. At the close of the prosecution case, the trial court ruled That a *prima facie* case had been established against the Appellant and he was put on his defence.

4. At the conclusion of the trial, the Appellant was convicted of the offence of arson and sentenced to serve 20 years in prison.

5. Being dissatisfied with the Judgment dated November 3, 2022, the Accused through his petition of Appeal filed on November 10, 2022 appealed against the sentence and relied on the following grounds: -

    i. That I pleaded guilty to the charges.

ii. That the learned trial Magistrate erred in law and in fact by not considering That the plea of guilty entered was not equivocal.

iii. That the learned trial Magistrate erred in law and in fact in failing to observe That there were threats, intimidation or blackmail.

iv. That the learned trial Magistrate erred in law & in fact in convicting the Appellant to a harsh & excessive Sentence based on circumstances and violated the provisions of Article 50 (2) of the *Constitution of Kenya, 2010*.

6. The Appellant later filed an Amended Memorandum of Appeal on March 7, 2023 limiting his Appeal to the Sentence only. His grounds were: -

i. That the learned trial Magistrate erred in law and fact by meting out a harsh and heavy sentence.

ii. That the learned trial Magistrate erred in law and fact by not taking into account the mitigation of the Appellant'

iii. That I pray to be present during the hearing of this Appeal on sentence only.

The Appellant only appealed against his sentence which he stated was harsh and excessive. He did not appeal against his conviction and as such the conviction is sustained.

7. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This was succinctly stated by theCourt of Appeal for Eastern Africa in *Pandya vs. Republic* (1957) EA 336 where it stated: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and That question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. The Appellant only appealed against his sentence which he stated was harsh and excessive. He did not appeal against his conviction and as such the conviction is sustained.

The Appellant's Written Submissions.

9. The Appellant urged this court to interfere with the Sentence of the trial court and reduce it as he was a first offender and That the Sentence was against Article 50 (2) (p) of the *Constitution* That every accused person should benefit from the least severe of the prescribed punishment for the offence. He relied on *Yawa vs Republic* (2018) eKLR.

10. The Appellant submitted That the he did not understand the seriousness of the charge That faced him. That it was in the best interest of the family to promote reconciliation as it was an attack of the property of his grandmother. The Appellant further submitted That this court should grant a

corrective sentence which reflected the *Constitution of Kenya* and which promoted the protection of fundamental rights of the Appellant. He relied on *Philip Makokha Keya vs Republic* (2014) eKLR.

11. It was the Appellant's submission That this court exercise its discretion and grant him a lesser Sentence as the 20-year Sentence was harsh and unfair.

12. In mitigation, the Appellant submitted That he was a first offender, unmarried and promised not to break any law again. That he had reconciled with his family and was remorseful.

The Prosecution's Written Submissions.

13. The Prosecution submitted That PW2 stated That he saw the Appellant burning the complaint's clothes. That further PW1, PW2, PW3 and PW4 confirmed That the complainant's house was set on fire. The Prosecution further submitted That further proof That the building was set on fire was in the form of photographs which were produced before the trial court.

14. It was the Prosecution's submission That PW2 identified the Appellant as the one who burned the complainant's house. That when he asked the Appellant why he was burning the house, he stated That he was being disturbed by a lot of things. It was the Prosecution's further submission That the Appellant fled after burning the house and was arrested the following day.

15. The Prosecution submitted That the Appellant did not challenge PW2's evidence, he did not also cross examine PW1. That when PW3 arrested the Appellant, he was very remorseful and sought for forgiveness. The Prosecution further submitted That when the Appellant was arrested by PW4, he admitted to burning the house but did not give his reasons for doing so. That the evidence of identification of the Appellant and being placed at the crime scene was beyond any doubt.

16. It was the Prosecution's submission That the Appellant burnt the complainant's house without any justification. That from the evidence on record, there was no dispute between the Appellant and the complainant.

17. The Prosecution submitted That from the Appellant's defence, it was clear That he planned the whole thing and could not say That it was an accident. That his defence was shallow, unsworn and was not backed by any other evidence.

18. It was the Prosecution's submission That the maximum sentence provided under section 332(a) of the *Penal Code* was life imprisonment. That considering the nature of the offence, how it was executed and the status of the complainant, the sentence imposed by the trial court was proper and called upon this court to uphold it.

19. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on November 10, 2022, the Amended Memorandum of Appeal filed on March 7, 2023, the Appellant's Written Submissions filed on March 7, 2023and and two issues arise for my determination:-

    i. Whether the plea was unequivocal

    ii. Whether the Sentence was harsh and excessive.

Whether the plea was unequivocal.

20. Although the Appeal was restricted to the sentence only, I have noted That the Appellant was unrepresented during the trial and That one of his grounds of Appeal was That the plea he entered

was equivocal. To ensure That the Appellant was accorded a fair trial in accordance to Article 50 of the *Constitution of Kenya*, I shall relook the plea process in the trial court.

21. The process of plea taking is provided under Section 207(1) and (2) of the *Criminal Procedure Code* which states :-

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided That after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

22. In the case of *Ombena vs Republic* (1981) eKLR, the Court of Appeal held That: -

> "In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
>
> "Held:
>
> (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
>
> (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
>
> (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
>
> (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
>
> (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

23. I have gone through the trial court proceedings and I have noted That the Appellant took plea on May 23, 2022 when the substance of the charge was read and explained to him in a language he understood and he denied the truthfulness of the charges by responding in Kiswahili "*si ukweli*". The same was recorded by the trial court and a plea of not guilty was entered.

24. On July 14, 2022, the Appellant informed the trial court That he was ready to change his plea. When the substance of the charge was read and explained to him in a language he understood, he responded "it is true" and a plea of guilty was entered. When the facts of the case were read out to him, the Appellant stated That they were not true and consequently a plea of not guilty was entered.

25. Guided by the aforementioned authority, it is my finding That the trial court complied with all the requirements and followed the proper procedure in taking the Appellant's plea. The Appellant's plea was therefore unambiguous and unequivocal. The case thereafter went to trial in which the

prosecution called 4 witnesses. The court found a *prima facie* case against the Appellant. Put on his defences the Appellant gave unsworn testimony in which he stated That he did not intentionally commit the offence and has asked for forgiveness.

Whether the Sentence was harsh and excessive

26. The Appellant has argued That the sentence meted against him was harsh and excessive. He has further urged That the court did not take into consideration his mitigation.

27. The principles guiding reconsideration of sentence by the appellate Court were set out in *Ogolla s/o Owuor vs R* (1954) EACA 270, where the Court of Appeal held That:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in R v Shershowsky {1912} CCA TLR 263 as emphasized in Shadrack Kipkoech Kogo v R Criminal Appeal No. 253 of 2003 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 irrelevance 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."

28. Similarly in *S vs. Malgas* 2001 (1) SACR 469 (SCA), the Supreme Court of Appeal of South Africa held That: -

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked That it can properly be described as "shocking", "startling" or "disturbingly inappropriate

1. The Appellant was charged and convicted of the offence of Arson. Section 332 of the *Penal Code* provides That:-

   Any person who wilfully and unlawfully sets fire to—

   (a) any building or structure whatever, whether completed or not; or

   (b) any vessel, whether completed or not; or

   (c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

   (d) a mine, or the workings, fittings or appliances of a mine, is guilty of a felony and is liable to imprisonment for life.

30. As stated above, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial

court if it is demonstrated That the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or That the court acted upon a wrong principle.

31. In this case, the Appellant was sentenced to 20 years for an offence which carried a Sentence of life imprisonment. It is my finding That given the circumstances of the case That the Appellant burnt his grandmother's house, the trial Magistrate was sufficiently compassionate. It is my further finding That the trial magistrate did not act on a wrong principle or misapprehended the law.

32. I have considered the Appellant's mitigation both in the trial court and in his submissions on this appeal. He told the trial court That he was remorseful and had sought the complainant's forgiveness. The trial court considered a pre-sentence report dated November 3, 2022 prepared by the probation officer. I have revisited the said report. The probation officer documented views of the Appellant's family and the community which showed That he was a very disruptive and violent individual. That he abused alcohol and bhang and turned violent whenever drunk. His family members were concerned about their safety. The report recommended a rehabilitative prison sentence.

33. It is my finding therefore that the trial court was not in error at all when it meted out a 20-year prison term. I however consider that the appellant will benefit from prison rehabilitation which will also allow him the benefit of early release from prison to enable him make peace with his family and community and restructure his life while still young.

34. I reduce the sentence to 12 years' imprisonment which sentence shall run from May 23, 2022 being the date That the Appellant was placed in pre-trial custody.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JUNE, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr. Njeru for the Respondent and Siele (Court Assistant)