



REPUBLIC OF KENYA



**Macharia v Republic (Criminal Appeal 36 of 2020)
[2023] KEHC 22798 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 36 OF 2020
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

GEOFFREY MBURU MACHARIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from both conviction and sentence of
Gatundu Criminal Case No. 383 of 2019 - Hon. L.M. Wachira)*

JUDGMENT

1. The appeal emanates from the conviction and sentence of the accused person in Gatundu criminal case No 383 of 2019. The appellant was with other accused persons who are not parties in this current appeal and were charged with two counts of offences.

Count I Attempted rescue of prisoners contrary to section 122(1) of the *Penal Code* - particulars being that the appellant together with 2 others on the May 14, 2019 at Mutuma Ap Post in Gatundu North- County within Kiambu county jointly with others not before the court by force attempted to rescue Wilson Maina Sakamoto and Erick Kamande Gathoni who had both been charged with the offence of being in possession of cannabis from lawful custody.

Count II Malicious damage to property contrary to section 339(1) of the *Penal Code* - particulars being that the appellant together with 2 others on May 14, 2019, at Mutuma AP Post in Gatundu North sub-county within Kiambu County jointly with others not before the court wilfully and unlawfully damaged ten (10) window panes valued at Kshs 15,000/= the property of the National Police Service.

2. The appellant with his co-accused were arraigned in court on May 16, 2019 and he pleaded not guilty to both counts. On May 28, 2019, the appellant chose to change the plea. On May 29, 2019, the charge and its particulars were read out to him and his co-accused in Kiswahili which he admitted. The facts



were then stated and the appellant confirmed they were correct. He was convicted on his own plea of guilty.

3. The trial magistrate having considered the appellant's mitigation stated; "appellant's conduct is very rampant in Gatundu North where civilians attempt to rescue prisoners from police custody." She proceeded to sentence the appellant to seven (7) years imprisonment in count 1 and one and a half (1½) years imprisonment in count 2 on May 30, 2019.
4. Aggrieved by the decision of the trial magistrate the appellant filed a petition of appeal citing the following grounds:
 - i. The learned trial magistrate erred in both law and facts by not considering that the imposed sentence was meted to be manifestly harsh and excessive.
 - ii. That the learned trial magistrate erred both in law and facts by failing to consider that the appellant was remorseful, 1st offender, the sole breadwinner of his entire family which include school attending siblings, reformed/rehabilitation repented and he pleaded guilty.
 - iii. That the trial magistrate erred in both in fact and law by failing to invoke section 12 of the CPC, hence the imposed sentence to be combined according to the stipulated law and hence run- concurrently.
 - iv. That the trial magistrate erred in both law and fact by failing to consider that the appellant was young married and ready to rejoin the society.
 - v. That the learned trial magistrate erred in both law and facts by failing to put into account that the appellant pleaded guilty and the entire mitigating factors and circumstances.
5. The appellant proposed to ask that the appeal be allowed, the conviction quashed and the sentence set aside.
6. The appeal was heard by way of written submissions. Both parties filed their submissions.

Appellant's Submissions

7. The appellant submitted that the sentence was harsh and excessive. The trial magistrate failed to exercise an impartial and transparent discretionary power in sentencing. The excessive sentence fails to serve the purpose of sentencing. A first-time offender needs to benefit from the least severe sentence, as per the sentencing policy guidelines.
8. That the appellant was a first-time offender and a minimum sentence ought to be meted out to him. The appellant is remorseful and apologizes for his bad behaviour and indicates he has learned his lesson, he promises to be a good ambassador for reform and harmonize the youth and other persons who have such behaviour.
9. The appellant urged the court to allow the appeal and review his sentence.

Respondent's Submissions

10. Opposing the appeal, the state/respondent's counsel submitted that the plea was unequivocal, the charge and the particulars were read out in Kiswahili language which the accused persons indicated they understood.



Analysis And Determination

11. The Court of Appeal laid down the duties of a first appellate court in *Okeno v R* {1972} EA 32 and *Kiilu & another v R* {2005} 1KLR 174, where it was held that: “The first appellate court must re-examine, rehear, scrutinize and evaluate the evidence on record by the trial court to draw its own conclusions and findings. In doing so it has only to bear in mind that the trial court had the advantage to observe the demeanor and credibility of witnesses.”
12. This court has considered the appeal, and the submissions of both parties for and against the appeal and will re-evaluate the evidence and come up with its own conclusion.
13. The prosecution has a duty to prove offences against accused persons beyond reasonable doubt. In the instant appeal, the appellant was convicted on his own plea of guilty.
14. An accused person is allowed to change plea at any time before sentencing. In the case of *John Muendo v Republic*, Nairobi criminal appeal No 365 of 3011 (2013) eKLR the court of appeal stated that:

“We want to add here that if the accused wishes to change plea or in mitigation says anything that negates any of the ingredients admitted and been convicted for, the court must enter a plea of not guilty. That is to say, an accused can change plea at any time before sentence.”
15. From the trial court record, the appellant initially on May 16, 2019 pleaded not guilty but changed his plea on May 29, 2021. The charges were read out in Kiswahili and the appellant admitted they were true. And when the prosecution laid out the facts of the case, the appellant confirmed they were correct.
16. From the record it is clear that the appellant’s plea was unequivocal, therefore this court finds that an appeal cannot lie against his conviction.
17. Section 348 of the *Criminal Procedure Code* prohibits appeals from a plea of own guilty;

“No appeal on plea of guilty, nor in petty cases no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”
18. In sentencing, the trial magistrate noted the rampant conduct of people trying to free prisoners in Gatundu North and opted to issue a deterrence sentence. The appellant submits the sentence is excessive and he pleads for leniency as a first-time offender. The appellant faults the trial magistrate for failing to consider his mitigation in exercising her sentencing discretion.
19. Section 122(1) (b) of the *Penal Code* provides:
 1. Any person who by force rescues or attempts to rescue from lawful custody any other person-
 - a. is, if the last-named person is under sentence of death or imprisonment for life, or charged with an offence punishable with death or imprisonment for life is guilty of a felony and is liable to imprisonment for life; and
 - b. is, if the person is imprisoned on a charge or under sentence for any offence other than those specified above, guilty of a felony and is liable to imprisonment for 7 years, and



c. is, if any other case, guilty of a misdemeanour.

20. The sentence of 7 years is within the law and therefore the trial magistrate did not err in imposing the same.
21. This court also finds that the trial magistrate did consider the appellant's mitigation in sentencing. The ground that the appellant's mitigation was not considered therefore fails.
22. On the issue of sentencing this court notes the trial magistrate sentenced the appellant to serve 7 years imprisonment in count 1 and 1½ years imprisonment in count 2 and the period was to run concurrently. It is the finding of this court that the ground of appeal that the trial court ignored section 12 of the *Criminal Procedure Code*, must fail.
23. The appellate court will only disturb the sentence of the trial court if the same was excessive. The trial magistrate having considered the mitigation and the rampant vice that was common in Gatundu North passed a sentence which she considered was deterrent. It cannot be said that the trial magistrate acted on the wrong principles. I thus find no reason to interfere with the sentence.
24. In the upshot, this court finds the appeal is lacking in merit and is hereby dismissed.
It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua/ Duale – Court assistants

Appellant – present (virtually from Kamiti Medium)

Mr. Gacharia - for the state/respondent

