Lokiriama v Republic (Criminal Appeal 1 of 2020)
[2023] KEHC 25921 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25921 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL 1 OF 2020

RN NYAKUNDI, J

NOVEMBER 29, 2023

BETWEEN

LOKOYAN LOLIMA LOKIRIAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction on sentence in the Resident Magistrate Court at Kakuma criminal offence No. 183 of 2019 by Hon. J M Wekesa (PM))

RULING

Background

1. The Appellant in this appeal was indicted in the court below for various offences as particularized below:

    1. From the submissions filed on 19.10.22 the appellant appears to have abandoned the appeal save on sentences alone

    2. He requests that the reminder of the sentence be served on probation/non-custodial

    3. The appellant was charged and convicted of five (5) counts of:

        i. Attempted murder which has a maximum sentence of life imprisonment.

        ii. Possession of firearm with maximum sentence of

        iii. Possession of ammunition with a maximum sentence of

        iv. Assault with intent to steal with a maximum sentence of 5 years

        v. Assault causing actual bodily harm with a maximum sentence and the sentence to run

2. The offences were all tried on the merits and on conviction appropriate sentences imposed. The Appellant now appeals against sentencing based on the mitigation in his submissions that he has since reformed and incapable of reoffending the respondent or the community. On the part of the Assistant Director Prosecution Mr. Kakoi he urged the court to take into account the quantum of the offence and the circumstances in which they were committed. He also invited the court to take judicial notice of the proliferation of small arms in the County, the insecurity resulting therefrom and the loss of lives.

Determination

3. This appeal is purely on sentence. Nevertheless the court is mandated to examine the entire record of the proceedings including reappraising of the evidence to come up with its own conclusions. Essentially the following case law entrenches the principles to guide the session judge in his or her exercise of discretion. In *Ogalo s/o Owoura v R* (1954) 21 E.A.C.A, 270:

> An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the cases of similar nature, while not being precedents, do afford material for considerations."

4. The same court in *Benard Kimani Gacheru v Republic* [2002]eKLR stated that:

> 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 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, anyone of the matters already states is shown to exist.

5. Our legal system as it was thought of some decades back ideally adjusts the punishment imposed on offenders to achieve a balance between the crime and its harm, the criminal and his or her guilty without going into undue subtleties of minute variations in the guilty of the perpetrators in the same sub-category of offences. The punishment in such a scheme of things in Kenya being almost entirely designs to serve the goals of retribution and deterrence of all non -descript members of a class, could be almost entirely stereotyped. That is why before the advent of *Muruatetu* decision [2017]eKLR all first degree murderers were rewarded with a death penalty. It also goes without saying that any offender convicted of robbery with violence contrary to section 296(2) of the *penal code* also received the death sentence for the offence upon conviction. To the extent that the above case law sets out the reviewability of sentence sometimes it is difficult for an appeals court to navigate the sentence landscape as most of them are found to be within the narrow legislative frame. Given the mini-max sentencing policy guidelines 2023 and the jurisprudential case log on sentencing there are now many devices available for trial judges to turn to for guidance to appropriately determine a fair and just sentence. Now a significant choice has to be made in every case a choice which was generally not possible a few decades ago. All what is required is for the legal machinery in the various hierarchy of courts to guard against the wrong choice and subsequently to result to a wrong sentence. How does the law usually protect the convicts against a wrong choice of sentence in the part of the trial magistrate? *The constitution* and other enabling statues grants leave for appellate review. While I appreciate the need for continuous reviewing of sentences within the scope of review jurisdiction, what makes one pause is the lack of criteria by which as a

superior court we can measure the justness, fairness, uniformity and proportionality of those sentences permissible in the same class of offences. It must be noted that here I am interested primarily in exercise of judicial discretion and the judicial choice met to adopt a particular sentence in review procedures.

6. Indeed, this is what I am being asked to undertake by the Appellant to permit to exercise a judicial choice so as to impose an alternative sentence other than that of the trial court. I think our system has muddled along as can be seen in various decisions with vague expressions like lack of sound exercise of judicial discretion, gravity of the offence, protection of society, the guilty of the perpetrator, heinous crime but none of this concepts is law. In the real sense of review jurisdiction customarily appeals courts are obligated to dealing with judicial violations of law and not slogans. There comes the problem and the limitations properly described as the reality of our legal system. However from the nature of the different factors to be taken into account in sentencing it is apparent that the penal system in our country works but with a cautionary statement that punishment is not meant to serve one principle/ objective inclusive.

7. In practical terms I have considered the submissions from the Appellant and the rejoinder observations Mr. Kakoi for the state on the punishment imposed by the trial court within the legal framework as established by law. The essential goals of punishment were met and there is truly nothing outrageous to demand of this court to substitute its own discretion for that of the trial magistrate. Ultimately driven by the provisions of section 382 of the *CPC* the appeal on sentence stands dismissed as catalogued in the criteria outlined elsewhere in this ruling.

SIGNED AND DELIVERED AT LODWAR THIS 29TH DAY OF NOVEMBER, 2023

And in the presence of;

Mr. Kakoi for the state

Appellant in person

.....

R. NYAKUNDI

JUDGE