Mwithale alias Fredrick v Republic (Criminal Appeal E111 of 2021)
[2022] KEHC 10661 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10661 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E111 OF 2021

PJO OTIENO, J

MAY 31, 2022

BETWEEN

PATRICK MICHUBU MWITHALE ALIAS FREDRICK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. Tito Gesora SRM in Maua CR Case No. 2966 of 2019)

JUDGMENT

1. The Appellant was arraigned before the Chief Magistrate at Maua in Criminal Case No. 2966 of 2019 charged with the offence of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The prosecution called a total of three witnesses with PW2, the complainant, testifying that on the material day he was carrying the Appellant, a person known to him, and another person who was not identified and charged, as pillion passengers, on his motor cycle, Registration No. KMEN 456B. On their way to Laare area, the Appellant and the other passenger ordered him, PW2, to get off the motor cycle. He refused but was then shown a knife forcing him to surrender and the Appellant and the other passenger then took off with the motor cycle.

2. On being cross-examined, the witness told the court that he had ferried the appellant to Mutuati where the appellant sold miraa then the appellant asked him to drop him and a stranger to Laare and that it was while on the way to Laare that he was attacked and robbed at about 11am. In re-examination the accused confirmed knowing the home of the appellant.

3. PW1, was the father to PW2 and testified that on the 03/9/2019, he was at home when the complainant reported to him that his motor cycle had been stolen by the appellant in the company of another person unknown to the complainant. He testified that he had bought the motor cycle and given it to the complainant and produced a purchase receipt to demonstrate tittle. He confirmed knowing

the appellant together with his father and that upon arrest after two weeks, the appellant, who is also known a s Jambazi, said that he had sold the motor cycle to one Ndariri who but refused to identify the said buyer. On cross examination, he admitted having been present at the scene, confirmed that he was informed of the incident by the complainant but denied suggestions that the complainant had sold the motor cycle. On suggestion that the appellant had differed with the complainant, he asked the appellant to sort out that with the complainant stating that the property was his in possession of the complainant and that it was the Nyumba Kumi who had arrested the appellant and took him to the camp.

4. PW3 was the investigating officer to whom the report was made and who recorded statements and later charged the appellant upon being arrested. He reiterated the story as told by PW2 then produced the logbook of the motor cycle together with the purchase receipt.

5. With the closure of the prosecution's case after the three witnesses, the Court held that a prima facie case had been established and the accused person was put on defence. The appellant opted to give sworn statement without calling any witness in which he denied the charges and testified that he was not aware of the offence he was charged with. He claimed to not to remember the date well but that he was home doing some farm work for the mother near the complainants home and that the reason he was arrested was a disagreement between him and a relative of the sub area manager. He however confirmed knowing the complainant well but that the two were not related but had no grudge.

6. In its reserved judgment the appellant was convicted as charged and sentenced to ten years' imprisonment. The appellant was only aggrieved and dissatisfied with the sentence and not conviction and filed the undated and amended ground of appeal, the Appellant raised the following two grounds: -

    a. That the learned magistrate erred in both law and facts by imposing a harsh and excessive sentence without considering the circumstances in which the offence was committed.

    b. That the learned trial magistrate erred in law and facts by failing to note that the purpose of a sentence of imprisonment is not only for retribution but also for rehabilitation."

7. On the directions by the court that the appeal be canvassed by written submissions, both sides filed submissions which I have read and will not rehearse here but just give an overview.

8. For the appellant, it is submitted that according to the evidence on record, he did not use actual violence on the complainant and that the complainant only lost his motor cycle which could be termed as a simple theft or stealing. He then added that that the ingredients of an offence of robbery with violence had not been met to warrant his conviction and sentencing.

9. To the contrary, the prosecution submits that they tendered sufficient evidence to convict the Appellant with the offence of robbery with violence and that the sentence meted was fair and lenient considering that the law under which the appellant was charged for robbery with violence attracts 14-year imprisonment.

10. I have duly and dutifully considered the record at trial and submissions and in my opinion the sole issue for determination by Court is whether the sentence imposed on the appellant was so exorbitant and excessive as to merit interference by the court. This must be limits within which the court must operate, it being that the appeal is against sentence only, even though the parties seem to have offered missions on the conviction.

11. Imposition of a sentence of imprisonment upon conviction is a matter at the discretion of the trial court and it is the law, whether in civil or criminal litigation, that an appellate court ought not to lightly and freely set to interfere with a discretion of the trial court unless and until it be satisfied that there

was an error in principle in that the trial court took into account an irrelevant matter or failed to take into account a relevant matter. For a criminal sentence, an appellate court would only interfere upon demonstration that the sentence is exorbitant or too harsh in the circumstances of the case. In *Bernard Kimani Gacheru v. Republic*, Cr App No. 188 of 2000, the Court of Appeal stated thus:

> " 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 stated is shown to exist."

12. In this matter the offence charged carried a mandatory death sentence but the trial court took into account the principles laid down by the Supreme Court that legislatively imposed mandatory sentences offend the judicial right to exercise discretion and imposed a sentence of 10 years. I find no breach of principle nor consideration of an irrelevant factor of failure to consider a relevant matter for purposes of sentencing. I equally find the sentence to be very modest and lenient hence deserve no interference. For that reason the appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 31ST DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

The Appellant in person

Mwaniki for the Respondent

Court Assistant: Mwenda