Mutembei v Republic (Criminal Appeal 12 of 2020)
[2022] KEHC 9892 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 9892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 12 OF 2020

TM MATHEKA, J

JULY 22, 2022

BETWEEN

PETER MBAABU MUTEMBEI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The appellant was on 30th April 2020 found guilty of the offence of Robbery with Violence on 6th May 2022 sentenced to life imprisonment.

2. He was aggrieved and filed appeal against both the conviction and sentence.

3. While the appeal was pending hearing and determination he filed an application for bail pending appeal on the ground of poor health, among others, which was refused.

4. The appeal on the conviction and sentence was heard, vide the judgment of this court delivered on 19th May 2022, the conviction was sustained.

5. The court took more time to consider whether or not to interfere with the sentence, in view of the appellant's submission with regard to his health. This is pursuant to the powers of the High Court set out at Section 354 of the *Criminal Procedure Code* in particular Section 354 (3) (a) & (b); which state

> " 354. Powers of High Court
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> (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
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> (a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence; (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence; (bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;"

6. To assist the court to consider which of the options provided hereinabove with respect to the sentence, I requested for a Probation Officer's Report. One headed "Resentencing Report" dated 15th June 2022 was filed by Probation and After Care Services (PACs) Nakuru. Upon perusal of the report I noted with concern that the views of the victim were not captured. The officer indicated that "the victim could not be located by the time of writing the report having moved jobs." No details were given as to how the officer had arrived at this conclusion. That sentence was in my view not sufficient explanation as to why the victim's views had not been captured.

7. Taking into consideration the nature of the offence, I returned the report and directed that efforts be made to trace the victim.

8. Vide a report filed on 1st July 2022, it was indicated that the victim was traced to the same place he had worked at the time of the commission of the offence but now at managerial position. The Probation Officer observed that he was still traumatized by the events of that 8th September 2012.

9. Be that as it may the Probation Officer's Report recommends that the appellant be given a three year non-custodial sentence.

10. I have carefully considered the Probation Officers Report, circumstances of this offence and the circumstances of the accused person. The only issue is whether I ought to interfere with the sentence of life imprisonment imposed by the learned trial magistrate.

11. It is trite that sentencing is the discretion of the trial court and there are principles set out for guiding an appellate court in interfering with sentence. I find illumination on this in the case, cited by Odunga J in *Nicholas Mukila Naletei v Republic* [2019] eKLR, *S vs Malgas* 2001 (1) SACR 469 (SCA) at paragraph 12. It says

> " 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 the 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 would have imposed it had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate" (emphasis mine)

12. Or if the sentence is so excessive to be an error of principle see Court of Appeal in *Shadrack Kipkoech Kogo vs Republic* Eldoret Criminal Appeal No. 253 of 2003. See also Court of Appeal in *Benard Kimani Gacheru vs Republic* [2002] eKLR where it was held ;

> " It is not settled law, following several authorities by this court and by the High Court, that sentence is a matter that vests in the discretion of the trial court. Similarly sentence must depend on the facts of each case. On appeal, the appellant 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 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." (emphasis mine)

12. The appellant herein relied solely on the ground of being sick as the reason for asking this court to reconsider his sentence. Was the learned trial magistrate aware of this when she meted out the sentence that she did?

13. It is evident that the appellant had, during the trial indicated that he was unwell. The record will show that the learned trial magistrate observed that the appellant used his alleged ill health to get out on bond, subsequently absconded, leading to the eventual arrest of his surety. Upon his arrest, the surety made efforts to have the appellant arrested and it was his (surety's testimony on oath) that the appellant as arrested while in the process of committing another offence for this, I must of necessity quote from the record.

> " The record is telling. All the time the applicant was missing the case for the co-accused had stalled. In fact, the court had given the appellant consideration because he was said to be unwell, ailing and requiring medical treatment. At one point his co accused is on record

telling the court that he was suffering in custody, yet his co-accused was at Industrial Area Remand "pretending to be sick"...The surety is on record on oath that he had to look for the applicant through the criminal networks he learnt about while in custody. He laid a trap for the applicant as he was going to commit another crime, while on bond, and that it is only through the appellant's criminal networks that he was able to get him and to have him arrested. After eight (8) years of having this matter in court, most of which was caused by the absence of the applicant, the trial court was able to finalize the trial...There is nothing on record to show the applicant's explanation as to where he was all the time the court was looking for him. There is nothing to show that he refuted his surety's statement that he had caught the accused in the act of committing another crime, that the accused told him that he had paid some people money to make his case disappear. These are all statements made on oath by the surety and which the applicant did not controvert."

14. For the avoidance of doubt I reproduce those proceedings here: This is what the surety told the court when he came to stand surety:

> " Proposed Surety Nathan Jaremia Nandwali Sworn States; I wish to stand surety for Peter Mbabu Mutembei. I know him very well. I worked with his father in the police force between 1992 and 1994. We were in Isiolo. I know that the bond is for Kshs. 300,000/-. I tender title deed for my parcel of land in Bahati. Which is registered on Bahati/Kabatini block 1/13591 measuring 50 x 100 valued at Kshs. 1,000,000/=. It was valued at Kshs. 800,000/=. I know my obligations on a surety. I know the consequences if he does not show up. I will ensure that he attends court and I will always avail myself."

15. After the accused absconded: Upon his arrest and at the application for withdrawal of the surety the surety stated on oath.

> " I am Nathan Jeremia Nandwa. I stood surety for the 2nd accused person sometimes in December or January. I made the decision to do the same as his close people approached me he was very sick. He had undergone 2 – 3 surgeries while in custody at Kenyatta National Hospital. He had internal bleeding. Though I did not know him. I used his close people to make the decision that I now regret. I have gone through a lot of problems. I was put in for 4 good months. This court had refused to place me on bond. I pleaded with this court that I had gathered some developments to enable me get the accused. I kept on posting this court on various developments. Last time I informed the court that he was in Namanga. While at Namanga I was able to get a link on his criminal network. On Monday this week I received very positive information from his confidant that he was planning to travel from Nairobi to Eldoret to go and commit crime. He has asked his confidant to help him get contact to his prospective victim. He wanted the victim to be a pastor. I didn't have any pastor in Eldoret. I created one. Through his confidant, I was able to provide the confidant with the contact of the pastor I had created. The accused communicated with the alleged pastor and they arranged a meeting...Through the DCIO Eldoret arrangements were made to have the accused meet the victim who was the alleged pastor. An ambush was arranged. The accused in company of a lady and a man proceeded to Valley Hotel in Eldoret where they were arrested by the team that was sent by the DCIO... Later in the day I came to court and requested for a mention and a production order to have the holding authority produce the accused... The accused was handed over to the investigating officer yesterday and the accused was brought to Nakuru Police Station awaiting production before this court...I humbly pray to this court to let me withdraw as a surety and I wish to add that the accused

person ought not to be allowed to subject any other person to what I have gone through. I have spent money and resources over the matter. I pray that my title deed and that of my surety be released to the depositors..."

16. Instead of a rejoinder this is what the appellant told the court;

> " Accused 2: As we were travelling yesterday, there is a bag that was left in the vehicle that we were in. The bag had my medicine. My life depends on those medicines. I pray that I may be detained at Nakuru Police Station as I wait to be given my chance to respond.
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> Prosecutor: No objection.
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> Court: Mention on 20th August 2018. Accused 1 to be remanded in custody at Nakuru Police Station."

17. Thereafter, the learned trial magistrate rendered the following Ruling;

> Ruling
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> I have considered the application made by the 2nd accused. He be allowed to seek another surety, and the response by the prosecution. I note that the 2nd accused was released on bond on 5th January 2017 after he presented his surety on 4th January 2017. Following his release, he did not return to court until he was arrested by his surety in Eldoret, allegedly where he had gone to commit crimes. I find that there are serious compelling reasons as to why he could not be released on bail/bond and as such he shall be remanded in custody pending the hearing and determination of the case.

18. Evidently, the allegations that the appellant though out on bond on account of illness were so serious that the learned trial magistrate found them to be compelling reasons to deny the appellant bond. There was no appeal or review.

19. When he came on an application for bail pending appeal it was the same record that worked against him.

20. But what stands out from that record is that the appellant did not deny or challenge what his own surety stated on oath, he only asked the court to allow him to get another surety which the court declined. Why is this important yet the issue is sentencing? It goes to show that when the learned trial magistrate issued the sentence, the court was well aware of the appellant's alleged illness. The learned trial magistrate took into consideration the fact of the appellant's sickness.

21. This was not a cause of re-sentencing, it was an appeal against conviction and sentence. The Learned trial magistrate did not sentence the appellant to death, as required by Section 296 (2) of the *Penal Code*, but sentenced him to imprisonment for life, in deference to Muruatetu, hence the appellant's case does not come into the purview of the Resentencing in Muruatetu.

22. Be that as it may, the review of sentence on appeal is allowed by the law but only within the specified parameters again in agreement with Nicholas Mukila Ndetei, there is room taking into consideration the circumstances of the offence, both the aggravating and mitigating circumstances; the motor vehicle was recovered, the victim did not sustain very serious physical injures serious but carries trauma to date, however the appellant was in the company of others, they were armed with a pistol, and fed the victim a poisonous substance.

23. The Kenya Prisons Service is a correctional facility whose mission is 'To contain offenders in humane safe conditions in order to facilitate the administration of justice, rehabilitation, social integration and

community protection'. Its motto is Kurekebisha na Haki. The appellant has demonstrated through his conduct during the trial in the subordinate court that, that despite his heath complaints, he requires containment for purposes of correction and rehabilitation.

24. In view of my finding that the learned trial magistrate was alive to his complaint, bearing in mind the numerous authorities on this point, I consider a review of the life sentence to 30 years' imprisonment to run from the date of his re arrest in 2019 proportionate.

25. In the end, the appeal is disposed of as follows: the conviction is sustained. The sentence is reduced to 30 years' imprisonment to run from 2019.

26. Orders accordingly. Right of Appeal Explained.

SIGNED THIS 19TH DAY OF JULY 2022.

MUMBUA T MATHEKA

JUDGE

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF JULY, 2022.

J. M. NGUGI

JUDGE

In the presence of;

Court Assistant N. Bor

Appellant present

For State Ms Mumbe