Situk v Republic (Criminal Appeal 68 of 2019)
[2022] KEHC 14310 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 68 OF 2019

WK KORIR, J

OCTOBER 27, 2022

BETWEEN

NATHAN KIPTUM SITUK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment, conviction and sentence delivered on 18/11/2019 by Hon. J.L. Tamar, PM in Eldama Ravine PM's Court Criminal Case No. 1260 of 2018)

JUDGMENT

1. The Appellant, Nathan Kiptum Situk, was in a judgement delivered on November 18, 2019 by the Principal Magistrate's Court at Eldama Ravine, convicted for the offence of grievous harm contrary to Section 234 of the *Penal Code*. He was subsequently sentenced to serve fifteen years in prison.

2. Through the supplementary grounds of appeal dated May 17, 2021, the Appellant faults his conviction and sentence on twelve grounds. I will, however, not restate the grounds of appeal for the reason to be disclosed shortly.

3. When the appeal came up for hearing on June 29, 2022, the Appellant indicated to the Court that he was abandoning all other grounds of appeal except the ground challenging the extent of the sentence. In brief oral submissions, he stated that the sentence was harsh. He indicated that the complainant had forgiven him. He further submitted that he was a young man of 35 years and urged the Court to give him a non-custodial sentence so that he can take care of his children. He also stated that he had reformed during his stay in prison.

4. Counsel for the Respondent opposed the appeal on the ground that the offence of grievous harm for which the Appellant was convicted attracts a maximum sentence of life imprisonment. It was submitted that in sentencing the Appellant to fifteen years in jail, the trial court must have considered the fact that the Appellant was a first offender. Further, that the trial court must have taken into account

the fact that the complainant was only twenty years old at the time of the attack and had lost an eye as a result of the assault. This Court was therefore urged to find that no reason had been advanced to warrant interference with the sentence imposed by the trial court and dismiss the appeal.

5. The Appellant has expressly confined his appeal to the alleged harshness, oppressiveness and excessiveness of the sentence. The principles that guide an appellate court on sentencing were stated by the Court of Appeal in *Joseph Gitau Macharia v Republic [2003] eKLR* as follows:

> ' The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogalo s/o Owuor (1954) EACA at page 270 wherein the predecessor of this Court stated:
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> 'The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v R, (1950) 18 EACA 147 'it is evident that the judge has acted upon some wrong principle or overlooked some material factors' To this we would also add third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case: R v Shershewsky (1912) C C A 28 TLR 364'.

6. Has the Appellant established any ground warranting interference with the sentence by this Court? Much as the sentence that was imposed was a legal one, the trial magistrate was required to take into account the fact that the Appellant was a first offender. The Appellant had also indicated remorse and asked for leniency. Although the assault had resulted in the loss of an eye by the complainant, imprisoning the Appellant for fifteen years was excessive.

7. When reserving this matter for judgement on June 29, 2022, I asked for a probation officer's report from the Probation Service. The report prepared by Daniel C Too was filed on July 14, 2022. In the report, it is indicated that the complainant was not opposed to the reduction of the Appellant's sentence subject to receiving compensation. There was indication that the family of the Appellant was willing to meet the complainant's demand.

8. As this matter was pending the writing and delivery of judgment, an affidavit sworn on September 28, 2022 by one Brevin Kipkoech Kimaru of national identity card number xxxx was filed in Court on September 28, 2022. Through the affidavit, Brevin Kipkoech Kimaru averred that he was the complainant at the trial and he has forgiven the Appellant. Further, that he had received compensation of Kshs 130, 000/= from the family of the Appellant. The affidavit therefore confirms the statement in the probation report that the family of the Appellant was willing to meet the complainant's demand for compensation.

9. Although the issue of compensation was not in the picture at the time the Appellant was sentenced by the trial court, it is a matter to be taken into consideration because the law allows for compensation of victims of crime. That compensation is allowed is confirmed by Section 31 of the Penal Code, Cap 63 which provides that:

> 'Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.'

10. In view of the stated factors, and having confirmed that the complainant has indeed been compensated by the Appellant's family, I allow the appeal on sentence. The period of two years and eight months which the Appellant has spent in prison is sufficient punishment. The sentence of imprisonment for

fifteen years is therefore reduced to the period already served. The Appellant is thus set free unless otherwise lawfully held.

Dated and signed at Nakuru this 24th day of October, 2022.

W. Korir,

Judge

Dated, countersigned and delivered at Kabarnet this 27th **day of October, 2022.**

H. K. Chemitei

Judge