



**Machanjo & 2 others v Republic (Criminal Appeal E024 of 2022)  
[2022] KEHC 16716 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E024 OF 2022  
DK KEMEL, J  
DECEMBER 21, 2022**

**BETWEEN**

**STEPHEN LIKUYANI MACHANJO ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH MUNGONYE ONGACHO ..... 2<sup>ND</sup> APPELLANT**

**JOSPEH WAFULA WASIKE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the re-sentence in Senior Principal Magistrate's Court at Kimilili  
Criminal Case No. 1084 of 2014, Hon. G Odhiambo, PM on 10th December, 2021)*

**JUDGMENT**

1. The appellants herein, Stephen Likuyani Machanjo, Joseph Mungonye Ongacho and Joseph Wafula Wasike had been jointly charged together with others who are not in this appeal with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* (cap 63 Laws of Kenya). It was alleged that on the night of November 22, 2013 at about 10. 00p.m at Sikulu village, Kiminini sub-location in Bungoma North district within Bungoma county jointly with others already before court, while armed with offensive weapons namely *rungus* and *pangas* robbed Dorcas Naboya Masakha of four male suits, thirty-eight shirts, two jackets, one sweater, two radios make sonytec and national, two solar lamps make sunkin, two mobile phones make tecno and Itel 2020, cash Kshs 200/= and assorted documents all valued at Kshs 80,000/= and at, immediately before and immediately after the said robbery killed Henry Shitemi The husband of the said Dorcas Naboya Masakha.” After a full trial, the learned trial magistrate sentenced each of them to death sentence.
2. The appellants preferred an appeal to this court against the conviction and sentence of the trial court and *vide* a judgement dated November 30, 2021 I upheld the trial court’s finding on conviction and further held that the sentence of death as pronounced by the trial court was too harsh and excessive



in the circumstances. I proceeded to remit the matter back to the trial court for re-sentencing and to consider mitigating submissions and thereafter impose an appropriate sentence.

3. On December 10, 2021 the trial magistrate proceeded to sentence each of the appellants to life imprisonment.
4. Having been dissatisfied with the sentence, they filed this appeal. The appellants filed a memorandum of appeal and later amended with the following grounds: -
  - a. That the appellants rely on article 165 (3) (b) of the Constitution of Kenya, 2010 which empowers this court to handle appeals of this nature, requesting this court to set aside the life imprisonment by the trial court and substitute the same with a lenient sentence.
  - b. That this honourable court considers section 333(2) of the Criminal Procedure Code.
  - c. That the life imprisonment is harsh and excessive and thus this court reviews the same and pass a lesser sentence after considering the mitigating factors.
  - d. That the appellants have been reformed, remorseful and rehabilitated as first offenders who have been in custody for over eight years.
  - e. That this court be pleased to allow and admit this appeal for re-sentencing.
5. The Penal Code prescribes a death sentence for the offence of robbery with violence. The trial court imposed the sentence as provided in law. I have perused the decision by the trial court and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time prior to the Supreme Court's decision in Francis Karioko Muruatetu and Another Vs R [2017] eKLR.
6. The appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.
7. The appellants submitted that the substituted life imprisonment sentence by the trial magistrate was harsh and excessive in the circumstances of this case. They argued that they have already spent eight years in custody and that they are rehabilitated and remorseful thus praying for a lesser sentence.
8. The respondent submitted that the actions of the appellants caused the death of Henry Shitemi and that after their mitigation the trial court exercised its discretion by passing a sentence of life imprisonment which is legal, just and cannot be said to be manifestly excessive. Counsel urged this court to dismiss the appeal and uphold the sentence.
9. Upon conviction, the appellants were sentenced to suffer death. That was the sentence prescribed by the law at that time. However, on appeal, this court took cognizance of the Supreme Court's decision in the case of Francis Karioko Muruatetu & Another Vs Republic (2017) eKLR which declared the mandatory death sentence unconstitutional as the trial courts were not given a free hand to receive mitigating circumstances and thereafter impose an appropriate sentence. Hence, there is need to interfere with the sentence. The above question brings to the fore the constitutional debate on whether death sentence is as authorized by section 296(2) of the Penal Code in a conviction for robbery with violence, unconstitutional and contrary to the general rules of International law and or Treaties and Conventions ratified by Kenya and if so, whether such mandatory death sentence offends the provisions of article 26 of the Constitution; whether mandatory death sentence erodes the dignity of individuals and arbitrarily deprives accused persons of their inherent right to life and other fundamental rights and freedoms enshrined in articles 24, 26, 28 and 29 of the Constitution and if so, whether such sentence is unconstitutional; whether mandatory death sentence deprives a court of law the discretion and right to consider mitigating circumstances in which an offence was committed,



whether the court in convicting an offender in robbery with violence can lawfully pass a minimum sentence or any other lawful sentence other than a mandatory death sentence.

10. I was inclined to remit the matter back to the trial court to consider mitigating submissions and impose an appropriate sentence. The trial court proceeded to pass a sentence of life imprisonment.
11. In the case of *Joseph Ochieng Osuga v Republic* [2021] eKLR this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. This court cited the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was 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 stated is shown to exist.”

12. Bearing the above holding and having in mind the circumstances of this case, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.
13. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R v Shersbousky* (1912) CCA 28TLR 263).”

14. In the case of *Wanjema v R* [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.
15. In the instant case, the appellants were, upon conviction for the offence of robbery with violence where the victim of the robbery was killed, sentenced to life imprisonment. There is no doubt that there was robbery on the night of November 22, 2013 at the complainant’s home and that her husband, one, Henry Shitemi was killed in the process and that the evidence adduced by PW4, Dr Godfrey Obela from Kitale District hospital, corroborated the same. PW1, Dorcas Nabova Masakha, stated that she was seated with her husband in their sitting room when they heard a violent knock on the door and immediately some people stormed in. One of the intruders lunged at her and cut her head using a *panga*. The intruder then cut the complainant’s husband as well and snatched two cell phones while shouting “leta pesa”. She stated that after the robbers had left, she took account of the situation and found out a number of items taken. The post mortem report, sonitec radio and the P3 form were produced in evidence. The witness also identified the radio as hers. The injuries she sustained during the robbery were confirmed by PW5, a clinical officer from Naitiri hospital.
16. The level of violence unleashed on the complainants is sufficiently serious to warrant long term imprisonment. The violence did cause death or grievous harm.



17. Therefore, in view of the above analysis, it is my view that the trial court considered the correct principles in imposing the maximum sentence of life imprisonment. However, various courts have passed varied sentences for the offence of murder as well as robbery with violence which range from such periods as twenty years to life imprisonment. depending on the circumstances of the offences. I have considered the circumstances of the offence and the mitigating factors of the appellants and note that indeed life was lost as a result of the appellants' actions and that the said life lost cannot be brought back again. It is also noted that the appellants have been in custody for the last eight years. I am inclined to reduce the life imprisonment sentence to a term of imprisonment of thirty-five (35) years from the date of arrest namely July 22, 2014 in compliance with section 333(2) of the *Criminal Procedure Code*.
18. The upshot of the foregoing observations is that the appeal on sentence partly succeeds to the extent that the trial court's sentence of life imprisonment is hereby set aside and substituted with a sentence of thirty-five years' imprisonment for each of the appellants herein which shall commence from the date of arrest namely July 22, 2014.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 21<sup>ST</sup> DAY OF DECEMBER, 2022.**

**D. KEMEI**

**JUDGE**

In the presence of:

Stephen Likunyani Machanyo 1<sup>st</sup> Appellant

Joseph Manyonge Ongachi 2<sup>nd</sup> Appellant

Joseph Wafula Wasike 3<sup>rd</sup> Appellant

Miss Omondi for Respondent

Kizito Court Assistant

