



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 141 OF 2018**

**LOBEI EKAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. In a Judgment of 6<sup>th</sup> December 2018 Hon. Justice A. C Mrima made the following orders:-

“The Appellant shall be produced before the Chief Magistrate’s Court at Eldoret for hearing on sentence only in respect of the two counts of robbery with violence and on priority basis.”

2. In respect to both counts, the Trial Court had handed down the death sentence. At resentencing the Court imposed a 30 year imprisonment for Count 1 and 20 years imprisonment for Count 2, both to run consecutively.

3. This Appeal is against that sentence. The Appellant argues that the Trial Court was swayed by emotions and did not consider that he was a first offender. Second, that the sentence imposed by the Court was not in the spirit of reformation and rehabilitation of an offender.

4. Occasion when an Appeal Court can interfere with the sentence meted out by a Trial Court is fairly restricted. It will only interfere if the sentencing court acted upon wrong principles, overlooked some relevant material or if the sentence is manifestly excessive in the circumstances of the case (Ogolla Owour Vs Republic (1954) EACA 270).

5. As I see it the issues raised by the Appeal are twofold. Whether the sentences imposed were harsh and whether it was appropriate to impose them consecutively.

6. The learned Magistrate gave his reasons for imposing the long prison terms. He stated:-

“.....the accused committed a robbery at the home of his employer where he killed him, raped his daughter after traumatizing them for many hours while armed with a knife.”

The Appellant committed two heinous crimes with one leading to the death of a victim. He was cruel and the prison terms meted by the learned Magistrate cannot be said to be harsh in particular when one considers that the maximum sentence available is the death sentence. The term of imprisonment imposed cannot be faulted.

7. The Appellant had been convicted of two offences and section 14 of the Criminal Procedure Code provides as follows regarding sentences in cases of conviction on several offences at one trial:-

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

8. From this provision, the imposition of consecutive sentences is circumscribed by the provision of section 14(3). Reference is made to section 7(1) which reads:-

“Sentences which subordinate courts may pass

(1) A subordinate court of the first class held by—

(a) a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court;

(b) a resident magistrate may pass any sentence authorized by law for an offence under section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006.”

9. The sentencing Magistrate held the position of a Chief Magistrate and was therefore duly authorized by the provisions of section 7(1) to pass consecutive sentences. Secondly, section 14(3) does not impose any limit on the aggregate term of consecutive sentences that the Chief Magistrate could impose as those as for Subordinate Courts of the first class. In other words, the exception in section 14(3) does not apply in the circumstances.

10. As to when it is appropriate to impose a consecutive sentence instead of a concurrent sentence, the Court of Appeal in Peter Mbugua Kabui [2016] eKLR stated:-

“..... In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

11. It has to be remembered that the sentences were imposed on the two counts of robbery while the sentence on rape had been held in abeyance. As noted by the Appellant Court that ordered the resentencing, the counts were twin counts where the particulars were similar save that there were two complainants being mother and daughter. It seems that the robberies were committed in one transaction but with two victims. For that reason, absent of exceptional circumstances, the sentences passed ought to have been concurrent instead of consecutive.

12. Although the Trial Magistrate did not express himself as to why he thought the circumstance were exceptional, the gravity of the offence seems to have weighed on his mind. He noted that other than the robbery there was also the killing of a victim and rape of another. No doubt, the commission of the offences were heinous yet this Court has noted that the sentence on the conviction of Rape had been held in abeyance and as noted by the same Magistrate earlier on 4/8/2017:-

“The Complainant’s husband was also killed and the accused is facing a separate charge of murder in the High Court.”

13. Given that the Appellant may face another fate in the murder trial for the killing, I would think that for the two Counts of robbery carried out in one transaction, a consecutive sentence was not appropriate.

14. The Appeal is allowed to the limited extent that the sentences imposed shall run concurrently and not consecutively.

**Dated, Signed and Delivered in Court at Nairobi this 23<sup>rd</sup> Day February 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Lobei (the Appellant) present in person.

Miss Limo (DPP) for State.