**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL REVISION NO. 489 OF 2020**

**CHARLES AMKHONO.............................................................APPLICANT**

**VERSUS**

**REPUBLIC...............................................................................RESPONDENT**

**(From the sentence passed in Criminal Case No. 535 of 2014**

**in the Senior Principal Magistrate's Court at Kapsabet**

**by Hon. J. A. Orwa, SPM on 30 June 2020)**

**RULING ON REVISION**

**[1]** The applicant, **Charles Amkhono**, was the accused person before Kapsabet Senior Principal Magistrate's Court in **Criminal Case No. 535 of 2014: Republic vs. Charles Amkhono**. He had been charged with 3 counts of robbery contrary to **Section 295** as read with **Section 296(1)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** He pleaded not guilty on arraignment and upon full trial, was found guilty and convicted of all three counts, in a Judgment rendered on **29 May 2020**. The lower court then called for a Pre-Sentence Report for consideration on **30 June 2020**.

**[2]** Having given due consideration to the recommendations made in the Pre-Sentence Report and the other relevant information presented during the sentencing hearing, the learned trial magistrate sentenced the applicant to 15 years' imprisonment on each of the three counts. The lower court further ordered, on the **30 June 2020,** that the sentence imposed in respect of Counts 2 and 3 "…**be suspended till sentence in Count 1 is executed…"**

**[3]** Upon noticing the error in sentencing, the trial magistrate, *suo motu*, caused the file to be forwarded to the High Court for revision vide the letter dated **3 July 2020.** She explained therein that:

> **"…due to the fact that such sentences could not be implemented concurrently and/or consecutively prior to petition number 16/2016 Francis Muruatetu And Others vs. Republic Case coming in force, I inadvertently ordered for counts 2 and 3 to be suspended pending execution of count number 1. Having noted the error apparent on the face of the record of sentencing I hereby forward the original file for revision purposes…"**

**[4]** **Section 362** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya,** provides thus in connection with the revisionary powers of the Court:

> **"The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."**

**[5]** In addition to the foregoing, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

**"In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order.**

**[6]** This, therefore, is a matter that was reported to this Court for revision; and having carefully perused the record of the lower court, it is

manifest that the trial was conducted by a different magistrate and that the succeeding magistrate, **Hon. Orwa, SPM,** only delivered the Judgment and passed the impugned sentence. It is therefore understandable that the succeeding magistrate proceeded on the basis that the accused had been convicted of capital robbery for purposes of **Section 296(2)** of the **Penal Code;** and whereas the learned trial magistrate then proceeded to sentence the accused person to 15 years imprisonment on each of the three counts in lieu, citing the case of **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR as the reason for that decision, she erroneously ordered that the sentence in respect of the 2nd and 3rd counts be **"…suspended till the sentence in Count 1 is executed…"**

**[7]** Needless to say that such an order would only be called for in situations where the death penalty has been imposed in more than one count, with or without a term of imprisonment. This would invariably be the scenario in a case involving multiple counts. The Court of Appeal made this clear in **Peter Njagi Muchangi & 3 others vs. Republic** [2013] eKLR thus:

> **The trial court convicted the appellants on two counts of robbery with violence and sentenced them to death in each count. The trial court also convicted the appellant of the offence of malicious damage to property and sentenced them to four years' imprisonment. These should have been held in abeyance. In *Abdul Debano Boye & another -vs- Republic- Criminal Appeal No. 19 of 2001,* this Court held,**
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>> **"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reasons for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In the case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term"**
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> **Therefore, the trial court erred in applying multiple sentences to the appellants and we hereby substitute them with the proper sentence, that is; the appellants are sentenced to death on count one of robbery with violence and the sentences in respect of the other count of robbery with violence and the offence of malicious damage to property are accordingly held in abeyance.**

**[8]** In the premises, since it is apparent, from a perusal of the lower court record, that the offences charged in the three counts in **Kapsabet SPM's Criminal Case No. 535 of 2014** were committed on the same date and at the same time; and that the victims, who are brothers, were all in the house of **PW1**, the proper course was for the sentencing court to order for the imprisonment terms imposed therefor to run concurrently. Thus, in **Peter Mbugua Kabui vs. Republic** [2016] eKLR the Court of Appeal restated that:

> **"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.**
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> **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."**

**[9]** That said, it is also plain that the sentence of 15 years imposed in respect of each of the three counts is illegal in so far as it goes beyond the prescribed penalty for the offence of robbery under **Section 296(1)** of the **Penal Code**. That provision states that:

> **"Any person who commits the felony of robbery is liable to imprisonment for fourteen years."**

**[10]** Hence, in **Daniel Kyalo Muema vs. Republic** [2009] eKLR, the Court of Appeal proffered the following approach to sentencing:

> **In searching for the intention of the Parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. This principle is contained in Section 66 (1) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:**
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>> **"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".**
>
> **The second observation is that the principle of law in Section 66 aforesaid is entrenched in Section 26 of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence of a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment."**

**[11]** It is plain then that where the phrase **"shall be liable to"** is part of the penal provision, the period prescribed ought to be treated as the maximum penalty beyond which the sentencing court cannot travel. This point was made by the Court of Appeal in **Caroline Auma Majabu vs. Republic** [2014] eKLR, albeit in the context of **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act.** Here is what it said:

**"Applying the above definition, the use of the word "*liable*" in *section 4(a)* of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule.**

**[12]** And in **M K vs. Republic** [2015] eKLR, the Court of Appeal held that:

**What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "*shall be liable on conviction to suffer death*" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the *dicta* in James -v- Young 27 Ch. D. at p.655 where North J. said:**

**"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".**

**We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".**

***[13]*** *The Court then proceeded to hold that:*

**"Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to *Section 20 (1)* of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in *Section 20 (1)* we hereby state that the correct interpretation of the proviso in *Section 20 (1)* is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment**.

**[14]** By parity of reasoning, it is manifest that for purposes of **Section 296(1)** of the **Penal Code,** the maximum sentence envisaged thereby is 14 years' imprisonment. What, then, would be the correct sentencing approach to employ in a case such as this? T*he suggestion given in **Paragraph 23.9** of the **Judiciary Sentencing Guidelines** is that:*

**"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."**

**[15]** Moreover, at **Paragraph 22.12** of the **Judiciary Sentencing Policy Guidelines**, it is recommended that:

**"To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence…Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations."**

**[16]** Thus, since **Section 296(1)** of the **Penal Code** provides for 14 years' imprisonment, the sentencing court ought to have settled on 7 years as the starting point before factoring in the mitigating and/or the aggravating circumstances; bearing in mind the decision of the East African Court of Appeal in **Arissol vs. Republic [1957] EA 449** that:

**"It is unusual to impose the maximum sentence on a first offender and it would be wrong to depart from that rule because on the evidence she might have been convicted of a graver offence…" (also see Otieno vs. Republic [1983] eKLR)**

**[17]** It is not in dispute that the accused was a first offender, and a married man with children. However, the evidence placed before the lower court also revealed that the incident occurred at around 12.30 a.m. in the night; that the accused was accompanied by no less than four other persons; that they demolished the main door to gain entry into **PW1's** house; and that at least one of the victims was wounded in the process. Moreover, the Pre-Sentence Report shows that the offender was not remorseful for the offence, notwithstanding that some of the stolen property were recovered from his house. In the premises, it is my considered view that a term of imprisonment of 8 years on each of the three counts, to be served concurrently, would have met the ends of justice in the matter**.**

**[18]** In the result, on account of the errors aforementioned, the sentence of 15 years' imprisonment imposed by the lower court against the accused person in **Kapsabet SPM's Criminal Case No.535 of 2014** on each of the three counts of robbery contrary to **Section 296(1)** of the **Criminal Procedure Code** is hereby set aside and replaced with 8 years' imprisonment on each of the three counts to be served concurrently from the date the accused person was sentenced by the lower court.

It is so ordered.

**DATED, SGINED AND DELIVERED AT ELDORET THIS 17TH DAY OF MARCH 2021**

**OLGA SEWE**

**JUDGE**