



REPUBLIC OF KENYA

IN THE HIGH COURT OF KEYA AT NAIROBI

CRIMINAL MISCELLANEOUS APPLICTION NO 340 OF 2019

ERIC KAMAU WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of; E.Kanyiri, Senior Resident Magistrate, in

Criminal Case No. 2890 of 2016, on 27th November, 2018, at Makadara

Chief Magistrate's court.)

JUDGMENT

1. The subject matter herein was initiated as; a chamber summons application filed on 25th June 2019, in which the applicant was seeking to be allowed to file an appeal out of time. It was supported by an affidavit he swore in which he deposed that, he is a pauper and could not afford a lawyer to file the appeal on time. That, the court grants him leave as prayed, as the delay was occasioned by the challenges in custody.

2. The application was filed alongside a petition of appeal and the grounds thereto. The Respondent had no objection to grant of the leave sought and consequently the application was allowed. The parties agreed to canvass the main appeal, hence the judgement herein.

3. At the hearing of the appeal, the appellant abandoned the appeal on conviction and proceeded against the appeal on sentence. He told the court that, he would fully rely on the grounds of appeal filed. Upon perusal thereof, I note that, the main ground in relation to sentence states that: -

“The learned trial magistrate erred in both law and facts where he/she contravened the principle of sentencing policy and guidelines as stipulated by the law”

4. However, the Respondent opposed the appeal based on the grounds of opposition dated 22nd September 2021, wherein it is stated that, the sentence passed was legal and lenient. That, the appeal has no merit and is an abuse of the court process and therefore should be dismissed accordingly.

5. The appeal was disposed of by; oral address by both parties and submissions filed by the Respondent. In a nutshell, the appellant relied on the documents filed. On its part, the Respondent, in brief submissions, argued that, Section 296(2) of the Penal Code (cap 63) laws of Kenya, provides a death sentence for an offence of robbery with violence.

6. That, the learned trial Magistrate in sentencing the appellant, considered various factors including; the nature of the offence and the penalty provided under the law, the time the appellant was in custody and the aggravating and mitigating circumstances. Further, jurisprudence in the case of; *Francis Karioko Muruatetu & Another vs Republic (2017) eKLR* was also considered. The Respondent further argued that, the weapon used in the robbery, inflicted serious injuries on the victims and that, it was a gang attack.

7. In addition, the Respondent stated that, the sentence meted by the lower court is vague, in the sense that, it does not clearly state to which of the two counts it relates to and/or which accused was to serve what sentence. Therefore, it is not clear as to whether, the imprisonment relates to count 1 or 2 or both. That, it leads not just to a miscarriage of justice but also brings confusion to the Prison authorities.

8. I have considered the appeal in the light of the materials placed before the court. I find that, from the record of the lower court, the appellant was charged jointly with another, Peter Kimani, with the offences of robbery with violence contrary to; section 295 as read together with sections 295 (2) of the Penal Code in two counts. He pleaded not guilty to both counts. The case was fully heard.

9. In a nutshell, the prosecution case is that, on 10th November 2016, while armed with offensive weapons namely; metal bars and machetes, robbed Maurice Juma Musungu of; Ksh 21,000, one T.V set and one solar battery, and Charles Ateru Allan of; Kshs 21,000, one T.V set, one woofer and one star-time decoder and that at the time the robberies, the appellant used actual violence on the victims.

10. The evidence of PW1 Morris Juma, states inter alia that, the appellant herein attacked him with a panga and cut him on the head and left him bleeding. PW2 Charles Ateru also told the court that, he witnessed the appellant assaulting PW1 using bottle, metal rods and his hands. Further, the appellant beat him up with beer bottle on the head and as he ran to the neighbour's house and collapsed. The evidence of these witnesses as to the injuries sustained, was corroborated by medical reports of; Dr. Zephania Kamau (PW4), Dr Maundu (PW5) and a clinical officer Celine Nyambu (PW4).

11. In pronouncing the sentence, the learned trial magistrate stated as follows: -

“In sentencing I have considered the offence in question and penalty provided under the law. I have considered the Supreme court decision in Petition No 15 of 2015; Francis Kerioko Muruatetu and Another vs Republic. I have considered the mitigation offered by each accused on 11th February 2019. I have also considered the pre bail reports both filed for each accused dated 14th December 2018, where the offenders were classified as medium risk. I note that, the accused have spent two years two months in custody to date. I note that, while accused are first offenders, the offence was aggravated by the weapon used. Taking into account all above consideration, accused persons are to serve 10 years each imprisonment. R/A 14 days” (emphasis mine)

12. It suffices to note that, at the conclusion of the judgment, the learned trial magistrate stated as follow.

“After analyzing the evidence, I find that 3 out the 3 ingredients of offence of robbery with violence have been proven by prosecution beyond reasonable doubt and there being positive identification of accused persons as the assailants, in this matter, I hereby find that the accused persons guilty of the two counts of the offence of Robbery with violence contrary to section 296 (2) of the penal code and convict the accused person of the said offence accordingly and within section 215 of the Criminal procedure code” (emphasis added)

13. It is clear from the aforesaid that, the appellant was convicted on two counts but the sentence imposed is not clear. I do agree with the Respondent that, it is ambiguous. It does not clearly indicate as to whether, it is in respect of count 1 or 2. Further, it is not clear as to whether, 10 years' imprisonment relates to each accused or offence.

14. In the given circumstances, this court cannot be able to ascertain whether the sentence is harsh, excessive or even lenient. As an appellate court, the court is indeed empowered to correct an error pursuant to the provisions of section 362 of the Criminal Procedure Conduct but it must be in relation to, the correctness, illegality and impropriety of the sentence. It does not extend to omission or ambiguity. If this court were to impose a sentence, it would be exercising original jurisdiction, which is not available to it in the given circumstances,

15. In that case, I direct that, the file herein be remitted back to the Chief Magistrate's Court at Makadara, for the learned trial magistrate, to clarify the sentence imposed to enable the court appreciate the same and for further orders (if need arises). In that respect, the appellant is at liberty to re-apply once the sentence is dealt with.

16. It will also be of great importance to know what the committal warrants reads, as I could not find any on the lower court file. I direct the Hon Deputy Registrar send a copy of this judgment to the Chief Magistrate Makadara, to place the file before the learned magistrate.

It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 18TH DAY OF OCTOBER 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person

Ms Akunja for the Respondent

Edwin Ombuna - Court Assistant.