



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 14 OF 2019

BETWEEN

JOSECK OTIENO MAKOBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Kisumu

Criminal Case Number 272 of 2016 by Hon. J. Ngarngar (CM) on 05th April, 2019)

JUDGMENT

Background

1. The Appellant herein **JOSECK OTIENO MAKOBA** was *convicted on the first* two counts of failing to secure a firearm safe namely a G3 rifle serial number FMB 392308 and 20 rounds of 7.62 mm caliber contrary to section 18(3) of the Firearms Act Cap 114 Laws of Kenya (*the Act*) and a third count of unlawful use of firearm contrary to section 26A (1) (a) of *the Act*.

2. *In a judgment dated on 05th April, 2019, the Appellant was sentenced to a fine of Kshs. 10,000/- in default to serve 2 months' imprisonment for the 1st and second counts and to seven (7) years imprisonment in the third count.*

Appeal

3. *Aggrieved by the sentence and conviction, the Appellant lodged the instant Appeal on 17.04.19 in which he raised the following issues for determination. THAT*

1) The Learned Trial Magistrate erred in law and in fact by handing over a verdict of guilty when the evidence on record was insufficient to warrant the decision

2) The Learned Trial Magistrate erred in law and in relying on extraneous matters to convict the Appellant

3) The Learned Trial Magistrate erred in law and in fact by failing to take into consideration the defence that was advanced by the Appellant

5. The state submitted that the sentence imposed on the Appellant is lawful based on the circumstances of the case.

Analysis

6. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

7. Section 251 of the Act under which the Appellant was charged provides that:

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

8. Under the foregoing provision, the trial court had discretion to impose a custodial sentence or some other form of punishment. The court in its discretion imposed a custodial sentence.

9. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on the issue of the trial court's discretion in sentencing as follows: -

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

10. The Court of Appeal in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated 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 states is shown to exist."

11. In yet another case, the Court of Appeal in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 stated thus: -

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered".

12. *I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of both parties. I have similarly considered the provisions of Section 354 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) which provides that this court has power upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under subsection 3(b), "in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence".*

13. The Appellant is a relatively young man and a first offender and a long custodial sentence would in my considered view not serve the interests of justice. This is not to say that this court does not recognize the seriousness of his actions.

14. From the foregoing, I am persuaded to interfere with the sentence imposed on the Appellant. The sentence of **4 years** is substituted with a sentence of **3 years**. The sentence will run from the date of conviction which is **23rd July, 2018**.

DATED AND DELIVERED IN KISUM THIS 30th DAY January, 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

Counsel for Accused – Absent

For the State - Ms. Gathu