



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 24 OF 2019.

DENNIS KIRUI KIPLANGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the Resident Magistrate Hon. R. Yator

delivered on 19th March 2019 in Molo Criminal case No. 204 of 2017.)

JUDGMENT

1. The appellant was charged with main charge of **robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code**. The particulars being that on the 9th day of September 2017 Bararget Forest in Molo Sub County within Nakuru County jointly with others not before Court robbed **Festus Ngeno**; 3 jackets, 1 trouser, 3 mobile phones all valued at Kshs. 20,000/= and cash money worth Kshs. 40,000/= and or immediately before or immediately after the time of such robbery wounded the said **Festus Ngeno**.

2. The appellant was also charged with an alternative charge of **handling stolen goods contrary to section 322(1) and (2) of the Penal Code**. The particulars being on the 11th of October 2017 at Bararget Forest in Molo Sub County within Nakuru County otherwise than in the course of stealing dishonestly retained 2 jackets knowing or having reasons to believe them to be stolen goods.

3. On 16th October 2017 the substances of the charge and every element was read to and explained to the appellant in English a language the lower court recorded he understood. The appellant denied the charge and a plea of not guilty was recorded. The matter was set for hearing on several occasions but the same did not kick off for various reasons given by the prosecution and the appellant until 23rd October 2018 when the complainant testified. On 23rd May 2018 an advocate by the name **Kipsang** came on record for the appellant requested the Court to review the appellant's bond terms and be supplied with the statements and other evidence the prosecution would wish to rely on. On 3rd June 2018 when the case was coming up for hearing the said advocate was in Court ready to proceed though he did not have the statements; when the complainant testified the case was adjourned since the prosecution was not ready to proceed. The said advocate never made an appearance in the case again and the Court record doesn't indicate what transpired as the appellant proceed without his advocate on 23rd October 2018.

4. On 19th March 2019 when the case came up for hearing the appellant indicated to the Court, he wanted to change his plea. The charges and the elements were read out to the appellant in Kiswahili a language that he understood and he pleaded guilty to the charges. It is on record the trial Court warned the appellant on the consequences of pleading guilty considering the nature of the offence as the count attracts a life imprisonment. And the appellant stated he still wanted to plead guilty. The prosecution went ahead to adopt the testimony of the complainant who had testified and produced 6 exhibits; 2 jackets (exb. 1), 1 long stick (exb.2), outpatient card (exb. 4), hospital referral letter (exb.5) and P3 form (exb.6). Record show that appellant stated "I still plead guilty."

5. A plea of guilt was entered and the appellant was convicted on his own plea of guilty. The appellant was sentenced to serve life imprisonment taking note of the extent of injuries sustained by the complainant during the time of the robbery and the fact he was armed. The Court indicated that the offence was prevalent and thus the need to impose deterrent sentence.

6. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through a Petition of Appeal dated 22nd of March 2019 and challenging both conviction and sentence on the following grounds: -

i. That the learned trial magistrate erred in law and in fact by failing to sagaciously draw an inference that my plea of guilty as charged could have been (as it was) as a result of coercion

ii. That the learned trial magistrate erred in law and in fact by failing to warn the appellant on the repercussions of pleading guilty of the charges as provided for

iii. That the learned trial magistrate erred in law and in facts by failing to appreciate that the appellant was not subjected to a fair trial in accordance with article 50 of the Constitution

iv. That the learned trial magistrate erred in law and fact by rushing to make a decision to convict the appellant without being well informed of his capacity to plead to the charges

v. That the learned trial magistrate erred in law and facts by failing to find that the appellant's constitutional rights were infringed by the police by holding the appellant in custody for six days in a row i.e from 10th October 2017 to 16th October 2017;

vi. That the sentence imposed upon the appellant was harsh and excessive based on the circumstances and contravened the provisions of Article 47 of the Constitution;

vii. That further grounds of appeal shall be adduced at the hearing of the appeal; and

viii. That the appellant prays to be supplied with certified copy of the trial proceedings.

7. The state opposed the appeal on both conviction and sentence. On 9th of July 2020 when the matter proceeded for hearing the appellant adopted relied submissions which he filed via email and the grounds of appeal set out above. State counsel for the prosecution made oral submissions.

APPELLANT'S CASE

8. He urged the Appellate Court to find his appeal merited and proceed to quash the conviction, set aside the sentence and set the appellant at liberty.

PROSECUTION'S CASE

9. The state counsel submitted that the appellant was convicted and sentenced on his own plea of guilty. She urged the Court to consider the aggregated circumstances in the case. She submitted that every element of the charge was read to the appellant in the language he understood. Further that the trial Court went ahead to explain to him the consequences of pleading guilty to the serious offence he was charged with but he went ahead to plead guilty and even after the facts were read to him, he still pleaded guilty.

10. The state counsel submitted that the plea was unequivocal as provided by **Section 27 of the Criminal Procedure Code**. She relied on the criminal appeal case of **Stephen Wachira Vs Republic** and urged this Court to dismiss the appeal.

ANALYSIS AND DETERMINATION

11. I have perused the Court record, I have also considered submissions by parties herein and find the following as issues for determination: -

i. Whether the plea was unequivocal

ii. Whether the Appellant's Right to fair trial was infringed.

iii. Whether the sentence imposed was harsh and excessive

i. Whether the plea of guilt was unequivocal or not.

12. The procedure and guideline for plea taking is well articulated in **Section 207 of the Criminal Procedure Code** and the same was affirmed by the Court in the case of **Adan vs Republic [1973] EA 445** where it was held:

“The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.”

13. Further the Court of Appeal in the case of **Obedi Kilonzo Kevevo - v - Republic [2015] eKLR** stated as follows in relation to plea taking:-

“The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.”

14. Record show that the charge was first read to him on 16th October 2017. On that day he responded by saying “it is not true” and plea of not guilty was entered. Hearing the case commenced on 23rd October 2018. One witness, the complainant testified and identified exhibits which were marked for identification. The matter was adjourned for further hearing but it never proceeded until 22nd February 2019 when the prosecutor indicated that they were ready to proceed with one witness but the appellant informed the Court that he wanted to plead guilty. That was a period of about one year 5 months after plea was first read to the appellant. I note from record that the appellant had been granted bond the day plea was first read to him. The change in mind could not therefore be attributed to effects of harsh conditions in remand.

15. I note from record that when the appellant informed the Court of his intention to change plea, the Court warned him of the consequences of pleading guilty considering the nature of the offence and that the same may attract a life imprisonment. The warning was recorded by the trial magistrate. The appellant responded by saying “I still plead guilty.”

16. From the above analysis I find that the appellant’s plea was unequivocal, he was read to the elements of the charge and the Court further explained to the appellant the consequences of his plea of guilty and he still pleaded guilty. The prosecutor adopted evidence adduced by the complainant and produced exhibits which had been marked and the appellant stated again “I still plead guilty “that is when the trial magistrate entered plea of guilty and convicted the appellant. The appellant was given a chance to mitigate and in mitigation, he never retracted what he had earlier said.

17. Record show that after PW1 had adduced evidence in chief, the appellant cross examined him. His participation clearly show that he understood the charge and its elements well and he was conversant with the language of the Court. This answers the issue raised on fair trial. The appellant has failed to demonstrate that he subjected to unfair trial.

18. From the foregoing, I have no doubt that the plea was unequivocal and the trial magistrate never erred in convicting the appellant.

i. Whether the Appellant’s Right to Fair Trial was infringed.

19. The Appellant contended that his rights to fair trial under **Article 49 and 50 of the Constitution of Kenya, 2010** were violated as he was not arraigned in Court within twenty-four (24) hours of his arrest. Record from the charge sheet show that the appellant was arrested on 12th October 2017 and first arraigned in Court on 16th October 2017.

20. I however note that the appellant never raised this issue the first time he was arraigned in Court. However, as was rightly pointed out by the State, a contravention of the said **Article 49(1)(f) of the Constitution** does not vitiate a trial because an aggrieved party has the option of seeking compensation from the State by way of damages or any other relief set out in the Constitution of Kenya. **Article 22 of the Constitution** of Kenya provides as follows: -

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

21. I also take note of the fact that the detention for more than 24 hours did not affect plea of guilty as on first arraignment, he denied the charge and pleaded guilty over one year later while out on bond. The longer detention before plea did not therefore contribute to his plea of guilty.

(iii) Whether the appellant sentence was harsh and unreasonable

22. The appellant submitted that the sentence imposed on him was harsh and excessive. The charge sheet read the appellant was charged of **robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.**

23. **Section 295** provides as follows: -

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

24. While **Section 296(2) of the Penal code** provides as follows: -

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

25. The trial magistrate sentenced the appellant to life imprisonment. **Section 296(2)** however provided mandatory death sentence. However, the Supreme Court constitutionality of mandatory sentences was canvassed at the Supreme Court in the **Francis Karioko Muruatetu & another - v -Republic [2017] eKLR** where it was held that mandatory sentences deprive Courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person.

26. In view of the above I have considered the appellant's mitigation, the circumstances of the offence herein and I am of the view that the sentence imposed was harsh. I therefore set aside sentence imposed and sentence the appellant to 10 years' imprisonment.

27. **FINAL ORDERS**

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed.
3. Sentence of life imprisonment is set aside and replaced with 10 years' imprisonment.
4. Sentence to run from the date the appellant was sentenced in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru This 30th day of September, 2020

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person