



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 64 OF 2019

JOSEPHAT WANYONYI NASONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against sentence delivered by Hon. D. Onyango, CM, on 22/05/2019 in Criminal Case No. 1334 of 2012 in the Senior Principal Magistrate's Court at Kimilili, Josephat Wanyonyi Nasongo v Republic)

JUDGEMENT ON SENTENCE

1. The appellant has appealed against his sentence of twenty (20) years imprisonment in respect of the offence of robbery contrary to section 296 (2) of Penal Code (Cap 63) Laws of Kenya in count 1 and twenty years' imprisonment in respect of the offence of gang rape contrary section 10 of the Sexual Offences Act No 6 of 2006, which sentences were ordered to run concurrently.
2. The state has supported the sentence.
3. In this court the appellant has raised eight (8) grounds of appeal.
4. Originally, the appellant had been sentenced to death in respect of capital robbery by the trial court. On appeal this court (Sitati, J) confirmed the conviction but set aside the sentence of death. She then proceeded to remit to the trial court the issue of a re-hearing on sentence.
5. During the re-hearing on sentence, the appellant was accorded the opportunity to mitigate. In his grounds of mitigation, the appellant told the trial court that the sentence imposed was harsh and inhumane. He also told the court that he was a poor person with a young family, who solely depended upon him as their sole bread winner. Additionally, he told the court that he was a first offender. He also told the court he had been in custody since 2012. He finally told the court that his long incarceration would lead to poverty, illiteracy and poor morals in his children.
6. The prosecution opposed his appeal in respect of sentence. The prosecution then made submissions in respect of the convictions of the appellant, which are not relevant. I therefore do not need to consider those submissions.
7. It is important to point out that on 14th May 2019 Riechi, J, delivered the judgement of Sitati, J, on her behalf in *Josephat Wanyonyi Nasongo v Republic, Bungoma, High Court Criminal Appeal No. 182 of 2016*, in which she dismissed the appellant's appeal on both conviction and sentence in count II, which charged the appellant with gang rape. Her Ladyship also dismissed the appellant's appeal in count I, in which the appellant had been convicted of capital robbery. Her Ladyship also quashed the death penalty. Thereafter, following the Supreme Court decision in *Francis Muruatetu & Another [2017] e-KLR*, her Ladyship remitted the case to the trial court for re-sentencing. Her Ladyship then directed that the trial court was to impose any sentence other than the sentence of death, after taking into account the mitigation of the appellant. She then informed the appellant that he had a right of appeal to the Court of Appeal within 14 days.
8. It is in the light of the foregoing by the High Court (Sitati, J) that the trial court proceeded to re-sentence the appellant.
9. It appears that the appellant exercised his right to be re-sentenced first by the trial court, thus leaving the issue of appealing to the Court of Appeal against his conviction in abeyance or suspense.
10. The trial court in re-sentencing the appellant considered his mitigation. The court then proceeded to pronounce itself in the following terms: *"I note that the sentence for the second count of 20 years' imprisonment was not interfered with. I have considered the period the accused has been in custody."*
11. The trial court then proceeded to state that: *"In count 1 accused shall serve 20 years' imprisonment as from 19/8/2016 when he was first*

sentenced. The said sentence to run concurrently with the one in count 11.”

12. It is clear that the trial court backdated the sentence of 20 years’ imprisonment in count 1 to run from 19/8/2016, when the appellant was first sentenced. It is not proper to back date a sentence of imprisonment. This back dating is taken care of by the mandatory statutory requirement that a trial court takes into account the period an accused has been in custody in terms of section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

13. It is also clear from the sentencing notes of the trial court that it failed to take into account the period the appellant had been in remand custody, that is, from the time of arrest and detention and up to the time of sentencing. These are errors of law that the trial court committed; which entitle me to interfere with the sentencing discretion of the trial court.

14. The factors I am required to take into account as a first appeal court are as follows.

15. As a first appeal court, I am required to take into account the circumstances of the offence including the mitigating and aggravating factors. The mitigating factors include the following. The appellant was a first offender. He was also a family man with family responsibilities. He had been in both remand (pre-sentencing period) and imprisonment period from date of sentence to date, which translates to about nine years. The trial court was bound by the provisions of section 333 (2) of the Criminal Procedure Code [Cap 75] Laws of Kenya to take those periods into account.

16. Furthermore, I am also required to take into account the aggravating factors which include the following. The appellant and his accomplices were each armed with a lethal and dangerous weapon namely rifles (guns). The appellant and his two accomplices gang raped Pw 2 in a brutal and beastly manner to the extent that she was unable to walk and she was also bleeding as she was being taken to hospital. In addition to the offence of gang rape, the appellant and his accomplice stole the complainant’s cash money in the sum of Shs 20,000/- and shop properties worth shs 35, 860/-, which have not been recovered.

17. I have taken into account the foregoing mitigating and aggravating factors. I have also taken into account the period the appellant has been in custody.

18. After taking into account the foregoing matters, I hereby reduce the sentence of 20 years’ imprisonment to eight years (8), which sentence will begin to run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 29th day of September, 2020 through video link in the presence of the appellant and Mr. Thuo holding brief for Ms. Nyakibia for the Respondent.

J. M. BWONWONG’A.

J U D G E

29/09/2020