REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 82 OF 2019

JAIRO NATO MULUMA.....1ST APPELLANT

MOSES ADIRA KIYAI.....2ND APPELLANT

AGGREY AJEGA EMBWAKA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. C.C. Oluoch (SPM) in Mavoko Senior Principal Magistrate's Court Criminal Case No. 979 of 2012)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JAIRO NATO MULUMA..... 1st ACCUSED

MOSES ADIRA KIYAI.....2ND ACCUSED

AGGREY AJEGA EMBWAKA.....3RD ACCUSED

JUDGEMENT

1. The Appellants herein, **JAIRO NATO MULUMA, MOSES ADIRA KIYAI** and **AGGREY AJEGA EMBWAKA** were jointly charged before the Senior Principal Magistrate's Court at Mavoko with one count of Robbery with Violence, contrary to Section 295 as read with section 296(2) of the Penal Code and an alternative charge of handling suspected stolen goods contrary to section 322(1) as read with 322(2) of the Penal Code. They were convicted in respect of the main charge and sentenced to death. The appeal to the High Court was unsuccessful and on 28.2.2019 after resentencing proceedings in respect of the appellants before Hon. C.C. Oluoch, SPM, the court after hearing the mitigating circumstances and considering the probation officer's report resentenced the appellants to death.

2. The appellants are aggrieved by the sentence and have lodged this appeal in which they sought for resentencing.

3. According to the appellants they were resentenced to death and yet they were entitled to resentencing. They relied on the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR** and argued that in addition to resentencing, the court take into account the time served by dint of section 333(2) of the Criminal Procedure Code.

4. On the part of the Respondent, it was submitted that resentencing is not tantamount to clemency; that the appellants had their petition commuted to life imprisonment by the President under the power of mercy. The respondent conceded to the appeal and urged the court to interfere with the sentencing discretion that was exercised by the trial court.

5. I have considered the submissions made before me in this appeal. For the avoidance of doubt, I need to point out from the outset that the ruling is solely related to the issue of resentencing and not the merits of the appeal since this court had already determined the same before

the appellants filed a petition for resentencing. In this regard, the singular issue to be determined is whether the court may make a downward review of the resentence by the trial court.

6. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor v Republic [1954] EACA 270**, pronounced itself on this issue as follows:-

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

7. In the case of **Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal 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.**

8. I have considered section 333(2) of the Criminal Procedure Code that provides that:

> *(2)* ***Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.***

9. It is therefore clear that the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

10. On the issue of whether or not the sentence should be revised downwards, section 382 of the Criminal Procedure Code provides for instances where a finding or sentence are reversible by reason of error or omission in charge or other proceedings**.** It states that:

> "***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings*.*"***

11. The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant appeal, there is on the trial court record probation officer's reports that indicated that the 1st appellant spent 7 years in custody; it was noted that he faced issues of greed for quick money, violence, poor decision making and required counseling. On the part of the 2nd appellant, it was noted that he denied commission of the offence and served 7 years in custody. It was noted that his brother is a nuisance in the village and is of slippery conduct. On the part of the 3rd appellant, it was noted that he dropped out of school due to truancy and has served 7 years in custody. It was noted that he needed guidance and counselling; he faced issues of greed for quick money, violence, poor decision making.

12. Be that as it may, the jurisprudential trends have seen sentences of between 30 and 25 years being handed over to persons who commit robbery with violence, and I do this with all caution because the appellants appeal is against the resentence as this court already determined their first appeal and dismissed it.. In **Aggrey Chiteri v Republic [2019] eKLR,** the applicant was resentenced to 5 years for robbery with violence from the date of the resentence judgement; In **Leonard Kipkemoi v Republic [2018] eKLR,** the appellant was resentenced on appeal to 20 years imprisonment to run from the date of sentencing. It is noted from the reports by the probation officers that the appellants' conduct in their respective villages were not good. Again it is noted that the circumstances of the offence were rather tragic in that one of the complainant's guards was killed. This calls for a deterrent sentence. I also note that the appellants had been in remand for some time before being convicted and hence the said period will be taken into account. It is also noted that the reports by the probation officer reveals that the appellants are somehow social misfits in their respective villages and hence custodial rehabilitation is the best form of reform. In the premises, i find that a resentence of 30 years' imprisonment is suitable for each of the appellants and which will take into account the 7 years that they have been in custody. I need to point out that there is really no arithmetic formula in sentencing and also considering that there was a death occasioned by the actions of the appellants.

13. In the result, the appeal succeeds to the extent that the resentence of the appellants to death by the trial court is hereby set aside and substituted with a sentence of 30 years' imprisonment from the date of arrest namely 17.12.2012.

It is so ordered.

Dated and delivered at Machakos this 17th day of September, 2020.

D. K. Kemei

Judge