



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 23 OF 2019

ROBERT KINOTI ALIAS KAMKONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence from Hon. P.N. MAINA (S.P.M) in the Principal Magistrate's Court at Marimanti Law Courts in Criminal Case No. 431 of 2018 dated 19th October 2018.)

J U D G M E N T

1. The Appellant was charged before **Senior Principal Magistrate's Court at Chuka** with the offence of threatening to kill contrary to **Section 223(1) of the Penal Code (Cap 63 Laws of Kenya)**. It was alleged that on 15th July 2018 at around 2100 Hours at Marimanti Township in Tharaka South Sub-County, without lawful excuse uttered words threatening to kill **HEZEKIA NGOCI KAMWARA**.

2. The Appellant pleaded not guilty. However, when the matter came up for mention on 27th August 2018 the Appellant pleaded guilty and was convicted. The trial Magistrate called for a probation officer's report before sentencing the Appellant. The report was subsequently filed. The Magistrate remarked that though the Appellant was not a first offender, the report was in favour of a none custodial sentence. He then proceeded to place the Appellant on Community Service Order (C.S.O) sentence for a period of three years at Marimanti Police Station on 30th August 2018. It would seem from the record that later on 19th October 2018 the Court was moved by a probation officer, Mr. Kurgat and informed that the Appellant worked for only 2 ½ weeks. The Appellant while serving the sentence committed another offence, that is stealing, was charged in Criminal Case No. 658/2018. He was sentenced to three years imprisonment. The Probation Officer reckoned that the appellant could not serve the Community Service sentence. The Community Service sentence was revoked and substituted with a sentence of (10) years imprisonment. The trial magistrate further remarked that the sentence was to run consecutively with the sentence in Criminal case No.658/2018. The Appellant was dissatisfied with the sentence and filed this appeal, initially raising seven grounds filed in court on 24th September 2019. He prays that the appeal be allowed, the sentence be set aside and he be set at liberty. The appeal was admitted on 15th January 2020. Later directions were taken that the appeal be canvassed by way of written submissions.

3. The Appellant filed written submissions on review of sentence for the offence of threatening to kill on the following grounds:-

- 1. That the learned trial magistrate erred in matters of law by failing to note that the sentence was harsh in the circumstances of this case.**
- 2. That the learned trial magistrate erred in matters of law and fact by failing to note that the appellant pleaded guilty to this case.**
- 3. That the learned trial magistrate convicted the appellant with bias, since he failed to note that the appellant was arrested while under C.S.O he could not come to work again because he was already in custody.**
- 4. That the learned trial magistrate erred in both matters of law and facts by failing to invoke Muruatetu case during sentencing in this instant matter and prefer a definite sentence to the appellant.**

The Appellant effectively abandoned the earlier grounds of appeal.

4. The Appellant submits that the sentence handed to him in this case was harsh and inhuman since he had another case, Criminal Case No.658/2018 and the trial magistrate ordered the sentence to run consecutively instead of ordering the same to run concurrently. The Appellant prays that the sentences in Criminal Case No.658/2018 and 719/2018 be ordered to run concurrently. He submits that he pleaded guilty in all the criminal cases. He submits that since he was ordered to serve three years on Community Service, the sentence be substituted

with three years imprisonment. The appellant has relied on the Supreme Court of Kenya in Francis Karioko Muruatetu & Another -v- Republic & Others (2017) eKLR. The authority is however not relevant to the offence the appellant was charged with and the circumstances of this case. The Appellant also relies on;

The Supreme court of India in State of M.P. vs Bablu Natt stated that “**the principle governing imposition of punishment would depend upon the fact and circumstances of each case**”. In Alister Anthony Pareira -vs- State Maharashtra the court held that:-

“ Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence could mee the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”

The Appellant submits that the court has to bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should be considered.

5. He submits that the trial magistrate violated the appellant’s right to fair trial under **Article 50** of the Constitution. He prays that the sentence be reviewed.

The State opposed the appeal and filed submissions through the office of the Director of Public Prosecution. They submit that they support the sentence meted out by the trial Magistrate and urged the court to dismiss the appeal. It is submitted that the sentence meted out was legal and lawful, just and fair. That the trial magistrate considered that despite meting out a none custodial sentence against the appellant who had previous criminal records, he went ahead to commit another offence at Marimanti Police Station while serving the Community Service sentence, That the court further noted that he had committed another offence in open court where he injured a fellow remandee and was charged with assault and creating a disturbance in a manner likely to cause a breach of peace. That the Appellant’s previous records, character and ante-cedents were all indicative that he needs time in correction facility in order for him to be rehabilitated. It is submitted that the appeal lacks merits.

6. I have considered the appeal and the submissions. I have also considered the proceedings before the trial court. What is before this court is an appeal on the sentence. There are three issues:-

- i. The jurisdiction of the trial magistrate on sentencing upon revocation of the Community Order sentence.
- ii. The trial magistrate’s discretion to order a sentence to run concurrently or consecutively.
- iii. Appel on sentence.

7. Jurisdiction of the trial magistrate on sentencing upon revocation of the Community Service sentence.

The Appellant was ordered to serve a sentence of three years on community Service. **Section 3 (1) & (b)** of the Community Service Orders **Act No. 10/1998. 11/2017 & 18/2018 Orders Act** provides:-

“ Where any person in convicted on an offence punishable with-

- a. Imprisonment for a term not exceeding three years with or without the option of a fine; or**
- b. Imprisonment for term exceeding three years but for which the court determines a term of imprisonment for three years or less with or without the option of a fine to be appropriate, the court may, subject to this Act make a Community Service Order requiring the offender to perform Community Service,”**

The Act therefore gives discretion to the trial magistrate to place a person on Community Service where offence is punishable with a term of imprisonment not exceeding three years with or without the option of a fine or imprisonment for a term exceeding three years but is sentenced to three years or less. The maximum sentence which can be passed under Community Orders Act is three years. In this case the Appellant was placed on Community Service Order for three years. The Act places an obligation on a person who has been placed on Community Service. **Section 4** provides:-

Obligations of a person subject to Community Service Order;

- i. A person who is subject to a community Service Order shall-
 - a. Report to the supervising officer specified in the order for assignment of work; and
 - b. Perform for the period specified in the order such work at such times and at such place as he may be instructed by the supervising officer; and
 - c. Report to supervising officer, any change of address which may occur from time to time.

Section 5 provides for breach of Community Service Orders. Section 5 (c) provides that if the offender commits a breach or fails to comply with any conditions or requirements of a Community Service Order, the court may, *inter alia*;

“ c) revoke the order and impose any other sentence under the law, as the court deems appropriate.”

The Act gives the court discretion to revoke the order and to impose any other sentence provided under the law.

In this case the appellant committed an offence while he was serving a sentence on Community Service. He was imprisoned for that subsequent offence and it became impossible for him to continue serving the none custodial sentence. The Appellant has admitted that he committed the offence and that he pleaded guilty.

8. I find that under the Community Service Act, the court is supposed to supervise the process of the sentence. This can clearly be seen from the structure of the statutory bodies charged with the responsibility of overseeing the implementation of the Act, see Community Service Orders (Case Committee Regulations 1999.)

Where it becomes impossible for the court to supervise the process of the sentence and for the offender to perform Community Service, the court will revoke the order. In this case the Appellant was imprisoned for three (3) years after serving Community Service for two and half weeks which was 25 Hours out of the 10260 Hours (3) which he was supposed to serve. The trial magistrate was therefore clothed with jurisdiction to revoke the order and impose any other sentence under the law as the court deems appropriate. This means that the trial magistrate is not bound to convert the Community Service Order sentence to a term of imprisonment. The magistrate is to exercise discretion and sentence the offender as provided under the law that was contravened. All that the court has to do is to take into account any period served on Community Service and reduce the sentence with that period. The trial magistrate did not therefore err by imposing the sentence of ten years on the appellant. The appellant was charged under **Section 223(1) of the Penal Code (Cap 63 Laws of Kenya)** which provides as follows:-

“ Any person who without any lawfully excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.”

The sentence passed by the trial magistrate was provided under the law.

9. On the question whether the trial magistrate erred by failing to order the sentence to run concurrently, **Section 37 of the Penal Code** provides:-

“ Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof: Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.”

The Appellant was tried at different and separate trials. There is no provision for the trial magistrate to order the sentence to run concurrently. **Section 14 of the Criminal Procedure Code** provides:

“ Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently. (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court. (3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences - (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose. (3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

It is therefore lawful to pass consecutive sentences in the circumstances prescribed under this section. The Court of Appeal in the case of **Peter Mbugua Kabui-v- Republic (2016) eKLR** stated as follows:-

“ As a general principle the practice is that if an accused person commits a series of offences at the same time in a single

act/transaction a concurrent sentence should be given. However if separate and distinct offences are committed in different criminal transactions, even though the courts may be in one charge sheet, and on trial, it is not illegal to mete out a consecutive term of imprisonment.”

In the case the court was satisfied that as the offences were committed at different time, dates and against different complainants, the trial court and the High Court did not err in ordering consecutive terms of imprisonment for the two counts.

In this case the appellant committed two distinct offences at different times and against different complainants. The trial magistrate did not err by ordering the sentence to run consecutively. The sentencing policy guidelines on whether the court should impose consecutive or concurrent sentences, 7.13 states:-

“ Where the offences emanates from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentence should run consecutively 7.14. The discretion to impose concurrent or consecutive sentences lies in the court.”

The offence which the appellant committed while serving the community Service was dealt with before another court all together. The magistrate in this case had nothing to do with the sentence in those proceedings.

The discretion was exercised fairly and judiciously in the circumstances of this case. The ground is without merits.

10. Appeal on sentence:

The appellant plead guilty to the charge. He was not a 1st offender. He committed another offence when servicing the Community Service order sentence. The appellant referred to the sentencing policy guidelines on sentencing which are supposed to mee the following objectives:

- i. Retribution:** To punish the offender for his/her criminal conduct in a just manner.
- ii. Deterrence:** To deter the offender for his/her criminal conduct in a just manner.
- iii. Rehabilitation:** To enable the offender reform and discourage or prevent him from committing similar offences
- iv. Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Further to promote sense of responsibility through the offender contribution towards meeting the victim’s needs.
- v. Community protection:** To protect the community by incapacitating the offender.
- vi. Denunciation:** To communicate the community condemnation of the criminal conduct.

The trial magistrate while passing the sentence noted that the appellant was a repeat offender as he had three previous convictions but despite that considered a none custodial sentence. That he committed another offence when servicing the none custodial sentence. She also noted that the accused had assaulted a fellow remandee causing him actual bodily harm and creating disturbance. She concluded that the appellant was a violent person whose threat should not be taken lightly. She found that a deterrent sentence was called for. The trial magistrate properly addressed her mind to the guiding principles on sentencing. The appellants previous records, character and antecedents are indicative that he requires a long period of incarceration in a correctional facility so that he can reform and be rehabilitated. It is trite that sentencing is essentially the exercise of discretion and the court will not normally interfere with the exercise of discretion unless it is demonstrated that the court acted on wrong principle, ignored material facts, took into account irrelevant considerations or on the whole the sentence is manifestly excessive. The Court of Appeal in *Bernard Kimani Gacheru -v- Republic Criminal Appeal No.188/2000* stated as follows:-

“ 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 the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overloaded some 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 stated is shown to exist.”
See also *Wanjira -v- Repulic (1971) E.A 493.*

In view of the analysis of the reasons stated by the trial magistrate when passing sentence, although the sentence imposed was the maximum, the sentence was justified. I find no reason to interfere with the sentence imposed by the trial magistrate. The sentence will be reduced by 25 Hours which the appellant had served on Community Service.

The upshot is that I find this appeal without merits and is dismissed.

Dated, signed and delivered at Chuka this 27th day of October 2020.

L. W. GITARI

JUDGE

27/10/2020

Judgment read out through skype, Appellant present.

Mr. Momanyi prosecuting Counsel present,

Mr. Muriuki Court Assistant this 27th day of October 2020.

L.W. GITARI

JUDGE

27/10/2020