REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NUMBER 195 OF 2019

ROBERT KIMUTAI CHERUIYOT.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Iten Senior Principal Magistrate's Court

Criminal Case Number 884 of 2018 delivered on 26th November, 2019 by Hon. C. Ateya (RM)

J U D G M E N T

1. The appellant Robert Kimutai Cheruiyot was charged with three (3) counts:-

COUNT 1

ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE

PARTICULARS: On the 9th day of September 2018 at Kilos Trading Centre, Marakwet West Sub County within Elgeyo Marakwet County, unlawfully assaulted GABRIEL RUTO CHEPTOO thereby occasioning him actual bodily harm.

COUNT 2

ASSAULT IN RESISTING ARREST CONTRARY TO SECTION 103(a) NATIONAL POLICE SERVICE ACT NO. 11A OF 2011

PARTICULARS: On the 29th day of September 2018 at Kilos Trading Centre, Marakwet West Sub County within Elgeyo Marakwet County within Elgeyo Marakwet County, assaulted NPR RAYMOND KIPKOSGEI KIPRUTO with intent to resist the lawful apprehension of himself for the offence of assault causing actual bodily harm.

COUNT 3

ASSAULT IN RESISTING ARREST CONTRARY TO SECTION 103 (a) OF THE NATIONAL POLICE SERVICE ACT NO. 11A OF 2011

PARTICULARS: On the 29th day of September 2018 at Kilos Trading Centre in Marakwet West Sub County within Elgeyo Marakwet County within Elgeyo Marakwet County assaulted NPR ALLAN KIPRONO KANGONGO with intent to resist lawful apprehension of himself for the offence of assault causing actual bodily harm.

2. On 22nd November, 2019 he was found guilty and convicted of each of the charges.

3. On 26th November 2019 he was sentenced to serve three (3) years imprisonment on Count 1 and twenty (20) years imprisonment on Count 2 and 3 respectively. The sentences were directed to run concurrently.

4. He filed Petition of Appeal and Grounds which he later amended to read: -

"SUPPLEMENTATY GROUNDS OF APPEAL FILED UNDER SECTION 350 (2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA IN RELIANCE TO ARTICLE 49(h) OF THE CONSTITUTION OF KENYA 2010

Having been in receipt of my trial court records of proceeding and its judgment I beg to amend my grounds as follows: -

1. *THAT I am a first offender.*
2. *THAT the sentences meted upon me were harsh, unjust, unfair and inhuman.*
3. *THAT I have been in prison for a long time.*
4. *THAT I am remorseful, repentant and reformed because I have learnt the incarceration behind bars."*

5. Essentially, therefore his appeal is against the sentence.

6. The grounds were accompanied by written submissions.

7. In his oral submissions during the hearing of the appeal, he stated that the twenty (20) years imprisonment terms were harsh considering the circumstances of the offence in that Marakwet West, Kerio Valley, where he comes from borders the Pokot. That his people and their neighbours had engaged in acts of insecurity and tension was very high. That it was in this environment that the complainants came to arrest him. That they had approached him from behind. That his reaction was in his own defence because of the fear that he was being attacked, a fear emanating from the tension resulting from that high insecurity.

8. He urged the court to find that a perusal of the complainants' P3s would show that complainants had not sustained injuries that amounted to grievous harm from the incident as alleged

9. He also submitted that the complainants were also shocked by the harshness of the sentence and were even willing to withdraw their complaints at this stage.

10. The prosecution through Mr. Chacha submitted that the appellant was serving a fifteen (15) years imprisonment sentence in Eldoret CM **Criminal Case Number 127 of 2014.** That the appellant had no excuse for the attack on the complainants because they were accompanied by the area chief who was known to the appellant. That even if the complainants did not identify themselves, they did not deserve to be stabbed. That the appellant's act of resisting arrest increased the tension in the area.

11. In response, the appellant submitted that these people, the complainants, came to arrest him claiming that they had a warrant of arrest for him. However when he demanded to see it they did not show it to him hence his reaction. He urged the court to read his reaction to the arrest in the context of the circumstances of the insecurity and tension in the area. He confirmed that he was serving fifteen (15) years imprisonment for defilement. He prayed that the sentences in this case and in the defilement case be made to run together.

12. In his written submissions, the appellant pointed out several cases where accused persons and appellants facing serious offences had received lenient sentences because of the prevailing circumstances at the commission of the offence, and the specific circumstances of their cases.

13. The issue is whether this court can grant the orders sought.

14. **Section 14 of the Penal Code** gives the sentencing court the sentencing discretion and the discretion to direct that sentence to run concurrently or otherwise. **Section 354 of the Criminal Procedure Code** gives this court the power, on appeal against sentence to *"increase, reduce or alter the nature of the sentence".*

15. In determining whether to interfere with the sentence herein I must bear in mind the guidance in the principles which have been firmly settled as far back as 1954, in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270.** These principles determine as to when, an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court: the court stated;

> *"The Court does not alter a sentence unless the trial Judge has* ***acted upon wrong principles*** *or* ***overlooked some material factors****". To this, we would add a third criterion namely,* ***"that the sentence is manifestly excessive in view of the circumstances of the case*** *(***R - v- Shershowsky (1912) CCA 28TLR 263****)."*

16. 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 factors or, that a wrong principle was applied or, that short of these, the sentence itself is so excessive and therefore an error of principle [and] must be interfered [with] …"*

17. The record shows that in sentencing the appellant the learned trial magistrate stated;

> ***"I have considered the mitigation of the accused and the circumstances of the case. The accused having been found guilty and is currently serving sentence for another offence is hereby sentenced as follows…"***

18. The trial court stated that it took into consideration the circumstances of the case and the fact that the appellant was already serving another sentence.

19. The offence of grievous harm carries a maximum sentence of life imprisonment. I note that the maximum sentence for this offence is similar to the maximum sentence for **manslaughter c/s 202 as read with 205 of the Penal Code.** Applying the principle of proportionality in sentencing, such a term of imprisonment would be meted out to a person who had caused the victim injuries that would be so severe as to be life threatening. I believe that that is an indication how serious the injury sustained by the complainant must be. To my mind, a term of 20 years' imprisonment would have to be looked at in the light of the injuries sustained by the complainants.

20. A perusal of the P3 in respect of each of the complainants indicated that the assessment by the examining doctor set the degree of injury as maim. This was assessed from the cut wounds, which each of the complainants sustained. These were stitched, and each received treatment of antibiotics and analgesics. The question that begs then is whether these were life-threatening injuries to warrant the 20-year imprisonment sentences. It is evident from the P3s that they were not.

21. Further, the *Sentencing Policy Guidelines* at *paragraph 3:1* speak about one of the principles of sentencing, the principle of *Proportionality*. It states;

> *"The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence**. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender." (Emphasis mine)***

22. The Court of Appeal speaking to the issue of proportionality of sentence in **Thomas Mwambu Wenyi vs Republic [2017] eKLR** first pointed out that sentencing was the discretion of the trial court. The court cited with approval the holding of *Bosire J*. (as he then was) in **Ambani –vs- Republic (1990) KLR 161.** Therein, the Judge stated that;

> ***"…a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence."***

23. The Court also cited the Supreme Court of India in **Alister Anthony Pereira vs State of Maharashtra** at **paragraphs 70-71** where the court had this to say on sentencing:-

> *"70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.*
>
> *71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."*

24. Coming back to this case, on the first count, **Section 251 of the Penal Code** provides for the offence of assault and its penalty thus:

> ***"S. 215 Assault causing actual bodily harm:***
>
> ***Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years."***

25. Regarding Count 2 and 3 the assault on a Police Officer **Section 103 of the National Police Service Act** provides:

> ***"S.103 Assault in execution of duty Any person who—***
>
> ***(a) assaults, resists or willfully obstructs a police officer in the due execution of the police officer's duties;***
>
> ***(b) assaults, resists or willfully obstructs any person acting in aid of the police officer;***
>
> ***(c) attacks an animal belonging to the Service; or***
>
> ***(d) intentionally or recklessly, destroys police property, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both."***

26. The case for the prosecution is that the Police Officers involved in this case were members of the Kenya Police Reserve. I note that these are provided for under **Section 110 of the same Act** which states: Composition of the Reserve*;*

"S. 110 (1) The National Police Reserve (hereinafter referred to as "the Reserve") shall consist of such persons resident in Kenya (other than serving members of the Kenya disciplined services) as, having attained the age of eighteen years, volunteer for service and are enrolled as reserve police officers.

(2) The National Security Council shall determine the maximum number Reserve police officers. (3) The Reserve may be deployed in Kenya to assist the Kenya Police Service or the Administration Police Service in their respective mandates including in the—

(a) maintenance of law and order;

(b) preservation of peace;

(c) protection of life and property;

(d) prevention and detection of crime;

(e) apprehension of offenders; and

(f) enforcement of all laws and regulations with which the Service is charged.

(3A) The police reserve officers shall—

(a) be provided with proper uniform, service identity cards and weapons;

(b) be deployed in specific areas, with defined commands and supervision structures; and

(c) undergo vetting and training before deployment.

(4) A person serving as a Reserve police officer shall be bound by the same requirements as a police officer and shall be supervised by the Service."

27. From the record, the second and third complainants together with the assistant chief went to arrest the appellant for the charge of assault of the first complainant. The record shows that the assistant chief suddenly grabbed him from behind without any warning and without telling him why or whether he was being arrested. He reacted. That reaction resulted in the injuries that were sustained by the second and third complainants and to his arraignment in court.

28. It is noteworthy that the story about the tension between the appellant's community and their neighbouring community never came up during the trial. It never came up in his defence. The appellant in raising the issue on appeal was denying the prosecution the opportunity to challenge the new facts. Those statements were made intentionally to sway this court. I must ignore them.

29. What is evident from the record is that the assistant chief's testimony supports the appellant's position the persons who came to arrest him did not introduce themselves. The second and third complainants being the Police Officers were obligated to conduct themselves as police officers. There is nothing on record to show that they were in uniform, to be identified as police officers by the appellant or those present. They did not establish that they were actually members of the National Police Reserve. They and the assistant chief did not act in accordance with the law but suddenly accosted the appellant, leading to the scuffle.

30. Nevertheless, the appellant had no excuse to attack the complaints. He seems to have a belligerent personality. He was being arrested for assault, and proceeded to attack the complainants.

31. Taking guidance from the sentencing guidelines I have set out herein above and my findings that the complainants did not sustain serious injuries, it emerges therefore that the sentences of twenty (20) years imprisonment imposed on the appellant were harsh and manifestly excessive in the circumstances of the case to warrant the interference by this court.

32. I would therefore allow the appeal, set aside the sentence of twenty (20) years' imprisonment on the second and third counts and substitute the same with a sentence of four (4) years' imprisonment to be served from the date he was first remanded in custody. This is to run concurrently with the sentence of three (3) years' imprisonment on the first count.

33. Right of Appeal 14 days.

Dated, delivered virtually this 30th day of December, 2020.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant; Martin

Appellant Present

Court Prosecutor Ms. Limo Prosecuting Counsel