aREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NOS. 5 & 6 OF 2019

(*CONSOLIDATED)*

ALEX MUTHINI MUSYA.....1ST APPELLANT

JACOB MAKAU KAMII.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the resentence of Hon. I. M. Kahuya, (Principal Magistrate)

in Machakos Chief Magistrate's Court Criminal Case No. 1631 of 2014

passed on 8/01/2019)

JUDGEMENT

1. The Appellants herein **ALEX MUTHINI MUSYA** and **JACOB MAKAU KAMII** were jointly charged before the Chief Magistrate's Court at Machakos with one count of Robbery with Violence contrary to section 295 as read with Section 296(2) of the Penal Code. They were convicted and sentenced to death.

2. This Court Vide ***High Court Misc Crim Pet 178 & 179 of 2018*** quashed the death sentence that was meted on the appellants in **Machakos CRC 1631 of 2014 and HCRA 14 of 2017** and directed that the **Machakos CRC 1631 of 2014** be remitted back to the trial court for resentencing.

3. The resentencing proceedings were undertaken before Hon. I. M. Kahuya PM in which after hearing the mitigating circumstances and the presentence report sentenced the appellants to 25 years' imprisonment commencing from the date of conviction.

4. The appellants are aggrieved by the sentence and have lodged this appeal in which they raise the following grounds:

a) That the court invoke article 50(2)(p) of the Constitution in passing a lenient and proportionate sentence.

b) That the court find that they were convicted and sentenced as first offenders and grant them lenient sentences

c) That the court review their sentences under Section 46 of the Prisons Act.

d) That the court find that they are remorseful and have embraced the idea of rehabilitation while in incarceration.

e) That they be granted a second chance in life to enable them realize their desired dreams.

5. According to the appellants they were resentenced to 25 years imprisonment and they relied on the case of **Francis Karioko Muruatetu & Another v R (2017) eKLR** and argued that they are remorseful, first time offenders with fatherly responsibilities.

6. On the part of the Respondent, it was submitted by Mr Machogu that pursuant to Section 333(2) of the Criminal Procedure Code the time the appellants spent in custody ought to be considered.

7. I have considered the submissions made before me in this appeal. The singular issue to be determined is whether the court may make a downward review of the resentence by the trial court.

8. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor vs. 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."***

9. 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.***

10. I have noted that the learned magistrate during the resentencing indicated the time within which the sentence was to run; to wit from the date of conviction. Section 333(2) of the Criminal Procedure Code 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.***

11. 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.

12. Because the resentencing court did not take into account the period the appellants spent in remand I direct that the sentence should run from the date of arrest namely 10.10.2014.

13. One of the prayers sought by the appellants is that of review under Section 46 of the Prisons Act and in this regard, I associate myself with the views of Korir, J in **Musa Wambani Makanda vs. Republic [2017] eKLR** that:

"The power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 is as follows:

> "(1) ***Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.***
>
> Provided that in no case shall -
>
> (i) ***any remission granted result in the release of a prisoner until he has served one calendar month;***
>
> ***(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.***
>
> (2) ***For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.***
>
> (3) ***A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-***
>
> ***(a) spent in hospital through his own fault; or***
>
> ***(b) while undergoing confinement as a punishment in a separate cell.***
>
> ***(4) A prisoner may be deprived of remission -***
>
> ***(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;***
>
> ***(b) where the Cabinet Secretary for the time being responsible for internal security considers that it is in the interests of public security or public order.***
>
> ***(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.***

14. The court in **Francis Opondo v Republic [2017] eKLR** stated that the power of remission lies with the prisons authorities and not the court and therefore the appellant ought to address his request to the prisons authorities and this court has no jurisdiction to grant the appellants' request.

15. The third limb of the issues for consideration is whether or not the sentence should be revised downwards. **Section 382 of the Criminal Procedure Code Act provides for instances where 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***

16. 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 no miscarriage of justice has occurred to the appellants so as to warrant interference with the sentence of 25 years and I find no illegality of principle when the learned magistrate resentenced the appellant to 25 years. From the record the 2nd appellant is described by the pre-sentence report as a recidivist whereas the 1st appellant was described as a person who associated with bad company hence was influenced to commit crimes.

17. 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 appealed against sentence only after they were resentenced and hence the court cannot analyze the evidence that prompted the conviction by virtue of the fact that the appellants had already lodged their appeals before this court which were duly determined. In **Raphael Mourice Muriu Ngoya & another v Republic [2019] eKLR,** the appellant was resentenced to 20 years on appeal for a similar offence; In **Leonard Kipkemoi v Republic [2018] eKLR,** the appellant was resentenced on appeal to 20 years imprisonment to run from the date of sentencing. In that regard, the appellants' resentence of 25 years imprisonment is found to be reasonable save that the same is to run from the date of arrest namely 10.10.2014.

18. In the result the appellants' appeal only succeeds to the extent that the sentence of 25 years shall run from the **10.10.2014.**

It is so ordered.

Dated and delivered at **Machakos** this **18th** day of **December, 2019**.

D. K. Kemei

Judge