REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 59 OF 2015

MUSA WAMBANI MAKANDA……...PETITIONER

VERSUS

REPUBLIC OF KENYA…….RESPONDENT

(Appeal from the judgement delivered on 18th November, 2015 by Hon. J. N. Maragia, Resident Magistrate in Busia CM Criminal Case NO. 2849 of 2014)

JUDGEMENT

1. The Appellant, Musa Wambani Makanda is currently serving a sentence of three years imprisonment for the offence of arson contrary to Section 332(a) of the Penal Code. When his appeal came up for hearing on 21st February, 2017 he indicated that his appeal was on sentence only. His statement agrees with his grounds of appeal dated 23rd August, 2015 and filed in Court on 23rd December, 2015 in which he decries the harshness of the sentence claiming it was excessive as it was the maximum provided by the law.

2. Mr. Owiti conceded the appeal saying that the same will allow the Appellant to enjoy remission of sentence. It is Mr. Owiti's case that the statutory right to remission of sentence had been removed at the time the Appellant was convicted and sentenced. He however noted that three years imprisonment is a reasonable sentence for the offence committed by the Appellant which attracts life imprisonment.

3. Mr. Owiti's concession to the appeal on the ground that the Appellant is not entitled to remission of sentence has no legal basis. 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. [Act No. 25 of 2015, Sch.].”

4. I did not understand why Mr. Owiti was of the view that the remission of sentence was not available to the Appellant simply because he was imprisoned at a time when remission of sentence had temporarily been removed from the Prisons Act. Section 46 is clear that remission of sentence is available to convicted criminal prisoners. The Appellant was a convicted criminal prisoner when remission of sentence was reintroduced and he is entitled to benefit from remission, if he meets the conditions for remission of sentence. The only persons who could not receive remission of sentence were those sentenced and had completed their prison terms during the time that remission of sentence was removed from the law. Otherwise all convicted criminal prisoners whether convicted during the existence of the initial right to remission of sentence, during the period that remission had been removed or after remission had been reintroduced in 2015 are all entitled to remission of sentence as provided by Section 46 of the Prisons Act. This is on condition that they meet the provisions of the said Section.

5. I support my position using Article 50(2)(p) of the Constitution which states that:

“(2) Every accused person has the right to a fair trial, which includes the right-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

6. In the case of a convicted criminal prisoner, the least severe sentence is the one to which remission has been applied. It is immaterial that they were convicted during the period that remission had been removed from our statute books.

7. I am however not convinced by Mr. Owiti’s assertion that if indeed remission of sentence was not available to the Appellant then this Court should take that fact into account and allow the State’s concession to the appeal. The power of remission of sentence belongs to the prisons authorities and this Court should not usurp power reposed elsewhere by Parliament. If the State was correct that the Appellant is not entitled to remission, then that is not a good reason for conceding the appeal since the three years imprisonment imposed on the Appellant would still be lawful.

8. Turning to the Appellant’s appeal against sentence, I note that in considering whether to interfere with the sentence imposed by the trial Court, an appellate court is governed by the parameters laid down by the

Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR.** In that case the Court stated that:

> **"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 sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong 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 states is shown to exist."**

Sympathy is not among the reasons that will make an appellate court reduce a sentence.

9. As to what the principles of sentencing are, I stated in **Dalmas Omboko Ongaro v Republic [2016] eKLR** that:

> **"10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:**
>
> **"In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (*Makanga v R. Criminal Appeal* No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (*Mathai v R* [1983] KLR 442) and whether there has been restitution of the property by the accused (*Hezekiah Mwaura Kibe v R* [1976] KLR 118)."**
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> **The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism."**

10. The offence for which the Appellant was sentenced attracts life imprisonment. The record shows that the Court considered the Appellant's mitigation before imposing sentence. The sentence was indeed lenient considering that the complainant lost his house as a result of the crime. In the circumstances of this case I find no basis for interfering with the sentence imposed by the trial Court.

11. Considering that remission is available to the Appellant, I direct the prisons authorities to consider him for remission of sentence like any other prisoner at the opportune time. Otherwise the Appellant's appeal fails and the same is dismissed.

Dated, signed and delivered at Busia this 30th day of March, 2017

W.KORIR,

JUDGE OF THE HIGH COURT