



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 86 OF 2011

Gabriel Wanjohi MachariaAppellant

Versus

Republic.....Respondent

(Appeal against sentence in Criminal case number 100 of 2011, Republic vs. Gabriel Wanjohi Macharia at Mukurweini Law Courts on 26.4.2011 by Hon. F.M. Kombo).

JUDGEMENT

The appellant in this case pleaded guilty to the offence of causing grievous harm contrary to Section 234 of the Penal Code^[1] and was convicted on his own plea of guilty.

Initially, the Appellant had been charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and he pleaded guilty to the said offence, but subsequently the charge sheet was substituted with to grievous harm and he once again pleaded guilty to the charges. The trial court then a DM11 (Prof) Magistrate stated that he had no jurisdiction and referred the matter to the SRM for sentencing.

Before the SRM, the charges were read afresh to the appellant and he answered “*it is true because of what he did to me.*” The learned Magistrate entered a plea of not guilty and the trial commenced on 26.4.2011 but after the complainant gave his evidence, the Appellant replied “*That is what happened. I cut the accused. The charge is true.*” The learned Magistrate thereupon directed that the charges be read again to the Appellant and he answered “*It is true.*” A plea of guilty was entered and the Appellant was accordingly convicted on his own plea of guilty. In mitigation, the Appellant said “*I did that because of the complainant had offended me. I pray for leniency.*” The trial Magistrate sentenced him to serve **ten years imprisonment.**

In his grounds of appeal, the Appellant claims that he was not brought to court within the meaning of Section 72 of the previous constitution (even though this case commenced in 2011 more than six months after the promulgation of the Constitution of Kenya 2010). He also cited the provisions of Section 36 of the Criminal Procedure Code.^[2] The Appellant also faulted the Magistrate for not subjecting him to insanity test.

This matter came up before Hon Justice Ngaah on 27.5.2015, he ordered that the Appellant be taken for a mental assessment and a report be filed. Pursuant to the said order, the Appellant was examined and report dated 4.6.2015 was filed was filed on 5.2015. The report concluded that the Appellant was normal and fit to stand trial. The matter came up before me for hearing on 30.9.2015 and I noted that he was not

ready to offer submissions and suggested that he files written submissions.

On 7.10.2015, the matter came up before me and the Appellant did not bring written submissions. He instead said he was remorseful and added that he will never commit an offence again. He added that he had repented his sins.

Counsel for the state opposed the appeal, and submitted that the Appellant was brought to court within the required period, that he was arrested on 27.11.2011 as evidenced by the charge sheet and arraigned in court on 16.3.2011 a delay of 16 days and that he can apply for a civil remedy. Counsel submitted that such a delay does not exonerate an accused person and cited the case of **Anthony Kinyanjui Kimani vs Republic**.^[3]

Regarding sentence, counsel maintained that the Appellant was convicted on his own plea of guilty and noted that law provides for life imprisonment for the offence, yet the Appellant was only sentenced to 10 years imprisonment, and added that the Appellant was not remorseful at all and that in mitigation he stated that his sole intention was to kill.

It is important at this stage to recall the provisions of Section 348 of the Criminal Procedure Code which provides as follows:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”

Even though the Appellant herein pleaded guilty to the offence, he now seeks to quash both conviction and the sentence contrary to the above section. The law only permits him to appeal against the extent or legality of the sentence.

But in my view, the above section does not preclude the Appellant from citing any issues touching on the constitutionality of the proceedings or violation of his constitutional rights because should the court find sufficient grounds relating to the violation of the constitution or the violation of the accused constitutional rights, then that can be a ground to challenge the legality of the proceedings. This is because the constitution being the supreme law of the land is superior to other laws and I find nothing in Section 348 of the Criminal Procedure Code that can bar the Appellant from citing issues pertaining to violation of his constitutional rights.

Having so stated, I note that the Appellant did mention to the court that he was beaten by members of the public at the time of his arrest and this led to hospitalization and possibly this explains why he was not arraigned before the court immediately. I therefore find no merit in the Appellants' allegations that his constitutional rights were violated by not presenting him before the court within the time prescribed by the law after he was arrested.

Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.^[4] In **Shadrack Kipchoge Kogo vs Republic**,^[5] the court of appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

Section 234 of the Penal Code provides that “any person who unlawfully does grievous harm to another

is guilty of a felony and **is liable to imprisonment life**. Learned state counsel was of the view that the sentence imposed in this case was lenient because the appellant was sentenced to ten years yet the law provides for life imprisonment. Was the appellant sentenced to a lesser term than prescribed by the law?? In answering this question I pose the question “*What is the construction of the terms shall be liable?*” In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty.^[6] This principle is contained in section **66 (1)** of the Interpretation and General Provisions Act^[7] which provides:-

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed”

My further observation is that the principle of law in Section **66** aforesaid is entrenched in Section **26** of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section **26 (2)** and **(3)** of the Penal Code provides:-

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

There is however a proviso to Section **26(3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. In my view, from the wording and language of Section **26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the penal code but to offences under other written laws.^[8]

The phrase used in penal statutes (*ie shall be liable to*) was judicially construed by the East African Court of Appeal in **Opoya vs Uganda**^[9] where the court said at page 754 paragraph B:-

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”

I find that the sentence of life imprisonment prescribed under Section **234** of the Penal Code is not mandatory, and that in determining the sentence, the court has to consider the facts and circumstances of the particular case and in particular be guided by the principles governing the imposition of punishments.

The Supreme Court of India in **State of M.P. vs Bablu Natt**^[10] stated that ‘*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.*’ Moreover, in **Alister Anthony Pareira vs State of Maharashtra**,^[11] 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 would meet 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 of the offence and all other attendant circumstances”

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.^[12]

I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law^[13] which are:-

- i. To ensure that the offender is adequately punished;
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;
- iii. To protect the community from the offender;
- iv. To promote the rehabilitation of the offender;
- v. To make the offender accountable for his or her actions;
- vi. To denounce the conduct of the offender
- vii. To recognize the harm done to the victim of the crime and the community prevent

I note that the Appellant is fairly elderly and that he at times seems confused even though medical examination confirmed he is mentally fit. He has already served 4 years and six months and he repeatedly said in court that he is remorseful and will not commit an offence again, **I hereby reduce the sentence to the period already served and order that the Appellant be released forthwith unless otherwise lawfully held.**

Dated at Nairobi this 30th day of October 2015

John M. Mativo

Judge

^[1] Cap 63, Laws of Kenya

^[2] Cap 75, Laws of Kenya

^[3] Criminal Appeal No. 157 of 2007

^[4] See Makhandia J (as he then was in Simon Ndungu Murage vs Republic, Criminal appeal no. 275 of 2007, Nyeri.

^[5] Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu & Onyango JJA)

^[6] See Daniel Kyalo Muema vs Republic, Court of Appeal Criminal appeal no. 479 of 2007 (Nairobi), Githinji, Anganyanya & Nyamu JJA.

^[7] Cap 2, Laws of Kenya

^[8] Supra note 3

^[9] {1967}E.A 752

^[10] {2009}2S.C.C 272 Para 13

^[11] {2012}2 S.C.C 648 Para 69

^[12] See Soman vs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

