REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO 88 OF 2010

STEPHEN KIPRUTO CHEBOI::::::::::::::::::::::::::::::::::1ST APPELLANT

BENJAMIN KIPLIMO CHEBOI::::::::::::::::::::::::::::::2ND APPELLANT

JOSEPH KIBOR CHEBOI::::::::::::::::::::::::::::::::::::3RD APPELLANT

VERSUS

REPUBLIC:::RESPONDENT

JUDGEMENT

This decision is being rendered in relation to the three (3) appellants, STEPHEN KIPRUTO CHEBOI, BENJAMIN KIPLIMO CHEBOI and JOSESPH KIBOR CHEBOI.

It is important that I make that position clear because the said 3 appellants had earlier had their appeals consolidated with the appeals of two (2) other persons, namely:

(a) THOMAS KANGOGO CHEBOI, and

(b) DAVID KIPSEREM CHEBOI

All the five persons had been convicted for offences emanating from their conduct, when they assaulted three (3) complainants.

The five persons all filed appeals to challenge their respective convictions and sentences.

On 26th April, 2012 the appeal of the five appellants came up for hearing before Mshila J. The appellants were represented by Mr. Kathili advocate, whilst Mr. Kabaka represented the Respondent.

Mr. Kathili informed the court that the parties had had a chance to discuss the matters in issue.

The discussions are said to have yielded an amicable resolution to the family dispute. Indeed, one of the complainants, WILLY KIMUTAI CHEBOI, filed an affidavit detailing the pertinent facts.

He deponed that one of the complainants, CHARLES KIPKOECH CHEBOI, had died in November, 2011. Meanwhile, the other complainant, JOHN CHERUIYOT CHEBOI had authorised WILLY to swear the affidavit.

WILLY stated that the five appellants and the three complainants were all brothers. All of them had attended family meetings which culminated in a resolution that the brothers should reconcile, in an

endeavour to voluntarily enhance family cohesion and reconciliation.

The meeting which gave rise to the reconciliation was attended by a total of 89 persons, from the Nerkwo-Katee Village.

The minutes of the meeting were presented to the High Court. They indicated that the appellants, the complainants, the other members of their family and all those who attended the meeting had unanimously resolved to withdraw the case.

On the basis of the resolutions passed at the meeting, the appellants asked the court to allow the appeal, so that the convictions could be quashed.

In the light of the said request, the Respondent conceded the appeal.

On 10th May, 2012 Mshila J. held that Alternative Dispute Resolution was applicable to offences which were misdemeanors. Accordingly, the convictions which were misdemeanors were deemed amenable to reconciliation, whilst felonies were deemed to be beyond the realm of reconciliation.

Indeed, the learned Judge made the following position clear;

"To encourage reconciliation or any other form of dispute resolution for felonies will not be in the best of public interest and will also not be in the best interest of justice."

Pursuant to the learned Judge's understanding, as stated above, the convictions of the 3rd and the 4th Appellants were quashed.

However, the court made it clear that the appeals of the other three (3) appellants should proceed to full hearing. That explains why although the appeal herein was made up of five (5) appeals which had been consolidated, two of the said appeals have already been determined.

Before the appeals were canvassed before me, I asked Mr. Kathili, the learned advocate for the appellants, whether the High Court would then be called upon to write a second judgement from one consolidated appeal.

The learned advocate submitted that in his considered opinion, the determination by my learned sister was not a judgement based on the merits of the appeal. The said determination was founded on the concession made by the Respondent, after there had been a reconciliation.

The appellants submitted that it is only after this appellate court had heard the appeal that it would write a judgement. That submission is said to be founded on Section 354 of the Criminal Procedure Code.

The appellant's further submission was that pursuant to Section 354 (3)(b) of the Criminal Procedure Code, an appellate court which was handling an appeal against sentence, could reduce or vary the sentence which had been handed down by the trial court.

Mr. Kathili submitted that the circumstances of this appeal fell within the scope of Section 354(3) (b) of the Criminal Procedure Code, insofar as the appeal was against the sentence.

When I inquired whether or not the appeal before me was limited to challenging the sentence, Mr. Kathili indicated that his clients were also challenging their convictions.

I was therefore invited to allow the appeal. I was reminded that two of the appellants had already been set free. As those two were brothers of the remaining three appellants; and considering that the offences arose out of the same transaction, the 3 appellants before me urged me to treat them in the same way as the other two.

The appellants' take was that the parties involved in the case had pursued efforts to attain a Traditional Settlement, as envisaged by Article 159(2) (c) of the Constitution.

In answer to the appeal, Ms. Ruto, learned state counsel, expressed the view that the judgement of Mshila J. ought to be quashed, considering Mr. Kathili's concession that he had not canvassed the appeal before that Judgement was written.

However, this court did draw the Respondent's attention to the fact that they had actually conceded the appeal by the first two (2) appellants.

At that point, the Respondent said that the court was not obliged to accept the concession.

Of course, an appellate court was not under any obligation to accept the concession made by the Respondent in a criminal appeal. Notwithstanding any such concession, the court was still obliged to re-evaluate the evidence on record together with the applicable law, and to determine the issues at hand.

In this case, however, the fact is not simply about the concession which the Respondent had made earlier. It is about the fact that the Respondent appeared to be casting aspersions on the fact that the court had accepted what the said Respondent had told the court. In my consideration view, it cannot be right for any party to invite the court to take a particular position in a case, and to thereafter be critical of that court for accepting such an invitation.

I also hold the view that just because an appellate court has allowed the appeal of one appellant, it would be obliged to allow the appeals of other appellants whose appeals emanated from the same case. The court is under a duty to consider each appeal on its own merits. Some appeals may be premised on the same foundation, such lack of lighting at the scene of crime. But other appeals may arise from the same case, but be determinable on the basis of completely different considerations. For example, one appellant's conviction could be based on his identification at the scene of crime, whilst the appeal of his co-appellant may be based on the doctrine of recent possession.

The point that I am emphasising is that each case must be determined on its own merits.

The appellants have asserted that this Court ought to exercise its discretion under Section 354 (3) (b) of the Criminal Procedure Code, and thus reduce or vary the sentences.

They also indicated that they were also challenging their respective convictions.

I was reminded that the complainants and all the appellants were brothers. They had a dispute over land. However, they thereafter resolved the whole dispute.

It was for that reason that this court was invited to allow the appeal.

In so doing, the appellants contended that they should be deemed to have given effect to the traditional settlement mechanisms, as enshrined in Article 159 (2) of the Constitution. That Article stipulates as follows;

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles - ….....

c. ***alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...."***

The court sought to know from Mr. Kathili, the learned advocate for the appellants, if the courts could encourage reconciliation after there had been a conviction. His answer was that the provisions pertaining to reconciliation were not applicable after conviction.

I believe that the appellants understanding was right, in that respect.

I say so because whereas a complainant and the person who had committed an offence against him can reconcile even after there had been a conviction, such a reconciliation cannot, of itself, have any effect on the conviction. The conviction would stand even though there had been a reconciliation.

A conviction can only be upset through either an appeal or a revision. In this case, the appellants did not advance any arguments to challenge the legitimacy of the convictions against them.

I find no reason in law, or in fact, to quash the convictions. Accordingly, the said convictions are upheld.

Having thus sustained the convictions the three (3) appellants must be placed in custody forthwith.

However, as regards the sentence, I direct that a Probation Officer's Report be placed before me, to enable the court make an informed decision as to whether or not to sustain the custodial sentence.This court has deemed it necessary to seek the Probation Reports because of, inter alia, the alleged new-found reconciliation. My considered view is that if the said reconciliation within the family was real, the court may well play its role in cementing it, through an appropriate sentence.

Accordingly, this court will make its final orders on the sentences, after receiving the Probation Report.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 29TH DAY OF APRIL, 2014

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FRED A. OCHIENG

JUDGE