REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Appeal 114 of 2003
(From Original conviction (s) and Sentence (s) in Criminal Case No. 12 of 2003 of the Resident Magistrate's Court at Kangundo N.N. NJAGI on 16/4/03)

STANLEY MULI MAKAU ……..……APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

J U D G E M E N T

The appellant Stanley Muli Makau, was charged with two counts of Robbery with Violence Contrary to Section 296 (2) of the Penal Code and a third count of Assault Causing Actual Bodily Harm Contrary to Section 251 of the Penal Code. He was convicted of all the three counts and given a sentence of 10 years with 10 strokes of the cane in respect of each of the two counts of Robbery and 3 years with 3 strokes of the cane in respect of the third count of assault. He appealed against all the three convictions and sentences. At the hearing of this appeal, the appellant, through Mr Ndolo, representing him, abandoned the appeal on the convictions and proceeded, we think wisely, to argue the appeal on sentences only.

Mr Ndolo, submitted that the sentence of 3 years and 3 strokes on the assault charge has already been served by the appellant since he was sentenced on 16/4/2003. We indeed note that the said sentence has been served by the appellant who has until now served two and half years without considering so far the benefit of remission.

Turning to the two 10 year and 10 strokes sentences, Mr Ndolo pointed out, first, that the corporal sentences were illegal, the same having been removed from our penal system through an amendment of the Penal Code. He then pointed out the mitigating factors which he wanted this court to consider with a view of reducing the prison sentence of 10 years. These included the fact that the appellant was remorseful. That he was thirty three years old, married with one child, and was the sole bread winner. Mr Ndolo, for those reason sought reduction of the prison sentence.

In response Mr O'Mirera, for the Republic saw no good reason of interfering with the prison sentence aforementioned. He pointed out that the appellant and the complainant were close friends who had shared many good things. That for that reason alone, this court should consider the appellant's behaviour strange and one which should provoke outrage in the mind of the court. He also said that 10 years imprisonment meted out to the appellant where the maximum would be 14 years is not out of place or excessive. Mr O'Mirera accordingly encouraged the court to remove the illegalities from the sentence meted out by the trial court but proceed to uphold the 10 years sentence.

We have considered arguments from both counsel. There was no contention over the corporal sentence which is no longer part of our penal system. We therefore, have no hesitation in setting aside the corporal punishments in respect to all the three counts. As to the prison sentences of 10 years in respect of count one and count two, we observe that all the mitigating factors pointed out to us were similar to those put forward to the trial magistrate before she meted the sentences to the appellants. Indeed she made it clear in the lower court's record that she had taken the said factors into account. She also however clearly felt that the charges of robbery which the appellant had committed were very serious and called for a custodial sentence. We entirely agree with those sentiments.We observe that it was very odd indeed for the appellant to rob his own girlfriend, as he did. We do appreciate the fact that 10 years in prison is not a short time. But we also do not wish to lose sight of the maximum of 14 years period provided under the relevant section. We may presently sympathize with the appellant's situation but we cannot simply alter

the sentence downward merely because we might ourselves have given a lesser sentence had we been trying the case. As stated in the case of ***Sayeko*** *versus* **Republic** (1**989) K.L.R, 306 at page 309**,

> **"The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principle or overlooked some material factor, or the sentence is manifestly excessive in view of the circumstances of the case."**

We adopt the principles above quoted fully. While we are conscious of this court's discretion in sentencing we at the same time appreciate that the trial count's discretion also cannot unnecessarily be interfered with. The lower court did not act on any wrong principle nor did it overlook any material factor. The sentence while high cannot be called manifestly excessive taking into account the maximum provided and the circumstances of this case.

For the above reasons, this appeal must fail. We hereby confirm the prison sentence of 10 years in respect of each count one and count two to run concurrently as ordered by the lower court. As earlier indicated the corporal sentences are set aside. It is so ordered. Dated and delivered at Machakos this 24th day of November 2005

Read and delivered in the presence of

D.A. ONYANCHA

JUDGE

J. LESIIT

JUDGE