Rutto v Republic (Criminal Appeal E018 of 2023)
[2025] KEHC 1818 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1818 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E018 OF 2023

JRA WANANDA, J

FEBRUARY 21, 2025

BETWEEN

PHILEMON KIPTOO RUTTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal code in Iten Senior Principal Magistrate's' Court Case No. E1109 of 2023. The particulars of the offence were that on 15/02/2023 at around 1500hrs at Kiptoit village, Kapchelal sub-Location, Kokwai Location, in Keiyo North sub County, within Elgeyo Marakwet County, he wilfully and unlawfully assaulted one Kelvin Kipkosgei Cheboi, thereby occasioning him actual bodily harm.

2. The Appellant pleaded guilty to the offence, and the Prosecution read out the facts of the offence which he also confirmed as true. He was then convicted on his own plea of guilty.

3. Regarding sentencing, the Prosecution informed the trial Court that the Appellant was a repeat offender having been convicted in two previous separate criminal cases. After the Appellant mitigated, the trial Court sentenced him to serve 3 years' imprisonment.

4. Dissatisfied with the sentence, the Appellant instituted this Appeal. By the Petition filed on 22/11/2023, he raised the following 4 grounds, quoted verbatim:

    i. That the appellant was given a harsh sentence.

    ii. That the learned trial magistrate did not consider the prime factor of the offence.

    iii. That the lower honourable court violated the appellants' rights.

    iv. That the appellant was not given time to mitigate.

Hearing of the Appeal

5. The parties were given the liberty to file written Submissions. The Appellant, however, indicated to the Court that he did not intend to file any Submissions. On its part, the Respondent filed Submissions dated 10/07/2024, through Prosecution Counsel, Calvin Kirui.

Respondents' Submissions

6. Prosecution Counsel observed that from the Appellant's grounds, it is hard to pinpoint whether he appeals against the legality of the sentence or conviction, or both. He then submitted that the Appellant pleaded guilty to the charges and was convicted accordingly, that Section 348 of the *Criminal Procedure Code* bars appeals from subordinate Courts where an accused was convicted upon a plea of guilty, except on the extent and legality of sentence. He cited the case of Olel v Republic [1989] KLR 444 and submitted that, as a result, the Appellant is barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed.

7. Counsel however appreciated that the bar only operates where the plea is unequivocal and does not extend to barring the Court from inquiring as to whether a prima facie plea of guilty was unequivocal or not, or from making an inquiry as to whether the facts constituted an offence. He cited the case of Alexander Lukoye Malika vs. Republic [2015] eKLR. He also set out the manner of recording of a plea as prescribed under Section 207(1) and (2) of the Criminal Procedure Act and cited the case of Ombena vs. Republic (1981) eKLR. Counsel urged that from the trial Court's proceedings, plea was taken on 16/11/2023, the charges were read to the Appellant and interpreted into Kiswahili, he pleaded guilty, the facts were read to him, which he confirmed as correct, and a plea of guilty was then recorded. Counsel submitted that from the foregoing, it is clear that the plea was unequivocal.

8. He urged that the grounds of Appeal do not indicate any illegality on the sentence, that a holistic reading and interpretation of the Petition and grounds reveals that the same do not dispute the legality of the sentence. He then cited Section 251 of the *Penal Code* which prescribes the sentence for the offence of assault causing actual bodily harm, upon conviction, to be imprisonment for up to 5 years. He urged that the Appellant having been sentenced to 3 years imprisonment therefore, was granted a very lenient sentence.

Determination

9. The issue arising for determination in this Appeal is "whether this Appellate Court should interfere with the sentence of 3 years' imprisonment imposed by the trial Court".

10. From the Grounds of Appeal cited above, it is clear that the Appellant is only challenging the sentence meted out by the trial Court. Although Prosecution Counsel has made submissions on the issue whether the plea of guilty was unequivocal, it is not clear why he found it necessary to stray into that sphere when the Appellant has not raised any challenge in respect to the unequivocality of the plea of guilt, or absence thereof. I will, on my part, limit myself to the issue of the sentence, which is the only ground preferred by the Appellant.

11. Regarding interference with sentence at the appellate stage, the applicable principles were restated by the Court of Appeal in the case of Bernard Kimani Gacheru v Republic [2002] eKLR, as follows:

> "It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 stated is shown to exist".

12. Section 251 of the *Penal Code* under which the Appellant was charged, provides that:

> " Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. "

13. In view of the above, it is clear that the sentence imposed by the trial Court, was within the law. This observation does not however mean that I cannot interrogate the issue whether the sentence was manifestly excessive or harsh, which I now do. In doing so, I cite the Supreme Court decision in the the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in which it guided that, in re-sentencing, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender; and

(h) any other factor that the Court considers relevant.

14. Building on the above guidelines, Majanja J, in quoting Francis Karioko Muruatetu (supra), in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> " The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

15. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

16. Applying the above principles to the facts of this case, I may repeat that the Appellant was liable to a sentence of up to 5 years imprisonment. The trial court exercised its discretion and sentenced him to 3 years which is not the maximum prescribed and therefore. It is also not in dispute that the Appellant was given the opportunity to mitigate, which he did. The trial Court was also informed that the Appellant was a repeat offender having been previously convicted in two earlier separate criminal cases.

17. There are however also mitigating factors that I discern. For instance, although the trial Magistrate, in her Judgment stated that the Appellant was not remorseful, it is not clear how she reached this conclusion when in his mitigation, the Appellant conveyed his apologies for the offence by expressly stating that he was sorry. His plea of guilty also saved the Court precious judicial time thereby freeing the Court to embark on other important matters. The trial Magistrate did not state whether she took these matters into account. In the circumstances, I am of the view that the trial Court may have overlooked these material factors and by virtue thereof, imposed a sentence that appears excessive in the circumstances of the case.

18. Having been in custody since his arrest on 14/11/2023, the Appellant has so far been in custody for about 1 year and 2 months. I believe that he has now learnt his lesson, though a painful one and belated, and has had time to reflect on his actions. At 32 years of age, the Appellant is in his prime age, and I believe that his rehabilitation will be best achieved, not by confining him to custody for an unreasonable long period of time, but by reducing his incarceration.

19. I would have commuted the Appellant's sentence to the period already served save that while perusing the trial Court file, I have come across an Affidavit that was filed therein by one Police Constable Kiyian Munkasio, Force No. 118601, attached at Kapchelal Place Post, in opposing the Appellant's release on bail/bond, and who deponed that he was the Investigating Officer in the matter. Besides confirming that the Appellant had other previous criminal convictions as aforesaid, all for the offence of assault, and thus, a repeat offender, he also deponed that the Appellant, on several occasions, threatened the complainants through mobile phone that he would pay the cash bail and fines and finally when out of the prison/jail, he will kill them. He deponed further that the Appellant threatened to kill the local administration, the Chief and Nyumba Kumi personnel for effecting his arrest. For these reasons, I will not commute the sentence as suggested.

Final Order

20. In the circumstances, I make the following Orders:

    i. The Appeal against conviction fails.

    ii. In respect to the sentence however, I set aside the sentence of 3 years imprisonment imposed by the trial Court and substitute the same with a sentence of 2 years imprisonment, computed from the date of arrest, namely, 14/11/2023, as stated in the Charge Sheet.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Appellant present virtually from Tambach Prison

Ms. Mwangi for the State

C/A: Brian Kimathi