Kirema v Republic (Criminal Appeal E032 of 2023)
[2025] KEHC 8169 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E032 OF 2023

DKN MAGARE, J

JUNE 5, 2025

BETWEEN

MICAH KIREMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence in Mukurweini MCRC No. 489 of 2019. The Appellant set out 10 grounds of appeal. he however, opted to proceed with ground 6 that the sentence was harsh, excessive and exorbitant.

2. The Appellant prayed that he was not interested in the rest of the grounds. he stated that a reconsideration of sentence to run concurrently instead of consecutively will make the sentence less excessive.

3. The Respondent did not oppose the request by the Appellant. The issue is whether this court should interfere with the sentence imposed by the trial court upon the Appellant.

4. The Appellant was charged in Mukurweini SRMCRC No. 489 of 2019 with the offence of store breaking and stealing contrary to Section 306(a) of the *Penal Code*. The particulars of the offence were that on 17.9.2019 at Kabuta Trading Centre in Mukurweini Sub-county of Nyeri County jointly with others not before court broke and entered a store of Benson Mwangi Nyaga and committed therein a felony namely stealing and did steal items valued at Ksh. 58,170/=.

5. The Appellant was also charged with the second count of being in possession of suspected stolen property contrary to Section 323 of the *Penal Code*. The trial court found the Appellant guilty on both counts. On count I, the court convicted the Appellant and sentenced him to pay a fine of Ksh. 100,000/= or in default to serve 5 years imprisonment. On count II, the court convicted the Appellant and fined him Ksh. 100,000/= and in default to serve 5 years imprisonment.

Analysis

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 held as follows:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

7. The limitation on the powers of this court on appeal are found in Section 382 of the *Criminal Procedure Code*, which provide as follows:

> "382: Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

8. Courts in criminal cases should consider the standard of proof and the effect of a conviction on an accused person. In this case, the Appellant was to serve 10 years with a possibility of enhancement to life imprisonment upon conviction. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for life or such period as provided in law. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state.

9. The discretion that this court enjoys in sentencing permits a balanced and fair sentencing, which is also the hallmark of enlightened criminal justice. As was stated in State vs. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA said:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual

circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts."

10. It is the duty of the court to ensure that the sentences so prescribed are imposed in accordance with *the Constitution* and the law. As was elaborated by the persuasive Constitutional Court of Uganda in Susan Kigula & 417 Others vs. Attorney General, Const. App. No. 3 of 2006:

> " The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with *the Constitution*."

80. I therefore have no doubt 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 ends of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 Sentencing Guidelines are as follows: -

> " 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
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> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
>
> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
>
> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community
>
> v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.

vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society"

11. The Appellant did challenged the severity of sentence imposed and prayed that the sentences in the two counts against him should run concurrently. The Court of Appeal in Peter Mbugua Kabui vs Republic [2016] eKLR expressed itself on the matter as hereunder:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the *Criminal Procedure Code* is inapplicable to this case in light of the provisions of Section 7 (1) of the *Criminal Procedure Code*. We further observe that Section 14 of the *Criminal Procedure Code* stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."

12. Sentence is a matter that rests in the discretion of the trial court. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated 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."

13. Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, it took into account an irrelevant factor or applied a wrong principle. In the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence

itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)"

14. The Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

15. The Appellate court cannot interfere with sentence unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts, as stated in Hillary Kipkirui Mutai v Republic [2022] eKLR.

> 9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

16. The offences that the Applicant committed were in a series and were committed on the same date, 17.9.2019. The Appellant's case is that the sentences in both counts should run concurrently. Unfortunately, the court gave a fine of Ksh 100,000/= in default of 5 years imprisonment. the sentence did not have regard that the properties were all recovered, the court did not consider the fact that the appellant was a first offender. further, though mitigation was given that the appellant had a wife and children.

17. the maximum sentence in this regard was 7 years. the long sentences do not require options of a fine. giving the option of a fine removes the concurrent sentences.

18. Section 323 of the *Penal Code* provides as follows:

> Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the *Criminal Procedure Code* (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

19. There is no sentence provided. Therefore, punishment under section 36 of the penal Code applies. the said section provides as follows:

> When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

20. The maximum sentence for count II should have been 2 years. The court meted 5 years. The effect of the foregoing is that the court erred in meting out excessive sentence. The Appellant succeeds in showing that the sentence was excessive and did not consider all requisite factors. The second count, a sentence above the maximum sentence was meted out. The court notes that the fine was meant to have the appellant lose the aspect of concurrent sentence. This was improper exercise of discretion for the offence that occurred in the same transaction. the period so far served is above the maximum sentence that the Appellant will have served had he been given 2 years in count 2. In the circumstances, sentence is set aside and replaced with the period served.

21. The net effect is that I direct that the appellant's sentence be reduced to the period served. To that extent the appeal is allowed on sentence only.

Determination

22. In the upshot, I make the following orders: -

    a. The sentence of 5 years imprisonment in default of a fine of Ksh. 100,000/= in respect of each of Count I and Count II is set aside as being excessive in the circumstances. In lieu thereof, I replace the same with period served.

    b. The net effect is that the Appellant is released forthwith unless otherwise lawfully held.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF JUNE, 2025.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of:-

Mrs. Kaniu for the State

Appellant present

Court Assistant – Michael