Asiago & 2 others v Republic (Criminal Appeal E013 of 2023) [2024] KEHC 12705 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12705 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E013 OF 2023

WA OKWANY, J

OCTOBER 17, 2024

BETWEEN

JOSEPH ASIAGO & 2 OTHERS .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment and Sentence in the Chief Magistrate's Court at Nyamira, Criminal Case No. 1041 of 2016 delivered by Hon. C. Chepseba, Chief Magistrate on 27th April 2023)

JUDGMENT

1. The Appellants herein, Joseph Asiago Bundi alias Otucho, Vincent Onyancha Makori and Geoffrey Mokua Ochogo, were charged with 4 counts of the offence of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code, Cap 63 Laws of Kenya. The particulars of the charge were that on the night of 8th and 9th day of December, 2016 at Nyamnori village, Nyambiri sub-location in Nyamira North sub-county within Nyamira County jointly with another not before court while armed with offensive weapons namely pangas and rungus (piece of stick) on count 1 robbed; Benard Mbuga Ondieki of his Kodak film camera, one lesso, one torch, two phones make Tecno and Mipal, belt and cash Kshs. 50/= all valued at Kshs. 6,550/= and immediately before or after the time of such robbery used actual violence to the said Benard Mbuga Ondieki.

   On Count 2, robbed Teresia Kemunto Ondieki of her cash Kshs. 200 and a mobile phone make Nokia all valued at Kshs. 3,200 and immediately before the time of such robbery threatened to use personal violence to the said Teresia Kemunto Ondieki.

   On count 3, robbed Zacharia Oginga Nyambane of his torch of one battery, a wallet containing his National Identity card and one mobile phone make Tecno all valued at Kshs. 1,800 and immediately before the time of such robbery used actual violence to the said Zacharia Oginga Nyambane.

On count 4, robbed Sophia Moraa Ondieki of her cash Kshs. 2,700 and immediately before the time of such robbery threatened to use personal violence to the said Sophia Moraa Ondieki.

2. The Appellants also faced the alternative charges to count 1, 2 and 3 of Handling stolen property contrary to section 322(1) as read with section 322(2) of the Penal Code. The particulars of the charges were that on 9th December 2016 at the same place as stated in the main count, otherwise than in the course of stealing dishonestly retained, in respect to the 1st Appellant; one lesso, one phone make Mipal, one black torch of two batteries, 2nd Appellant; one mobile phone make Tecno and 3rd Appellant; one belt and one Kodak film camera. while knowing, or having reason to believe it to be stolen property.

3. On the alternative charge to count 2, the 2nd Appellant was alleged to have retained one mobile phone make Nokia while knowing or having reason to believe it to be stolen property while on count 3, the 1st Appellant allegedly retained one small torch of one battery while knowing or having reason to believe the same to be stolen property.

4. The Appellants denied all the charges and the case proceeded to a full trial where the Prosecution called a total of 8 witnesses as follows: -

5. PW1, Benard Mbuga Ondieki, was on the night of 8th and 9th December, 2016, asleep in his house when, at around midnight, people who claimed that they were police officers knocked at his door and threatened to break into his house if he did not open the door. He opened the door and was immediately hit on the head by a panga as three people stormed into his house, grabbed his torch, Ksh.50 I = , two mobile phones (make Mipal smart phone and Nokia 1200). The robbers also took a Kodak camera, 1 lesso, 1 belt and eggs before ordering him to call his son (PW2)whom they also assaulted.

6. PW1 stated that the robbers then proceeded to his mother's house. They assaulted PW1's mother and sister before making away with their property and money. The robbers also assaulted his uncle one Zacharia Oginga and left him for the dead. They raised an alarm and neighbors came to their rescue. It was after they were rescued that they realized that Zacharia had bled profusely and lost consciousness.

7. PW2, Mike Ondieki Mbuga, testified that he was on the material night asleep in the kitchen when, at about midnight, his father (PW1) called him but no sooner had he opened the door than he noted that they had been attacked by people who ordered them to lie down. The robbers proceeded to his grandmother's house where they robbed his aunt of money and assaulted his grandmother. He stated that he was able to identify the voice of one of the Appellants, one Otucho, during the incident as he knew him boda boda transporter prior to the incident. He stated that the robbers locked them up in his grandmother's house and that neighbors came to their rescue at around 5;30am.

8. PW3, Teresia Kemunto, the mother and grandmother of PW1 and PW2 respectively testified that PW2 called her on the night of 8th December 2016 to inform her that they had been attacked by armed assailants who also broke into her house and extorted money from her and her daughter. She explained that they were later escorted to the hospital and that she was able to identify one Otucho as one of their assailants.

9. PW4, Zacharia Oginga Gisore, testified that he had visited his sister in-law (PW3) when armed gangsters attacked them on the material night. He stated that he was injured in the attack and that he was not able to identify any of the assailants as it was dark.

10. PW5, Peter Oyange, the Assistant Chief of Nyambiri Sub Location, received information regarding the robbery incident and visited the crime scene where he found PW1 and PW4 who had been injured in the attack. He arrested the 2nd Appellant after receiving a tip off that he was involved in the attack.

He added that other suspects were also arrested following the recovery of some of the stolen items from their houses.

11. PW6, Richard Kinutia Langat, the government chemist, carried out DNA analysis on the exhibit memo he had received from the DCIO Ekerenyo after which he made a report dated 27th July 2017 which he produced in court as an exhibit.

12. PW7 David Mursoy, was the investigating officer. He on 9th December 2016 engaged the services of a police dog handler who was able to trace the 1st accused who was at the time hiding in a plantation while armed with a dangerous weapon. He also arrested the 2nd and 3rd accused who were subsequently charged with offence of robbery with violence upon the completion of the investigations.

13. PW8, Moseti Maangi, the Clinical Officer based at Ekerenyo Sub County Hospital examined the victims of the attack and signed the P3 Forms on 17th December 2016. He noted that their injuries were a month old and that the weapon used to inflict the injuries was a blunt object. He conceded that he did not treat the victims but that he relied on the treatment notes from St. Leonard's Hospital.

14. At the close of the Prosecution's case, the trial court found that the Appellants had a case to answer and consequently placed them on their defence. The Appellants elected to give unsworn testimonies and did not call any witnesses.

The Appellant's Case

15. DW1, the 1st Appellant, maintained his innocence and stated that he was on 9th December 2016 on his way from work when he was arrested by a police officer and the area chief. He was later charged with the offence of robbery with violence.

16. DW2, Vincent Onyancha Makori (the 2nd Appellant), testified that he was a student in form 3 and that he was on 9th December 2016 sent home from school for school fees when, on his way back to school, he was accosted by 10 people who interrogated him. He was later arrested by the DCIO who told him they were investigating a robbery case. He stated that he did not commit the offence.

17. DW3, the 3rd Appellant, testified that he was on the morning of 9th December 2016 weeding napier grass in the company of his wife when the area chief and told him to accompany him to the road where he found many policemen who assaulted him before ferrying him to the police station. He explained that he met his co accused persons at the police station for the first time. He denied any involvement in the robbery and attributed his woes to the dispute between his deceased mother and the chief where the chief had accused his mother of killing his (Chief's) wife. He claimed that the Chief had vowed that he will eliminate his entire family and that his mother died just a few days after the said threat.

Judgment and Sentence

18. At the end of the the case, the trial court found that the prosecution had proved its case against the Appellants beyond reasonable doubt. The trial court then returned a guilty verdict against the Appellants on the 1st, 2nd and 3rd counts of robbery with violence and sentenced them to Death. The Appellants were however acquitted on the 4th Count of robbery with violence for lack of evidence.

The Appeal

19. Dissatisfied with the decision of the trial court, the Appellants filed the present Appeal through the Petition of Appeal dated 8th May 2023 in which they listed the following grounds of appeal: -

    1. That we did not plead guilty to the charges herein and we do maintain the same.

2. That the trial magistrate erred in law and fact by failing to find that it was fatal for the initial report and the statements of the prosecution eyewitnesses to lack the details and description of the attackers and yet the complainant and the alleged eye witnesses had stated that they were able to recognize them for the attackers had masks.
3. That the trial magistrate erred in law and fact by failing to find that the circumstances at the alleged time of robbery were not conducive to allow proper identification of the alleged attackers.
4. That the trial magistrate erred in law and fact by failing to find that it was fatal for the police not to have prepared an inventory report on the alleged stolen properties allegedly recovered from the Appellants.
5. That the trial magistrate erred in law and fact by failing to consider the defence evidence and to find it more credible and in particular consistent with the evidence tendered by the complainants in this case.
6. That the trial magistrate erred in law and fact by failing to find that the prosecution witnesses were not trustworthy witnesses as the entire evidence was full of glaring contradictions and discrepancies.
7. That the trial magistrate erred in law and fact in finding that the prosecution had proved the charge of robbery with violence beyond any reasonable doubt.
8. That the trial magistrate erred in law and fact in finding a conviction that was against the weight of evidence.
9. That the trial magistrate erred in law and fact by passing a harsh sentence under the circumstances.
10. That the trial magistrate erred in law and fact by failing to find that the proceedings in the instant case was not properly conducted since PW1 gave his first evidence instead of coming back for cross examination, the prosecution side allowed the complainant to give fresh evidence that changed the previous evidence that he gave before the court which amounted to gross violation of the appellants rights to fair trial as enshrined in article 50 (2) of *the Constitution* of Kenya.
11. That the trial magistrate faulted both in law and facts by failing to evaluate and scrutinize the evidence adduced by pw1that he identified the appellants herein during a parade which was not conducted.
12. That the trial magistrate faulted both in law and facts by failing to note that the witnesses were not able to identify the assailants during the alleged robbery and it is not clear how the appellants were traced with the crime herein.
13. That the trial magistrate faulted both in law and facts by failing to note that voice recognition alone was not safe to base a harsh sentence.
14. That the trial magistrate faulted both in law and facts by failing to note that the investigation conducted in this case was shoddy and baseless that could not have warranted a death penalty.
15. That the trial magistrate faulted both in law and facts by notwithstanding the fact that the police who arrested the attackers exposed them to the complainants instead of keeping them for identification by conducting an identification parade.

16. That the Learned Trial Magistrate erred in law and facts by giving a sentence that was harsh, excessive and hard in law, given that the Appellant never committed the alleged offence.

20. The appellants seek orders to quash the conviction and to set aside the sentences.

21. The Appeal was canvassed by way of written submissions which I have considered.

Duty of the Court

22. In Mark Oiruri Mose vs. R (2013) eKLR the Court of Appeal held thus on the duty of the first appellate court: -

> "This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

Issues for Determination

23. I have considered the record of appeal and rival submissions by the Appellants and the Respondent. I find that the main issues for my determination are: -

    i. Whether the Prosecution proved the charge to the required standard.

    ii. Whether the sentence was just and legal.

Proof of the offence.

24. Sections 295 and 296 (2) of the Penal Code state as follows: -

    295. Definition of robbery

    Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

    (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

25. The Court of Appeal discussed the ingredients of the offence of robbery with violence in Johana Ndungu vs. Republic [1996] eKLR thus: -

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with S.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

(See also Mugambi vs. Rep [1980] KLR 75 and Oluoch vs. Republic [1985] KLR).

26. The Prosecution was therefore required to prove the charge of robbery with violence, by establishing any of the ingredients under section 296(2). In *Dima Denge Dima & Others vs. Republic, Criminal Appeal No. 300 of 2007*, it was held that: -

> " …The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

27. The court of Appeal stated as follows when addressing the nature of evidence that can lead to a conviction in Benson Limantees Lesimir & Ano. vs. Republic Criminal Appeal No. 102 &103 of 2002: -

> " In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of R. vs Kipkering Arap Koske & Another 16 EACA 135 where it was inter alia held that:"
>
> "In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

28. The standard of proof in criminal matters is well settled. It is proof beyond reasonable doubt, which means that no room is given for question, gaps or doubts in the prosecution's case. In Bakare vs. State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase 'proof beyond reasonable doubt' and held that: -

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

29. Similarly, Denning J. stated as follows in Miller vs. Minister of Pensions [1947] stated: -

> " It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."

30. In the present case, PW1 testified that he saw three men enter his house and that one of them assaulted him with a panga thereby causing him grievous injuries. PW2 also painted a vivid picture of the events of the fateful night. He stated that three men forcefully pushed open their door and entered the house, assaulted his father and uncle. PW3 and PW4 also testified that they were injured in the attack.

31. PW7, the Clinical Officer, corroborated the victims' testimonies as he examined them and established that their injuries were a month old and that the weapon used to inflict the injury was a blunt object. He classified the injuries as 'harm'.

32. I have perused the P3 Form and the Treatment Notes. I note that PW1 was treated at Miruka hospital, St. Ronald Hospital and Ekerenyo Hospital in Nyamira

33. It is my finding that that the Prosecution established that PW1 and PW4 were attacked by people who broke into their house on the fateful night and that both suffered grievous injuries as a result thereof. The element of violence was therefore proved.

34. Turning to the limb of stealing, PW1 testified that he lost two mobile phones and money (Kshs. 50/=) which were stolen during the attack. PW1 gave the particulars of the two mobile phones a Nokia 1200 and Mipal smart phone. A Kodak film camera was also stolen in the incident. He handed the particulars of the stolen items to the police officers. PW3 also stated that she lost a mobile phone, a lesso and Kshs. 2900/= from her homestead. PW4, Zacharia Oginga Gisore also stated that he lost a phone, a torch among other items in the attack.

35. My finding is that the trial court arrived at the correct verdict when it found that the prosecution established, beyond reasonable doubt that PW1, PW2 and PW3 were attacked and violently robbed of their property on the night in question. The gist of this appeal is therefore whether the prosecution proved, beyond reasonable doubt, that the Appellants committed the robberies in question.

36. PW5, the Assistant Chief testified that he recovered some of the stolen items in the Appellants' houses while some of the items were found hidden under the ground. He also stated that a Kodak camera and a belt were recovered from the 3rd Appellant's house. PW1 and PW4 identified the said items as belonging to them.

37. It is worth noting that the eyewitnesses to the offence, namely; PW1, PW2, PW3 and PW4 testified that they were not able to recognize any of their attackers on the night in question as it was dark. PW2 however claimed that he was able to recognize the 1st Appellant's voice during the robbery as he had known him prior to the incident. It is however noteworthy that an identification parade was not conducted so as to enable PW2 pick out the 1st Appellant through voice identification. It is therefore clear that the only evidence linking the Appellants to the offence was the claim that the stolen items were recovered from their homes.

38. The trial court, in its judgment, found that the ingredients of the offence of robbery with violence had been proved because the Appellants had been sufficiently connected to the items that were stolen from the victims. This means that in the entire prosecution's case, the only evidence linking the Appellants to the offence were the alleged stolen items. The trial court rendered himself as follows on the issue of the recovery of the alleged stolen items: -

> " PW1, PW2 and PW4 lost their items and the same were found with the accused persons a few hours later. PW2 identified and mentioned Accused 1 to have been among the assailants. PW5 among others went to accused 1 place and on seeing them, he ran away and he was chased and he was arrested and the lost items found with them.

There is therefore circumstanced (sic) evidence committed the offence charged herein they were found a few hours after the robbery with the stolen items. I do therefore find that the prosecution proved count 1, 2 and 3 against the accused persons beyond reasonable doubt. I do find them guilty on count 1, 2 and 3 and convict them as charged."

39. From the above extract of the trial court's decision, it is clear that the said court mainly relied on the doctrine of recent possession when returning the guilty verdict. The question which arises is whether, in the circumstances of this case, one can say that the doctrine of recent possession is applicable to this case and was proved as against all the Appellants. The answer to the above question will require a closer scrutiny of the evidence of PW5 the area Chief and PW7, the Investigating Officer, on the circumstances under which the stolen items were allegedly found in the Appellants' possession.

40. PW5 testified as follows on the arrest of the suspects and the recovery of the stolen items: -

> " They told me that they were able to identify Joseph Asiago Bundi as one of the robbers. He comes from my area of jurisdiction...... I called AP officers from Nyangeita AP camp. They accompanied me to the said suspects home, he emerged from his house and ran away. We entered into the suspect's house. We found his wife and children. We carried a search in accused's house. We found a lesso, a blood stained panga and other items which were relevant in another case. The suspect I am referring to is accused 1. This is the lesso, a torch and panga..... we were tipped off that there was another suspect by the name Vincent Onyancha Makori.... We went there and we arrested him at a few meters from Accused 1's home. Vincent was then staying with his grandmother. We handed the suspect to the DCIO Nyamira Sub County. Geoffrey Mokua alias Kaka was arrested by members of the public. We recovered canvass belt from the Accused 3's house. We also recovered a Kodak film camera from Accused 3's house..... Nothing was recovered from Accused 2 at the time of his arrest."

41. PW 7, the Investigating Officer had the following to say about the items recovered from the suspects: -

> " Accused 1 was found with a blood stained panga by the Chief. We recovered other items from Accused 1's house. They are for another case.
>
> After that we went to Accused 2's grandmother's house, wherein Accused 2 was living. I recovered this big stick which Accused 2 had put in the bananas. It was used as a gun during the robbery. Accused 2 had hidden underneath the banana plantation, this Tecno phone red and black in colour with an Itel battery. It did not have a cover. Underneath the banana plantation, I recovered a Nokia phone, Ipad phone grey in colour. It did not have its cover. Accused 2 had a wallet black in colour. It contained the old currency Ksh. 200/= note, Ksh. 20/= coin and 3 Ksh. 10/= coins. It had school documents. It showed Accused 2 was then a student. Accused 2 took us to his grandmother's home within Nyambiri village though he hails from Nyakaranga village.
>
> We went to Accused 3's house. He had been detained at the AP Camp. Accused 3 one Mokua Geoffrey had hidden this canvass belt and this camera make Kodak film outside his house."

42. Having regard to the above extract of the evidence of the Chief and the Investigating Officer, it is clear that some of the stolen property were found in the houses of the 1st and 3rd Appellants. As regards the 2nd Appellant, it was alleged that some of the stolen items which included a big stick, were recovered hidden underneath a banana plantation.

43. My finding is that the alleged stolen property found in the banana plantation cannot be said to have been found in the possession of the 2nd Appellant as the court was not told that he was the owner of the said plantation or the only person who had access to the said plantation so as to lead to a conclusive finding that the said items were in the 2nd Appellant's possession. It is also instructive to note that the trial court was not told if the 2nd Appellant was the sole occupant of his grandmother's home and neither was the alleged grandmother called as a witness to explain how the said items found their way into her plantation. I find guidance in the decision in Athuman Salim Athuman vs. Republic [2016] eKLR, where the Court of Appeal discussed the doctrine of recent possession as follows: -

> " The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See Malingi V. Republic (1989) Klr 225 H.c And Hassan V. Republic (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga V. Republic, CR. APP. NO. 272 of 2005, where this Court stated: -
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> "It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other."

44. I find that the trial court arrived at the correct verdict when it held that the Prosecution proved its case against the 1st and 3rd Appellants on the 3 counts of robbery with violence on the basis that the items that were stolen from the Complainants during the robbery were found in their possession. For the reasons that I have already stated hereinabove, I am unable to find that the offence of robbery with violence was proved against the 2nd Appellant to the required standard. It is noteworthy that the only evidence that was tabled against the 2nd Appellant was the allegation that he had been seen in the company of the 1st Appellant and that some of the items were found outside his grandmother's house. It is my view that the 2nd Appellant's conviction was not supported by any tangible evidence.

Sentence

45. The next issue for determination is whether the death sentence passed on the Appellants, upon conviction, was manifestly harsh, inhuman and excessive. Section 296 of the Penal Code stipulates as follows on the punishment of robbery with violence: -

    (1). Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

    (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

46. In the present case, the Appellants were sentenced to death and I find that the sentence lawful as it has not been shown that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive

or patently lenient as to be an error of principle. (See Shadrack Kipkoech Kogo vs. R., and Wilson Waitegei vs. Republic [2021] eKLR].

47. In the case of Joseph Ochieng Osuga vs. Republic [2021] eKLR the court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. This court cited the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR where it was stated 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 stated is shown to exist."

48. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of Ogolla s/o Owuor vs R, (1954) EACA 270 wherein the Court of Appeal stated as follows: -

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky (1912) CCA 28TLR 263)."

49. In the case of Wanjema vs. R [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.

50. In the case of Francis Karioko Muruatetu & Another vs. Republic (2017)eKLR. The court held that; -

> " Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of *the Constitution*; an absolute right."

51. Sentencing is a discretion of the trial court. In Ambani vs. Republic (1990) KLR 161, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence.

52. In Republic vs. Jagani & Another (2001) KLR 590, it was held that: -

> " The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing

for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders."

53. The question is whether this court should interfere with the sentence. In James Kariuki Wagana –v- Republic (2018) eKLR Prof. Ngugi. J (as he then was) stated; -

> " while the sentence of death is the maximum penalty for both murder and robbery with violence the court has the discretion to impose any other penalty that it deems fit and just in the circumstances."

54. The learned judge argued that death penalty should be reserved for most heinous levels of robbery with violence.

55. In another persuasive decision by Gikonyo J. in Paul Ndung'u Njoroge vs. Republic (2021) eKLR considered a long term of imprisonment as appropriate where the violence did not cause death or grievous harm. In this case the ingredients of the offence of robbery with injury inflicted was grievous harm. The trial magistrate opined that his hands were tied to pass the death penalty. It is my view that the discretion of the trial magistrate was unfettered.

56. The current jurisprudence is that even though the maximum penalty for robbery with violence is death, the court has the discretion to impose any other penalty based on the circumstances of the case.

57. Bearing in mind the above decisions and having regard to the circumstances of this case, the question that arises is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

58. The trial magistrate passed the death sentence upon noting that the Probation Officer's pre-sentence report filed in respect to the Appellants was not favourable. My take is that the mere fact that the pre-sentence report did not favour the Appellants was not a factor that could bind the trial magistrate so as to deny him the room to exercise discretion during sentencing.

59. I find that in view of the fact that the injuries inflicted on the victims during the robbery incident did not result in death, a term of imprisonment is appropriate. I therefore set aside the death sentence and substitute it with imprisonment for a term of thirty (30) years which sentence shall factor in the period, if any, that the 1st and 3rd Appellants' spent in remand custody while awaiting their trial in compliance with Section 333(2) of the Criminal Procedure Code.

Disposition

60. I find that the instant appeal is merited, albeit in part, only in respect to sentence in respect to the 1st and 3rd Accused, while the 2nd Appellant's appeal is merited and succeeds on both conviction and sentence. For avoidance of doubt, I make the following final orders: -

    1. I uphold the trial court's conviction of the 1st and 3rd Appellants (Joseph Asiago Bundi and Geoffrey Mokua Ochogo). I however set aside the death sentence imposed on them and substitute it with 30 years' imprisonment which sentence shall factor in the period, if any, that the 1st and 3rd Appellants' spent in remand custody while awaiting their trial in compliance with Section 333(2) of the Criminal Procedure Code.

    2. I hereby quash the conviction of the 2nd Appellant (Vincent Onyancha Makori) and set aside his sentence. I direct that the 2nd Appellant be set at liberty forthwith unless he is otherwise lawfully held.

61. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE