



**Rotich & another v Republic & another (Criminal Appeal
E024 of 2021) [2023] KEHC 826 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E024 OF 2021
JWW MONG'ARE, J
FEBRUARY 9, 2023**

BETWEEN

SHADRACK KIPRONO ROTICH 1ST APPELLANT

SHADRACK KIPRONO ROTICH 2ND APPELLANT

AND

REPUBLIC 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

*(Being an appeal from the sentence of Hon. R. Odenyo in Eldoret Chief
Magistrates Criminal Case No. 1704 of 2018 delivered on 24th March 2021)*

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of the offence were that on the 19th day of April, 2018 at Kombatich village in Keiyo Sub-County, within Elgeyo Marakwet County, being armed with a dangerous weapon namely panga, robbed Robert Kipsang Kemboi of 5kgs sugar, two packets of doughnuts all valued at Kshs. 700/- and immediately after such robbery wounded the said Robert Kipsang Kemboi.
2. The appellant pleaded not guilty and the matter proceeded to full trial and the prosecution called six witnesses. The appellant was put on his defence and called no witnesses. Upon consideration of the testimonies of the witnesses and the evidence presented before the court, the trial magistrate dismissed the charge of robbery with violence. He then found that the evidence had disclosed a lesser charge of grievous harm contrary to section 234 of the *Penal Code* and sentenced him to 30 years' imprisonment.



3. Being aggrieved by the sentence only, the appellant instituted this appeal vide a petition premised on the following grounds;
 1. That the sentence meted upon (me) is too harsh considering the fact that (I) am a first offender.
 2. That (I) am remorseful, repentant and rehabilitated as (I) have learned to take responsibility for your actions.
 3. That (I) have a family which depends on me for financial and social support.
 4. That (I) beg to heavily rely on High Court Petition No. 15 of 2015 – Francis Karioko Muruatetu & Another vs Republic among other enabling laws.
 5. That this court has unlimited jurisdiction powers and discretion as contemplated in article 22(1), 23, 50(2)(p)(q) and 165(3)a,b and 258(1) of the [Constitution of Kenya](#) 2010 to handle matters of this nature.
 6. That, more grounds to be adduced at the hearing.

The parties filed submissions on the appeal.

Appellant's Case

4. Initially the appellant only appealed against sentence alone. However, on January 23, 2023 while he also filed further grounds of appeal and challenged the conviction as well. In his submission, he states that the trial court erred in relying on contradictory and inconsistent evidence adduced by the prosecution to convict him. He further submitted the court was wrong in failing to find that the investigation was shoddily conducted. On sentence, the appellant stated that the sentence did not take into account the time the Appellant had spent in remand before conviction which was contrary to the requirements of section 333(20) of the [Criminal Procedure Code](#).

Respondent's Case

5. Learned prosecution counsel opposed the appeal. He stated that although the appellant was charged with the offence of attempted robbery contrary to section 297(2) the trial court was right in finding that the evidence disclosed the offence of grievous harm and proceeded to convict the Appellant accordingly. He submitted that the charges were proved to the required standard and that the conviction was proper and should not be disturbed. He stated that the appellant did not offer any evidence to challenge the evidence by the prosecution. He further stated that upon conviction of that offence the punishment was a maximum sentence of life. Further, that sentencing is a discretionary power and the appellate court can only interfere with it if the trial court took into consideration irrelevant factors, applied wrong principles or generally the sentence is excessive. He cited the cases of [Mwikala Machugu v Republic](#) (2016) eKLR and [Bernard Kimani Gacheru vs Republic](#) (2002) eKLR in support of this submission.
6. Learned counsel for the state submitted that the trial court having considered all the circumstances where the victim's hand was chopped off and the apparent non-remorsefulness of the appellant during mitigation, it exercised its discretion and sentenced the appellant to 30 years' imprisonment. Counsel urged the court not to interfere with the sentence and dismiss the appeal.



Analysis And Determination

7. This being an appeal against sentence, I shall not delve into the merits of the conviction. The sole issue for determination is;
 1. Whether the Prosecution proved their case to the required standard
 2. Whether the sentence was harsh or excessive
 3. Whether the trial court considered the time spent in custody before sentencing

Whether the Prosecution proved their case to the required standard

7. At the filing of his petition of appeal, the appellant had challenged only the sentence. However, alongside his submission, he filed further grounds of appeal attacking his conviction. He stated that the evidence used to convict him was contradictory and inconstant and that the investigations leading to his arrest were shoddily carried out. Having perused the court record, I note that at the trial the prosecution called six witnesses. Evidence of the witnesses properly placed the appellant at the scene of crime. The Appellant was a neighbour of the complainant and was therefore known to him. Despite the fact, the Appellant had initially been charged with a different offence. The appellant did not provide any evidence to controvert or challenge the evidence by the prosecution during the trial and neither was he able during cross-examination to shake the prosecution witness's testimony. I am satisfied that the trial court was right in its finding that the evidence produced disclosed the offence of grievous harm contrary to section 234 of the *Penal Code*. I therefore agree with the trial court and uphold the conviction.

Whether the sentence was harsh/excessive

8. The appellant was found guilty of the offence of causing grievous harm. Section 234 of the *Penal Code* provides;

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
9. It follows that the law does not disclose a mandatory maximum or minimum sentence for the offence. I have considered the injuries caused on the complainant and find that the sentence was commensurate with the offence. I find no reason to disturb the sentence.

Whether the trial court considered the time spent in custody before sentencing

10. Section 333(2) of the *Criminal Procedure Code* states;
 - (2) Subject to the provisions of section 38 of the *Penal Code* (cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
11. I have perused the record of the court and the appellant was in remand from the commencement of the trial on 20th April, 2018. The record does not disclose whether the trial court took this into account. In the premises, I uphold the sentence and order that it run from April 20, 2018. The appeal is therefore dismissed.



DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF FEBRUARY 2023

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J.W.W.MONGARE

JUDGE

Judgment delivered virtually in the presence of;

- 1.Appellant is Present
2. Ms okok- Prosecution Counsel
3. Loyanae- Court Assistant.

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J.W.W.MONGARE

JUDGE

